WE *allow of the Printing and Publiſhing of the Book Intituled,* A General Abridgment of the COMMON LAW, Alphabetically Digeſted under Proper Titles, &c. By *Knightley D'Anvers* of the *Inner Temple*, Eſq;

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A

General Abridgment

OF THE

COMMON LAW,

Alphabetically Digeſted under proper TITLES:

WITH

NOTES and REFERENCES

To the WHOLE.

With Three TABLES. *The Firſt*, Of the ſeveral Titles. *The Second*, Of the Names of the Caſes. *And the Third*, Of the Matter under General Heads.

By *KNIGHTLEY D'ANVERS*,
of the *Inner Temple*, Eſq;

VOL. I.

Dedicated to the Lord Chief Juſtice *Holt*, with the Allowance of the Lord Keeper, and the reſt of the Judges.

The Second Edition, Corrected.

In the *SAVOY*:

Printed by E. and R. NUTT, and R. GOSLING, (Aſſigns of *Edward Sayer* Eſq;) for J. Walthoe in the *Middle Temple Cloyſters*.
M DCC XXV.

FH
MVSEVM
BRITANNICVM

To the Right Honourable

Sir *JOHN HOLT*, Kt.

Lord Chief Juſtice of *ENGLAND*.

MY LORD,

BEing about to Publiſh An Abridgment of the LAW, *I humbly preſume to Addreſs my ſelf for Patronage and Protection to Your Lordſhip, in whom all the Learning of thoſe Authors, from whence I Collect, ſo eminently Centers and Reſides. This, My Lord, is every Day's Experience to thoſe that have the Honour and Opportunity of Attending your Bar, where we hear your Lordſhip from the* Bench, *with ſuch Accuracy of Judgment reconcile the ſeeming Differences, and rectify the Miſtakes of many of our Books: And with ſuch Aſcendancy of Reaſon, Correct many Erroneous Opinions diſpers'd in the Books of* LAW, *that your Deciſions are always Inſtructive to the Profeſſion, as well as Satisfactory to the Parties. 'Tis from you, My Lord, the Students of late make thoſe early Advances in the Knowledge of the* LAW; *they are brought up at your Feet. 'Tis from you, My Lord, the Practiſers Derive thoſe Depths of Learning whereby they ſeem intitled to the Coif even before they have Grey Heads to Cover with it. 'Tis you, My Lord, that give ſuch Life and Energy to the* LAW, *that all Mankind is pleas'd with thoſe Exact Principles of impartial Juſtice you Act by, and chearfully Acquieſce in your Adminiſtration.*

I think, My Lord (with humble Submiſſion) Abridgments of the LAW *have always been held Uſeful; And that Excellent Abridgment of my Lord Chief Juſtice* Roll *(which is my Foundation) hath been well received on all Hands, and given Credit to this Way*

of Writing: And I humbly hope my Additions and References may in ſome Meaſure have rendered even that Aridgment more Uſeful, by taking in moſt of the Caſes that are in Print down to this Time. But I have not adventured to touch upon any of thoſe moſt Judicious Reſolutions and Opinions of your Lordſhip, which I have had the happy Opportunity of taking, in my Attendance in Court, they are of ſuch great Weight and Moment. I muſt confeſs my Abridgment will be very Lame without them: But I chooſe rather to beg your Lordſhip's Protection of my Book with all its Defects and Imperfections, than by publiſhing to the World any of your Lordſhip's more refined Thoughts, under the ſcanty Conduct of my weak Reaſon and Apprehenſion, to hazard your Lordſhip's Diſpleaſure, while I am imploring Your Favour to

MY LORD,

Inner Temple,
June 2d. 1705.

Your LORDSHIP's moſt Humble

And Obedient Servant,

Knightley D'Anvers.

TO THE

READER.

HAving made my Lord Chief Juſtice *Roll*'s *Abridgment* the Baſis of my Common Place-Book, and collected great Part of the Law in a Method much like the following; I was perſwaded to Review what I had done, and to make ſuch Alterations and Additions as might render the whole Uſeful, as one intire Abridgment of the Law. Whereupon at firſt I intended to have made as Short an Abſtract of the Caſes of my Lord *Roll*, as I had done of others for my Private Uſe: But conſidering that the Manner of my Lord *Roll*'s Abridging Caſes had been univerſally Approved, and the Danger of omitting often material Circumſtances, if I endeavoured to be more conciſe, and believing the whole would be more Uſeful if *Roll* was included and preſerved intire, I reſolved upon a Literal Tranſlation thereof into *Engliſh*, in which I have endeavoured to be as Exact as poſſible, taking Notice by way of Marginal Note (perhaps with too much Nicety) of the leaſt Alteration or Correction of the Faults of the Preſs, (of which there are not few) ſo that I hope I have done no Injury to that great Author by reducing him into that Language which is more generally Known, and in my Opinion, with more Advantage and Pleaſure both Written and Read; and indeed, ſince I was Ambitious of making the whole look as like one intire Work as I could, there was a Sort of Neceſſity either to reduce my Additions and References into old *French*, or *Roll*'s *Abridgment* into *Engliſh*; the laſt to me (who for a long Time had uſed to Common-Place in *Engliſh*) was the more Eaſie and Pleaſant Task.

The following *Abridgment* therefore contains my Lord *Roll*, with his ſeveral *Titles*, *Folio's* and *Placita*; which by the different Character may be eaſily diſtinguiſhed from the reſt: For thoſe *Titles* which are Printed in the *Roman Character*, and ſuch Part of the Body of the Book only as is Printed in the *Black Gothick* Character, is *Roll*'s, and the reſt my own *Collection*; in which I muſt deſire you to remember, that S. C. ſtands for *the ſame Caſe*, and S. P. for *the ſame Point*; that Q. denotes a *Query* of my own, and *Quære* at length, a *Query* of the Reporter whence taken; and a *Vide* imports there is ſomething more in the Book than what by me expreſſed.

Yours,

K. D.

A Catalogue of the AUTHORS *made Use of, with their ſeveral Contractions and Editions.*

A

1, 2 An. *or* And.	*Anderſon*'s Reports, 2 Parts, 1664.
All.	*Alleyn*'s Reports, 1688.
Aſt. Ent.	*Aſton*'s Entries, or *Placita Redcviva*, 1661.

B

Bend. Bendl. *or* N. Bend.	*Benloe*'s Reports, 1689.
1, 2 Brownl.	*Brownlow* and *Goldesborough*'s Reports in 2 Parts, 1651.
Bridg.	*Bridgman*'s Reports, 1659.
1, 2, 3. Bulſ.	*Bulſtrode*'s Reports, in 3 Parts, 1688.
Br.	*Brooke*'s Abridgments, 1576.
1, 2. Brown's Ent. *or* Br. Ent.	*Brown*'s Entries, or *Formula bene placitandi*, in 2 Parts, 1675.

C

Cro. Eliz. Cro. El. *or* 1 Cro.	*Croke*'s Reports of Caſes in the Reign of Queen *Elizabeth*, 1661.
Cro. Jac. *or* 2 Cro.	*Croke*'s Reports of Caſes in the Reign of King *James*, 1659.
Cro. Car. *or* 1 Cro.	*Croke*'s Reports of Caſes in the Reign of King *Charles* the Firſt, 1658.
12 Co. *or* 12 Rep.	Twelfth Part of *Coke*'s Reports, 1677.
13 Co. *or* 13 Rep.	Thirteenth Part of *Coke*'s Reports, 1677.
1 Co. *or* 1 Rep. 2 Co. or 2 Rep. *&c.*	My Lord *Coke*'s Reports in 11 Parts, 1672, 1697.
Cart.	*Carter*'s Reports, 1688.
Caſ. in Parl'.	Caſes in Parliament, 1698.
1 Chan. Rep. *or* Chan. Caſes.	1ſt Part of the Chancery Caſes, *fol.* 1697.
2 Chan. Rep. *or* Chan. Caſes.	2d Part of the Chancery Caſes, *fol.* 1701.
Co. Ent.	*Coke*'s Entries, 1614.

D

Di. *or* Dier.	*Dier*'s Reports, 1688.
Dal.	*Daliſon*'s Reports, 1689.
Dav.	*Davis*'s Reports, 1674.
Dr. & Stud'.	Doctor and Student, 1554.

F

F. N. B.	*Fitzherbert*'s *Natura Brevium*, 1567.
Fitz.	*Fitzherbert*'s Abridgment, 1565.

G

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Godb.	*Godbolt*'s Reports, 1652.
Hetl.	*Hetly*' Reports, 1657.

Hob.	*Hobart's* Reports, 1658.
Hutt.	*Hutton's* Reports, 1656.
Hardr.	*Hardreſs's* Reports, 1693.
Hal. Pl. Coron.	*Hale's* Pleas of the Crown, 1694.
Hearn's Ent. *or* Hearn's Pled'.	*Hearn's* Pleader, 1657.
Hans. Ent.	*Hanſard's* Entries, 1685.

I

1 Jon.	Sir *William Jones's* Reports, 1675.
2 Jon.	Sir *Tho. Jone's* Reports, 1695.
Jenk. Rep.	*Jenkins's* Century, 1661.
1 Inſt. *or* Co. Lit.	*Coke* upon *Littleton*, 1629 (1681.
2 Inſt.	2d Part of my Lord *Coke's* Inſtitutes,
3 Inſt.	3d Part of my Lord *Coke's* Inſtitutes, 1680.
4 Inſt.	4th Part of my Lord *Coke's* Inſtitutes, 1669.

K

Kelw.	*Keilway's* Reports, 1688.
1, 2, 3 Keb.	*Keble's* Reports, 1685.
Keb. Stat.	*Keble's* Statutes, 1695.

L

1, 2, 3, 4 Leon.	*Leonard's* Reports in 4 Parts, 1688.
Lat.	*Latch's* Reports, 1661.
Lane.	*Lane's* Reports, 1657.
Leys.	*Ley's* Reports, 1659.
Lit.	*Littleton's* Reports, 1683.
1, 2, 3 Lev.	*Levinz.* Reports, 1702.
Lev. Ent.	*Levins's* Entries, 1702.

M

Moor	*Moor's* Reports, 1688.
Marſh	*Marſh's* Reports, 1675.
1 Mod.	1ſt Part of the Modern Reports, 1682.
2 Mod.	2d Part of the Modern Reports, 1698.
3 Mod.	3d Part of the Modern Reports, 1700.
Molloy	*Molloy de Jure Maritimo*, 1701.

N

Noy	*Noy's* Reports, 1656.

O

Ow. *or* Owen	*Owen's* Reports, 1656.

P

Po. *or* Poph.	*Popham's* Reports, 1682.
Palm.	*Palmer's* Reports, 1668.
Pl. Com.	*Plowden's* Reports, 1571.

A Catalogue of the Authors made Uſe of, &c.

R

1, 2 Rol. Rep.	*Roll*'s Reports in 2 Parts, 1675.
1, 2 Rol. Abr.	*Roll*'s Abridgment in 2 Part's, 1668.
Ray. *or* Raym.	*Raymond*'s Reports, 1696.
Rob. Ent.	*Robinſon*'s Entries, 1684.
Reg.	Regiſter, 1531.
Raſt. Ent.	*Raſtall*'s Entries, 1596.

S

Sav.	*Saville*'s Reports, 1688.
Stil.	*Stile*'s Reports, 1658.
1 Sid. *or* Syd.	1ſt Part of *Siderfins*'s Reports, 1683.
2 Sid. *or* Syd.	2d Part of *Siderfin*'s Reports, 1684 laſt Printed, tho' firſt in Time.
1, 2 Sand.	*Sander*'s Reports in 2 Parts, 1686.
Stat. Pult.	*Pulton*'s Statutes, 1632.

T

Thomp. Ent.	*Thompſon*'s Entries, 1674.

V

Vaugh.	*Vaughan*'s Reports, 1677.
1, 2 Vent.	*Ventris*'s Reports in 2 Parts, 1696.
Vid. Ent.	*Vidian*'s Entries, 1684.

W

Winch.	*Winch*'s Reports, 1657.
Went. Off. Execut'.	*Wentworth*'s Office of Executors, 1668.

Y

Yelv.	*Yelverton*'s Reports, 1661.

Year Books.

FIRST Part of *Edward* the Third, 1596.
Second Part of *Edward* the Third.
Third Part of *Edward* the Third, 1600.
Book of Aſſiſes, 1606.
Henry the Fourth and Fifth, 1605.
Firſt Part of *Henry* the Sixth, 1609.
Second Part of *Henry* the Sixth, 1601.
Edward the Fourth, 1599.
Long *Quinto*, 1552.
Henry the Seventh, and *Henry* the Eighth.

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Actions in General.

An Action, What it is.

1. (a) ACTIO *est nihil aliud quam jus* (b) *prosequendi* (c) *in Judicio* (d) *quod sibi debetur.* Co. Lit. 285. a.

(a) For this Vide Jenk. Rep. 25. 2 Inst. 40. (b) A Writ of Error is no Action, but only a Commission to the Judges to examine the Record, &c. Jenk. Rep. 25. 2 Inst. 40. Yelv. 209. — But yet if by Writ of Error the Plaintiff therein may recover, or be restored to any Thing, it may be released by the Name of an Action. Co. Litt. 288. B. But for this vide 2 Rol. Abr. 405. S. 1. (c) For the Action continues only till Judgment is given; and therefore a Release of all Actions is regularly no Bar of an Execution, Co. Litt. 289. A. But for this vide 2 Rol. Abr. 404. p. 4.——And if the Warrant of the Plaintiff's Attorney is determined by the Judgment, vide 1 Rol. Abr. 291. M. 2, 3, 4. (d) So that it implies a Recovery of, or at least a Restitution to something. Co. Lit. 289. a.

2. (e) Or as it is otherways defined, A legal Demand of one's Right. *Co. Lit.* 285. a.

(e) For this vide 2 Inst. 40.

Actions. The general Division of them.

1. (f) Actions are either *Criminal or Civil.* Co. Lit. 284. b.

(f) For this vide 2 Inst. 40.

2. Criminal are either to have *Judgment of Death*, as Appeals of Death, Robbery, *&c.* Or only to have *Judgment of Damage* to the Party, Fine to the King and Imprisonment, as Appeals of Mayhem, *&c.* 2 *Inst.* 40.

3. (g) Civil or common Actions are either *Real, Personal*, or *Mixt.* Co. Lit. 284. b.

(g) 2 Inst. 40.

What Action Lies.

Where one or another at the Election of the Plaintiff.

1. (h) Where by Law a Man hath *several Remedies*, he may use which he will. *Co. Lit.* 145. a.

(h) Stil. 4. same Rule arguendo.

For what they Lie.

(i) Where several Matters may be joined in one Action.

(i) For this vide each respective Action.

1. If *A.* being seized of a third Part of a Messuage, *&c.* in Fee, demises the same to *B.* for Years, who assigns to *C.* And *A.* by Bargain and Sale inrolled, conveys his Reversion to *D* and his Heirs, who was then seised of another third Part in Fee; and afterwards the said *D.* leases his third Part also to the said *C.* for Years, and dies; and his Heir by Bargain and Sale inrolled, conveys the Reversion of the said two third Parts to *E.* and his Heirs, after which Waste is done. *E.* may bring one Action of (k) *Waste upon* these *several Leases*; for that neither the Interest of the Terms nor of the Inheritance were severed or divided to several, but were in one Person at the Time when the Waste was done. *Pasch.* 35 *Eliz.* between (l) *Haydock* and *Warnford*, *Poph.* 24, 25. Adjudged upon a Writ of Error upon a Judgment by *Nil dicit in Banco*: And (*per Popham*) the rather, because the Assignment of Waste is in one and the same Thing, *viz.* a Messuage.

(k) For this vide 8 Co. 87. b. at the bottom, F. N. B. 60. F. Cro. Jac. 330. Fitz. Wast. 79.

(l) Cro. Eliz. 290. S. C. adjudged, the Truth of the Case being shewed in the Declaration. Ow. 11. S. C. adjudged, being shortly stated thus, viz. That one Parcener leased her Part to A. and the other leased her Part to B. and both Leases were assigned to the Defendant, and one Parcener conveyed her Reversion to the other; after which the Waste was done, &c.

2. If in *Debt* upon 2 *Ed.* 6 for not ſetting forth of Tithes, the Plaintiff ſhews, that by Preſcription the Rector of *A.* hath had two Parts, and the Vicar of *A.* the third Part of the Tithes there, and that the ſaid Rector and Vicar *by ſeveral Leaſes* did demiſe to the Plaintiff, *per quod* he became *Proprietarius* of the ſaid Tithes, and the Defendant ſowed, *&c.* and carried away, *&c.* without ſetting forth *decimam partem, &c.* This Action is well brought; for though the Vicar and Parſon could not join becauſe they claim ſeverally by *divided Rights*; yet when both Titles are conjoined in one Perſon, the Matter of the Title is alſo conjoined; and this being a Perſonal Action, and (m) founded upon a Wrong, it is ſufficient to ſhew generally that the Plaintiff is *firmarius* or *proprietarius* of the Tithes, without ſaying by what Title. *Paſch.* 3 *Jac.* between (n) *Champernoon* and *Hill. Yelv.* 63. adjudged *per totam Curiam contra Fenner*, upon Motion after Verdict for the Plaintiff.

(m) Where the Title need not be ſhewn in the Declaration, vide the Subdiviſions of Declaration, Title Pleading.

(n) Brownl. 86, 87. S. C. and ſeems only a Tranſlation of the Report by Yelv. Cro. Jac. 68. S. C. adjudged, Moor 914. pl. 1293. S. C. adjudged, becauſe the Suit is founded upon the Tort as well as upon the Title. Noy 3. S. C. adjudged, becauſe one intire Debt founded upon one Wrong.

3. In real Actions where the Title is ſet forth in the Writ, ſeveral Lands by ſeveral Titles cannot be demanded in the ſame Writ. *Trin.* 7 *Jac.* 8 *Co.* 87. b.

4 But in real Actions founded upon a Wrong or Deforcement, in which no Title is ſet forth in the Writ, ſeveral Lands coming to the Demandant by ſeveral Titles, may be demanded in the ſame Writ. *Trin.* 7 *Jac.* 8 *Co.* 87. b.

(o) Ow. 11. S. P. cited Br. Joinder in Action 46. S. P.

5. A Man ſhall not have one Writ of (o) *Eſcheat* (p) *Ceſſavit, Meſne, &c.* founded upon ſeveral Tenures, becauſe in thoſe Writs the Tenure is ſhewed. *Trin.* 7 *Jac.* 8 *Co.* 86.

(p) F. N. B. 209. b. 210. b. Kelw. 105. a Fitz. Ceſſavit 4. 40, 41. Br. Ceſſavit 42.

6. So upon ſeveral Gifts in Tail, one Formedon in Deſcender, Reverter or Remainder lies not; for the Gifts are the Foundation, and are diſtinct and ſeveral, and therefore the Writs ought to be ſo alſo. *Trin.* 7 *Jac.* 8 *Co.* 87. a.

(q) 8 Co. 86, 87. Several like Caſes cited, Dier 145. Pl. 64. like point per Cur.

7 (q) If *A.* hath Iſſue three Daughters, *B. C.* and *D* and makes a Gift in Tail to *B.* and the Heirs of her Body, the Remainder of one Moiety to *C.* and the Heirs of her Body, the Remainder of the other Moiety to *D.* and the Heirs of her Body. And if *C.* dies without Iſſue, the Remainder of her Moiety to *D.* and the Heirs of her Body, and if *D.* dies without Iſſue, the Remainder of her Moiety to *C.* and the Heirs of her Body. *B.* diſcontinues, and dies without Iſſue; *C.* dies without Iſſue; and *D.* dies; her Iſſue may bring *one Formedon, becauſe all the Remainders began at one Time*, and depended upon one Eſtate, and ſpring as it were out of one Root. *Trin.* 7 *Jac.* (r) *Buckmer's* Caſe. 8 *Co.* 86. *Adjudged upon Demurrer for this Cauſe*; and ſo is the (s) 31 *Hen.* 6. 14. b. to be underſtood, where it is ſaid a Man may have one Formedon upon ſeveral Gifts.

(r) 2 Brownl. 274, 275. S.C. adjudged.

(s) Fitz. Brief. 113. S. C. & vide Cro. Jac. 330.

8. If a Man hath ſeveral Manors by Deſcent from ſeveral Anceſtors, and is diſſeiſed or deforced thereof, he may have one Writ of Right, Writ of Entry in the Nature of an Aſſize, or Writ of Aſſize; becauſe in ſuch Caſe no Title is made in the Writ. *Trin.* 7 *Jac.* 8 *Co.* 87. b.

9. But upon a Diſſeiſin to the Mother and Aunt, Coparceners in Fee-Simple, one Writ of Entry ſur Diſſeiſin lies not; for Title is made in ſuch Writ, and it would appear to be by ſeveral Anceſtors. *Trin.* 7. *Jac.* 8. *Co.* 87. b.

(t) Jenk. Rep. 211. Same Rule.

10. (t) In Perſonal Actions (u) ſeveral (x) (y) Wrongs and (z) Cauſes of Action may be comprehended in the ſame Writ. 8 *Co* 87. b.

(u) At Common Law ſeveral Treſpaſſes, and ſeveral Detinues, Maſſes, &c. may be joined in one Action. Jenk. Rep. 211. Fitz. Brief. 113.—So upon the Statute de Malefactoribus in Parcis, one Action lies for Hunting in ſeveral Parks, Br. Joinder in Action 120.—But an Action at Common Law, and upon a Statute, can't be join'd in the ſame Writ. Jenk. Rep. 211. (x) So one Action of Reſcous lies for the Reſcue of ſeveral Diſtreſſes taken upon Lands held by ſeveral Tenures, Br. Joinder in Action, 2. (y)

Six Men were bound in a Recognizance jointly and severally, and three were Arrested and in Execution, and suffered to escape: and the Plaintiff brought one Action of Debt upon the Statute for the Escape of them all. Kelw. 67, 68. adjudged good. (n) One Action lies for preferring several scandalous Petitions. 1 Bulst. 14, 15.

11. (a) As one Action of Trespass will lie for several Trespasses done at several Times and Places. 8 *Co.* 87. b.

12. (b) So (c) Debt for Rent (d) upon (e) several (f) Leases. 8 *Co.* 88. a. at the top.

(a) Br. Joinder in Action. 58. same Rule.

(b) Upon a Retainer, and upon a Mutuatus, Thomp. Ent. 111, 131. Rob. Ent. 191.——Upon a Judgment in a Court-Baron, and upon a Mutuatus, Thomp. Ent. 107. (c) So Debt and Detinue, for they are of the same Nature, Br. Joinder in Action, 97. Rast. Ent. 150. Pl. 13. 174. Pl. 15. 1 Br. Ent. 187. Asht. Ent. 81.—Secus of Actions of several Natures, as Debt and Trespass, Debt and Account. Br. Joind. in Action. 97. (d) So Debt lies upon a Bond, and upon a Mutuatus, though the Pleas must be several; for Nil debet, which is proper for one, will not serve for the other. 1 Vent. 366. per Cur.—So upon a Loan and upon a Lease. Rast. Ent. 152. 7, 8, 9. (e) So for Rent and for Goods sold. Br. Joinder in Action, 90. Br. Brief 122. Fitz. Det. 44. 104. Rast. Ent. 176. 15, 19.——So upon a Bond and for Goods sold. Hanf. Ent. 74. (f) Upon several Bonds. Fitz. Brief. 550. Fitz. Det. 122. Thomp. Ent. 114. Hanf. Ent. 88.

13. If in Covenant the Plaintiff shews that *A.* was seised in Fee of one Messuage, and possessed of another for a certain Term of Years yet enduring, and let both to the Defendant for a lesser Term of Years; and that the Defendant did covenant to repair, *&c.* And shews, That *A.* by one Deed did grant to the Plaintiff the Reversion in Fee, and by another the Reversion for Years, *&c.* And that after the Houses were out of Repair, *&c.* This Action is well brought; for as upon several Leases, or *upon several Grants of a Reversion one Action of Waste* lies, so upon the same Reason *one Writ of Covenant* will lie. *Mich.* 7. *Jac.* between (g) *Pyot* and the Lady *St. John. Cro. Jac.* 329. adjudged *per totam Curiam* upon a Motion after a Verdict for the Plaintiff.

(g) 1 Lev. 110. S. C. cited.

14. An *Ejectment* and *Assault and Battery* were joined in one Writ, and not Guilty pleaded, and a Verdict and entire Damages given for the Plaintiff. *Hill.* 16 *Jac.* between (h) *Bird* and *Snell*, *Hob.* 249. and said it seemed to be helpt by the Verdict.

(h) 1 Brownl. 235. S. C. and Winch held the Writ naught, but the Damages being found severally, the Plaintiff released those for the Battery, and had Judgment for the Ejectment.

15. If in an Action upon the Case the Plaintiff declares, That whereas *Accomodasset* to the Defendant a Gelding, *ad equitand. ab* L.. *usque* E. *& ibidem salvo deliberand.* to the Plaintiff; the Defendant intending to deceive the Plaintiff, rid upon the said Gelding from *L.* to *E.* and from *E* unto *L.* again, and by that riding so much abused the said Horse, that he became of little Value; and though the Plaintiff at *E.* demanded a Re delivery of the said Gelding, yet the Defendant refused, and yet doth refuse to deliver him, and hath converted the said Gelding to his own Use, *&c.* This Declaration is not good; because it contains distinct Matters, and (i) *Part* is founded *upon the Contract, and Part upon the Tort*, which are several Causes of Action, (k) and cannot properly be joined in one. *Mich.* 1 *Car.* between *White* and *Risden*, *Cro. Car.* 20. (l) But upon not Guilty, there being a Verdict for the Plaintiff, he had Judgment; though it was said, perhaps the Defendant might have (m) Demurred (as Lord *Hobart* conceived) for the Doubleness of the Declaration.

(i) Actions founded upon a Tort and upon a Contract cannot be joined. 1 Keb. 847. Pl. 45. 2 Keb. 803. Pl. 52.

(k) For they not only require several Pleas, but therein are different Process, in one Summons, Attachment, &c. and in the other Attachment, &c. 1 Vent. 366. per Curiam.—— Trespass against a Mayor and Commonalty and a private Man, and yet a Capias and Exigent lies against him, and against the Corporation a Distress only. Br. Joinder in Action. 11. and vide Br. Joinder in Action, 10. (l) 1 Vent. 366. like point per Curiam. (m) In Case the Plaintiff declared upon a Promise, to deliver to him 10 Pots of good and Merchandizable Pot-ashes, and that the Defendant had delivered 10 Pots not Merchandizable, but mired with Dirt. &c. And further, That the Defendant vendidit to the Plaintiff 10 other Pots of Ashes Warrantizando, &c. that they were good and Merchandizable, but had delivered them bad and not Merchandizable, knowing them to be naught: And the Defendant demurred. 1 Vent. 365, 366. adjornatur.

16. One Action will lie for entring the Houſe of the Plaintiff, breaking his Cheſts and carrying away his Goods and for beating his Servant, *per quod ſervitium amiſit*, for a (n) *General Action of Treſpaſs* and a *Special Action upon the Caſe* may be joined in one Action *Hill.* 22 *Car.* between (o) *Vincent* and *Furſy*, *All.* 9. agreed upon Motion after a Verdict for the Plaintiff, though Judgment was given againſt him for another Reaſon.

(n) Stil. 3. 202. S. P. doubted arguendo.

(o) Stil. 43, 44. S. C. and S. P. argued.

17. (p) In an Action againſt a common Carrier, the Plaintiff may declare upon the Cuſtom of the Realm, and alſo upon a *Trover* and *Converſion*; for not Guilty anſwers both, *per Mich.* 24 *Car.* 2. between (q) *Owen* and *Lewin*, 1 *Vent.* 223. *per Hale.*

(p) Matthews and Hopkins, S. P. 1 Syd. 244, 245, after a Verdict for the Plaintiff debated, and Judgment againſt him; but whether upon this Point, upon the Book ſeems doubtful. 1 Keb. 852, 870, 871. After a Verdict for the Plaintiff debated, and the Court inclined contra, and gave Judgment for the Defendant. But if not induced by another Defect in the Declaration. Q. 1 Vent. 365, 366. cited to have been adjudged good after a Verdict for the Plaintiff. 3 Mod. 322. cited and ſaid the Judgment was arreſted becauſe he had declared both ways. (q) 3 Keb. 59. Pl. 42. S. C. adjudged upon a Demurrer to the Defendant's Plea.

18. (r) If *Trover* and *Aſſumpſit* are joined in one Action, and upon Not Guilty the Jury *quoad* the *Trover* find for the Defendant, and *quoad* the *Aſſumpſit* for the Plaintiff, yet he ſhall not have Judgment; for (s) theſe cannot be joined in the ſame Action; and the Severance by the Jury will not help it, the Declaration being naught at the firſt. *Paſch.* 35 *Car.* 2. between *Bage* and *Bromwel.* 3 *Lev.* 99. adjudged.

(r) Holmes and Taylor S. P. 2 Lev. 101. per Hales, but Twiſden doubted and adjornatur, Raym. 233. Seemed accordingly, but adjornatur. (s) 1 Keb. 795. Pl. 573. 3 Keb. 59. Pl. 42.

Not where the Charge is in different Reſpects.

1. If in an *Aſſumpſit* againſt an Adminiſtratrix, The Plaintiff declares upon a Sale of Goods to the Inteſtate for 200 *l.* and upon another Sale to the Defendant her ſelf for 27 *l.* and that upon Account the Defendant was found indebted to the Plaintiff in thoſe Sums, and promiſed, *&c.* The Declaration is naught; for the Charge being *in* (t) *ſeveral Manners*, (u) viz. *In her own Right, and as Adminiſtratrix*, (x) it ought to have been by ſeveral Actions, *Hill.* 12 *Jac.* Between *Harrenden* and *Palmer. Hob.* 88. Adjudged and the firſt Judgment reverſed accordingly.

(t) So one Action of Debt lies not againſt Baron and Feme for ſome Money due from the Wife dum ſola, and other from the Husband upon Account, Revel and Grey. Hob. 184. after a Verdict for the Plaintiff adjudged. Noy 19. adjudged. (u) In one Caſe ſhe is charged de bonis propriis, and in the other de bonis Teſtatoris. 2 Lev. 228. 3 Lev. 74, and vide the Caſe of Wheeler and Collier, Cro. El. 406. Moor 419. Pl. 575.——But an Executor in the ſame Action may join one Promiſe made to himſelf, and another to his Teſtator; for the Judgment upon both is the ſame, 2 Lev. 228. per Curiam, ſeems to be intended good after Verdict. 2 Keb. 814. (x) So one Action of Debt lies not for Rent due in the Time of the Inteſtate, in the Detinet, and for other Rent due in the Time of the Adminiſtrator in the Debet and Detinet. 3 Lev. 74.

2. If in an *Aſſumpſit* the Plaintiff calls her ſelf Adminiſtratrix of *J. S.* and declares, That the Defendant was indebted to her in 300 *l.* but does not ſay as Adminiſtratrix, and farther declares for another Debt due as Adminiſtratrix, and that upon Accompt the Defendant was found indebted to the Plaintiff in 30 *l.* which he promiſed to pay, *&c.* and in the End of her Declaration produces the Letters of Adminiſtration; this is a good Declaration, for tho' the profert of the Letters of Adminiſtration, is only to warrant the ſecond Count, which is *in jure inteſtati*, and if it ſhould be admitted that the firſt Promiſe was *in jure proprio*, yet the latter being (y) upon Accompt with her ſelf, and the Promiſe made to her ſelf in her own Time, they may well be joined in one Declaration. *Trin.* 26 *Car.* 2. between *Curtis* and *Davis*, 2 *Lev.* 110, 111. After a Verdict and intire Damages, for the Plaintiff adjudged, *per totam Curiam contra Twiſden totis viribus.* And after Verdict it may be intended the firſt Debt was due to her as Adminiſtratrix, but a Writ of Error was brought, *& quid inde venit* the Reporter *neſcit.*

(y) 1 Vent. 268.

Where for the same Fact or Thing, several Persons may have several Actions.

1. (a) If *A.* delivers Goods to *B.* to deliver over to *C.* And *B.* does not deliver them over accordingly, but converts them to his own Use; either *A* or *C.* may have an Action against *B.* but both shall not have an Action; but he that first begins his Action shall go on with the same. *Mich.* 8 *Jac.* 1. *Bulst.* 68. *Flewelling & al' & Rave per Curiam.*

(a) Hardr. 321. like Point, but said they could not join.

2. If *A.* is seiz'd in Fee of the Reversion of a Close expectant upon a Term for Years, and *B.* is possessed of another Close adjoining thereto, between which said Closes there runs a Rivulet, and *B.* stops it, *per quod* the Close of *A.* is surrounded, so that the Timber Trees, *&c.* became rotten: *A.* in (b) respect (c) of the Prejudice to the Reversion, and the Termor, in respect of the Possession, and of the Shade, Shelter, *&c.* may have an Action; and a Satisfaction given to one, is no Bar to the other. *Hill.* 36 & 37 *Car.* 2. between *Bidlesford* and *Onslowe*, 3 *Lev.* 209. adjudged; where to an Action by the Reversioner, the Defendant pleaded Payment of 20 *s.* to the Termor, *&c.* in Satisfaction, and upon Demurrer adjudged a bad Plea.

(b) Where for the same Fact several Actions lie, in several respects. vide 2 Rol. Abr. 552. N. 7.

and the Notes there. (c) So if A. leases a House to B. for Years, and this is burnt down through the Neglect of a Neighbour, A. may have an Action for the Damage to his Inheritance, and B. to his Possession. 3 Lev. 360. adjudged.

For whom they Lie.

Where several Men may join in one Action.

1. (a) If one Man calls two other Men Thieves, and shews in certain of what, *&c.* they shall not join in one Action against him; for the Wrong done to one, is no Wrong to the other. *Trin.* 28 *H.* 8. *Dier* 19. *Pl.* 112. *per Curiam.*

(a) Goulst. 76. S. P. per Cur. Cro. Car. 512. S. P. per Cur. arguendo.

2. (b) So in (c) False Imprisonment. *Trin.* 28 *H.* 8. *Dier* 19. *Pl.* 112. *per Curiam.*

(b) Ow. 106. S. P. arguendo.

(c) So in Assault and Battery; for the Battery done to one can't be the same as that done to the other, and one Battery may hurt more than the other. Kelw. 55. a. Fitz. Joinder in Action, 17 Reg. 105. b. Ow. 106. arguendo.

3. If a Man holds several Lands of several Lords by Heriot Custom, and to defraud them of their Heriots, makes a fraudulent Gift of all his Beasts heriotable; all the Lords may join in one Action upon the 13 *Eliz. Trin.* 18. *Eliz. Dier* 351. *Pl.* 23. *per Harper*; but *Quære hoc.*

4. (d) If two (e) Joint-Owners of a Sum of Money are robbed upon the Highway, they may join in one Action against the Hundred in which, *&c. Pasch.* 22 *Eliz. Dier* 370. *Pl.* 59. *per Curiam.*

(d) 2 Leon. 12. S. P. but appears not whether they were Joint-Owners.

(e) Where Joint-Tenants must or may join in an Action, vide the Divisions, Title Joint-tenants.

5. Otherways if the Sums are several and several Properties, *&c. Pasch.* 22. *Eliz. Dier* 370. *pl.* 59. *per Curiam.*

6. If the several Cattle of *A.* and *B.* are distrained, and *C.* in Consideration of 10 *l.* to him paid by *A.* and *B.* assumes and promises to them to procure the Cattle to be re-delivered to them; if they are not re-delivered accordingly, one joint Action lies; for the Consideration is intire and cannot be divided, and it is a Question if one of them may bring the Action alone. *Hill.* 1649. between (f) *Vaux* and *Draper*, *Stil.* 156, 157, 203. adjudged by three Judges against one, who said they are several Promises, *viz.* to deliver to each severally their own Cattle, and so there must be two several Actions.

(f) 1 Rol. Abr. 31. Z. 9. S. C.

7. If *A.* hath one Mill, and *B.* another in the same Manor, which they have used to repair, and Time out of Mind, all the Grain which was ground and spent in the Houses of the Tenants of the said Manor, and was not ground at one of the said Mills, hath always, and ought to be ground at

the other, and *C.* a Tenant of the ſaid Manor, grinds at another Mill, *&c. A.* and *B.* may join in one Action againſt *C.* for the Damage is intire to both their Mills. *Mich.* 23 *Car.* 2. between (i) *Litheby & al. & Coryton.* 2 *Lev.* 27. agreed *per totam Curiam* upon Demurrer; but becauſe the Plaintiffs had declared that all the Grain ought to be ground at theſe two Mills, or one of them, which might be if all ought to be ground at one of the Mills and nothing at the other: For their own Expedition they prayed a *nil Cap. per Billam.*

(i) 2 Keb. 631. Pl. 42. 803. Pl. 51. 822. Pl. 35. 838. Pl. 71. S. C. and S. P. agreed, and Hales ſaid they muſt join, becauſe the Jury could not apportion the Damages. 2 Sand. 115, 116. S. C. & S. P. agreed per Cur. for tho' their Intereſt is ſeveral, yet the grinding at neither of their Mills is a joint Damage, and therefore they ſhall join; for if they ſhould bring ſeveral Actions, the Damages would be twice recovered. 1 Vent. 167, 168. S. C. & S. P. agreed per Curiam.

8. If within the Pariſh of *A.* there is a Cuſtom for the Pariſhioners yearly to elect two Perſons to be Churchwardens there, and according to the ſaid Cuſtom, *B.* and *C.* are elected, but the Surrogate of the Biſhop refuſes to admit and ſwear them into the ſaid Office, upon which they bring a *Mandamus*, and he falſly returns a Cuſtom for the Vicar to chuſe one Churchwarden, and that therefore he cannot admit both the ſaid Parties, but is ready to admit one of them, they may join in an Action for this falſe Return; for the *Mandamus* and the whole Proſecution and Charge thereof was joint; and this is no Office of Profit, nor Action brought for that, but for the unjuſt Return. *Trin.* 4 *Will. & Mar.* between *Ward & al' & Brampſton*, 3 *Lev.* 362. adjudged *per totam Curiam*, upon a Motion in Arreſt of Judgment after a Verdict for the Plaintiff.

9. If in an Action upon the Statute of 13 *Rich.* 2. *&c.* the Plaintiff declares that he was ſetting Sail with a certain Ship in his Poſſeſſion, laded with Merchandizes, Part his own, and Part of other Merchants, for him to Traffick with, taking of the others one 5*th* Part of the Profit, and that the Defendant proſecuted a Suit in the Admiralty for Stay of the Ship, until Caution given that ſhe ſhould not Traffick within the Limits of the Charter of the *Eaſt-India* Company; and thereupon by Proceſs of the Admiralty, cauſes the ſaid Ship to be arreſted at *P.* in *Com. S.* and there to be detained, *&c.* by which the Plaintiff loſt the Profit of his Voyage: This Action is well brought by him alone, for not only the Poſſeſſion, but the Property of the Ship, for any Thing that appears, was in the Plaintiff, and tho' others had Goods there, it does not appear they were Part-owners, and as to Part they were the ſeveral Goods of the Plaintiff, and he was to have a 5*th* Part of the Profits of the Reſidue. *Paſch.* 5 *Will. & Mar.* between *Sands qui tam, &c.* and Sir *Joſiah Child.* 3 *Lev.* 351, 354. upon a ſpecial Verdict, adjudged, and after upon a Writ of Error confirmed, *per totam Curiam*, and ſaid, tho' the Plaintiff had a joint Intereſt, yet upon Not Guilty the Plaintiff ſhould recover for his Part; and if the Defendants would have taken Advantage thereof (k) they ought to have pleaded in Abatement.

(k) For this vide the Sub-diviſions of Abatement, Title Writ.

10. If the Regiſter of the Biſhop refuſes to regiſter a Licence of a Chapel for a Conventicle, according to 1 *Will. & Mar.* and upon a *Mandamus* to do it, makes a falſe Return, (l) all the Inhabitants may join in one Action againſt him. *Trin.* or *Mich.* 8 *Will.* between ſeveral of the Inhabitants of *Hinley* Chapel in *Lancaſhire*, and the Regiſter of the Biſhop of *Cheſter.* 3 *Lev.* 363. adjudged upon Demurrer.

(l) Upon a joint Grievance all Parties may join—— in a Writ upon the Statute of Beau-pleader the whole Hundred or County may join. F. N. B. 270. a. ſo one Writ de eſſend. quiet. de toloneo, or one monſtraverunt lies for all the Tenants in ancient Demeſn. F. N. B. 15. D. 228. b. Br. Joinder in Action 81.

Againſt whom they lie.

Where for the ſame Fact or Thing againſt ſeveral, in different reſpects.

1. If two of the Sheep of *A.* have been loſt, and one of them is found

again, and the Shepherd of *A.* affirms it to be one of them, whereupon *A.* pays for the feeding of it, and cauſes it to be ſhorn, and marked with his own Mark, and after the Shepherd knowing this to be the Sheep of *A* falſely and fraudulently affirms to the Bailiff of the Manor to which Waif and Stray belongs, that the ſaid Sheep is a Stray; whereupon the Bailiff ſeizes it, *&c.* *A.* may have an Action againſt his Shepherd, for that by his falſe Practice he hath created a Trouble, Diſgrace and Damage to him; and tho' he hath good Cauſe of Action againſt the Bailiff, yet this will not excuſe the Shepherd. *Mich.* 22 *Car.* between (m) *Newman* and *Zachary*, *Allen* 3. adjudged.

(m) 1 Rol. Abr. 101. Pl. 11. S. C.

2. So if one ſlanders my Title, whereby I am wrongfully diſturbed in my Poſſeſſion, tho' I have Remedy againſt the Treſpaſſer, yet I may have an Action againſt him that cauſed the Diſturbance. *Mich.* 22 *Car.* *Allen*, 3. *per Hales.*

3. If there are ſeveral Proprietors of a Ship which hath uſually tranſported Goods for Hire, and a Maſter placed therein by the Part-owners, who hath 60 *l.* Wages for every Voyage from *London* to *T.* and *I. S.* without making any Contract with the Part-owners, and none of them being preſent, delivers certain Goods aboard to the Maſter, to be carried for Hire from *London* to *T.* and the Ship ſafely arrives there, but the Goods are ſpoil'd, an Action lies againſt the Part-owners; for tho' the Maſter is chargeable, in reſpect of his Wages, ſo are the Proprietors, in reſpect of the Freight, at the Election of the Plaintiff. *Trin.* 1 *Will & Mar.* between (n) *Boſon* and *Sandford.* 3 *Lev.* 258, 259. *per Holt* Chief Juſtice.

(n) 3 Mod. 322. S. C. and S. P. arguendo; by the State of the Caſe the Goods were ſpoiled thro' Neglect of the Maſter.

Where ſeveral Men may be joined in one Action.

1. (o) One Action will not lie againſt ſeveral Men for ſpeaking the ſame Words, for the Words of the one are not the Words of the other, and can no more produce a joint Action, than their Words and Tongues can be ſaid to be one. *Mich.* 20 *Jac.* between (p) *Chamberlain* and *Wilmore.* *Palm.* 313. adjudged upon Motion after a Verdict for the Plaintiff, and the Judgment ſtaid accordingly.

(o) 1 Bulſ. 15. S. P. arguendo, but ſaid it was otherways in the Spiritual Court, for that one Libel may be againſt ſeveral Perſons. (p) Cro. Jac. 647. S. C. adjudged and Judgment arreſted.

2. If *A.* Leaſes for Years to *B.* and *C.* rendring Rent, and *C.* aſſigns his Moiety to *D.* and after, Rent is arrear; *A.* may bring one Action of Debt for the Rent (q) againſt *B.* and *D.* for the Reverſion remains entire. *Paſch* 20 *Jac.* *Waldron* againſt *Vicars* and *Simons*, *Palm.* 283, 284. adjudged *per Curiam contra Chamberlain*, who ſaid one Action lay not, for that *B.* was chargeable upon the Contract, and *D.* for his Occupation, and ſo liable in different reſpects, which ought not to be confounded in one joint Action.

(q) So if B. dies it lies againſt his Executor, and D. between the Bailiffs and Commonalty of Ipſwich, and Martin, & al. Cro. Jac. 411. adjudged. 3 Bulſ. 211, 212. adjudged. 1 Rol. Rep. 404. adjornatur.

3. If two Men (r) procure another to be indicted falſly for a common Baretor, he may have an Action upon the Caſe againſt them both; tho' in Strictneſs the Procurement of one is not the Procurement of the other. *Pencavin* and *Trapping.* *Lat.* 262. *per Curiam.*

(r) So if two conſpire to maintain a Suit, and one only gives Money, for the intire Parlance makes the Conſpiracy, Br. Joinder in Action 47. Fitz. Error 31 Fitz. Maintenance 15.

4. So in (s) (t) Maintenance and (u) Treſpaſs, and (x) yet the Maintenance or Treſpaſs of one, is not the Maintenance or Treſpaſs of the other. *Lat.* 262. *per Curiam.*

(s) Kelw. 68. S. P. per totam Curiam, (t) So where one maintains generally, and the other ſpecially, by giving Money to the Jury, &c. Br. Joinder in Action, 47. 100. Br. Maintenance, 26. 52.——So one decies tantum lies againſt all the Jurors who take Money, for they all give but one Verdict and are but one Jury. Br. Joinder in Action, 5. 47. 100. 108. Fitz. decies tantum. 1. 4. 6. F. N. B. 171. a.——So againſt the Jurors and Embracers. F. N. B. 171. D. Fitz. Error 31. Fitz. decies tantum. 8, 9. (u) For this vide the Diviſions Title Treſpaſs. (x) But one Action upon the Statute of Labourers lies not againſt ſeveral Servants, for the Retainer

tainer and Departure of one, is not the Retainer and Departure of the other. Br. Joinder in Action, 6. 15. 41. Br. Labourers 12. Fitz. Brief. 505, 527.——But the Servant that departs, and the Master that retains him, may be joined in one Action. F. N. B. 167. a. Fitz. Brief. 901. Fitz. Laborer. 1. 23. 50.—So one Action upon the Statute of Liveries lies not against several Takers of Liveries. Br. Joinder in Action, 27. 66. Fitz. Action sur Statute 5. but one Action lies against the Giver of several Liveries to several Persons, Br. Joinder in Action, 27.

5. A Man can't declare against one Defendant, for an Assault and Battery; and against the other, for taking away his Goods, because the Trespasses are of several Natures, and against several Persons. *Mich.* 24 *Car. Cutsworth's* Case, *Stil.* 153. adjudged after a Verdict for the Plaintiff.

6. If there are several Proprietors of a Ship which hath usually transported Goods for Hire, and a Master placed therein by the Part-Owners, who hath 60 *l.* for every Voyage from *London* to *T.* And *I. S.* without making any Contract with the Part-Owners, and none of them being present, delivers certain Goods aboard to the Master, and the Ship safely arrives, but the Goods are spoiled, an Action lies not against Part of the Proprietors only, but it must be brought against all; for in respect of the Freight they are all chargeable upon the implied Contract; but not as Trespassers, for then one might be charged alone. *Trin.* 1 *Will. & Mar.* between (x) *Boson* and *Sandford*, 3 *Lev.* 258, 259. *per Holt* Chief Justice upon a special Verdict, and so adjudged, as the Reporter was informed by *Dolben*, Justice.

(x) 3 Mod. 321, 322. S. C. adj. the Goods being spoiled tho' the Neglect of the Master.

Rol. Fol. 1. begins.

Action upon the Case.

(A) (a) Tam (b) pro Domino Rege quam pro seipso.

(a) It lies where Damage to the King as well as Party, 2 Rol. Rep. 26. said arguend.

1. THo. Molyneux sued tam pro Rege quam pro seipso against Hugh Berewicke, for that whereas he was indicted and arraigned of Felony before the Defendant, unde protulit cartam Regis pardonationis, quam Defendens noluit allocare, dicendo quod the King's Writ nihil sibi valeret, and then Imprisoned him, and threatned to hang him, nisi submitteret Henrico Duci Lancastriæ, and bind himself in a Statute-Merchant to the said Duke in 3201. upon which the Defendant submitted himself, and is pardoned. Hill. 27 Ed. 3. B. R. Rot. 42.

(b) For assaulting and beating the King's Chaplain in the King's Palace and Presence, Br. Joinder in Action 57. Fitz. Trespass 18. Br. Prerogative 48.

2. If A. recovers in Debt against B. and thereupon outlaws him, and afterwards upon a Capias utlegatum, the Defendant is taken and rescued by a Stranger, A. shall have an Action upon the Case; (c) tam pro Domino Rege quam pro seipso against the Stranger. Mich. 11 Jac. B. between Lane and Stanshaul adjudged.

(c) The King for Honour and Conformity shall join, but the Party grieved shall have all the Damages. 1 Rol. Rep. 78. per Coke.——But the King shall have a Fine. Cro. Jac. 533. per Curiam.

(b) Barret and Winchcome. S. P. 1 Rol. Rep. 78. adjudged. Cro. Jac. 360. adjudged.

3. (d) So if after Judgment in Debt, and an Outlawry thereupon, the Defendant is (e) taken upon a *Capias utlegatum*, and by the *Sheriff* suffered to escape, the Plaintiff not being satisfied, (f) an Action *tam pro Rege quam pro seipso* lies against the *Sheriff*; for this Escape is as well in Contempt of the King, as to the Prejudice of the Plaintiff *Pasc.* 44 *Eliz.* between *Eden* and *Lloid. Cro. Eliz.* 877. adjudged upon a Writ of Error in *B. R.* upon a Judgment in *B.* tho' the Judgment was reversed for another Cause.

(c) So if the Sheriff is often in the Defendant's Company, and yet returns non est inventus, &c. Parkinson and Powel, Noy 22. adjudged, Cro. Jac. 532, 533. adjudged and affirmed upon a Writ of Error. (f) So Debt lies without saying tam pro Domino Rege, &c. Cro. Jac. 619, 620. bis adjudged; for he may bring his Action for what he has lost, and the Prothonotaries certified the Precedents both ways.

4. (g) Where

4. (g) Where a Thing is prohibited by a Statute, (h) but under no certain Penalty, the Party grieved may have (i) an Action upon the Statute; but it ought to be *tam pro Rege quam pro ſeipſo*, becauſe (k) in ſuch Caſe the King is to have a Fine. *Mich.* 4 *Jac.* between *Waterhouſe* and *Bawde*. *Cro. Jac.* 134. *per Curiam.*

(g) So upon the Statute of Scandal' mag' 4 Co. 13. a. 1 Rol. Rep. 78 Hetl. 122. Raſt. Ent. 593.

(h) An Action qui tam lies not upon 2 Ed. 6. for not ſetting forth of Tithes, for the King can have no Benefit thereof, and the Damages are given to the Party grieved only. Cro. El. 621. adjudged.— But Hetl. 121, 122. ſuch a Declaration was held good.— Yet Quære, for in ſuch Caſe the King has no Fine, but the Action is for a Debt given in Recompence of Tithes. 1 Rol. Abr. 223. Pl. 17. (i) Where ſuch Actions founded upon Statutes, ſhall be tam pro Domino, &c. vide 1 And. 138, 140. Moor 63, 64. Pl. 175. 2 Leon. 190. 3. Leon. 237, 238. Dier 159. Pl. 37. & Margine. Br. Joinder in Action 29. Br. Action popular 5. (k) For this Rule vide 1 Rol. Abr. 223.

Pleading in Actions Qui tam.

Of the Original.

1. If (a) in Debt upon the 14 *H* 8. *cap.* 5. for practiſing Phyſick without a Licenſe, the Writ be *quod reddat Domino Regi & Præſidenti Collegii qui tam pro Domino Rege quam pro ſeipſo ſequitur*, and the Declaration in the Name of the Preſident *qui tam pro Domino Rege, &c.* And ſhews a Practiſing without Licenſe *per quod actio accrevit* (b) *Domino Regi & dicto Præſidenti qui tam*, &c. Tho' (c) by ſome Preſidents the Writ ſhould be *ad Reſpondend'* the Informer, *qui tam pro Domino Rege quam pro ſeipſo*, yet this Writ is good, and this the more proper and better Way; for (d) the Forfeiture is given by Moieties, and (e) therefore it is not ſo proper for the Informer to demand the Whole, and thereupon the King and the Informer to have ſeveral Judgments for their Moities. *Trin.* 8 *Car.* between (f) the *College of Phyſicians* and *Butler*. 1 *Jon.* 261. adjudged and affirmed upon a Writ of Error.

(a) Moor 63. Pl. 175. S. P. Dal. 66. S. P. Moor 64. two like Caſes cited. Dier 95. Pl. 36. L. P. appears. 2 Mod. 100. S. P. adjudged. (b) An Information upon a Statute may be pro Domino Rege, pro ſeipſo, & pro pauperibus; but Debt muſt be for the King and Party only, and yet the Share of the Poor ſhall be ſevered in the Judgment. per 2 Keb. 820. (c) 3 Lev. 375. ſuch Precedents cited. (d) Vide a like Precedent upon the Statute of Hue and Cry, where the King is to have a Fine only. Raſt. Ent. 406. Co. Ent. 348, &c. (e) Br. Action. ſur Statute 4. (f) Cro. Car. 256. S. C. adjudged and affirmed upon a Writ of Error, and there ſaid the Writ is good both ways.

2. But in an Information it muſt be, that the Informer for the King and himſelf informs. (g) *Trin.* 8 *Car.* 1 *Jon.* 262. *per Curiam.*

(g) Cro. Car. 256. S. C. & S. P. per Cur. and ſaid that Informations are always ſo.

Of the Declaration, Plea, &c.

1. (a) If in an Action of Debt upon a Penal Statute, the Writ be *Præcipe*, the Defendant *quod reddat nobis, & I. S. qui tam pro nobis quam pro ſeipſo ſequitur, &c.* and the Declaration accordingly; and the Defendant (b) pleads *quod ipſe non debet præfato*, I. S. *qui tam, &c. in forma qua, &c.* This is no good Plea, becauſe the Writ and Declaration are not anſwered; (c) but the (d) Plea ought to have been according to the Demand, *viz. Quod ipſe non debet dicto Domino Regi & Præfat'* I. S. *qui tam*, &c. *Incerti temporis.* Between *Scot* and *Laws*, *Hob.* 327. the Court inclined accordingly after a Verdict for the Plaintiff.

(a) 3 Lev. 375. S. P. adjudged Cont' for the Debt is intire; and if he owes not to the Party, he owes not to the King: And if by this Plea there was a Diſcontinuance only, it was ſaid arguendo to be helped by 32 H. 8. being after Verdict. (b) The Defendant demurred pro eo quod nar ipſius I. S. eſt minus ſufficiens, &c. ad ipſum I. S. qui tam, &c. unde petit, &c. & quod I. S. qui tam, &c. ab actione, &c. never mentioning the King; and yet it was held well enough, Cro. Car. 11. per Admittance of the Court; for tho' the Writ be quod reddat Domino Regi & I S. yet it is preſumed for I. S. he being as the Original Party only. (c) So is Co. Ent. 165. b. 167. b. (d) And ſo alſo the Judgment muſt be. Stil. 329, 330.

2. In an Action *qui tam* upon the Statute of *Hue and Cry*, in the joining Iſſue or Venire, there ſhall be no Mention of *qui tam pro Domino Rege, &c.* but of the Party only; for ſo are (e) all the Precedents where the King is named only as it is an Offence againſt him: But he is to have no Part of the Sum recovered, but a Fine only. *Mich.* 9 *Car.* Anonymus. *Cro. Car.* 336. Adjudged upon a *Writ of Error*, and the Judgment affirmed accordingly.

(e) Yet ſome are otherways, as Raſt. Ent. 406, 407, Co. Ent. 348, 349.

3. (f) But where the Action is brought upon a Penal Statute, by which Part is given to the King, and Part to the Informer, it is the common Courſe to enter that the Party *qui tam, &c. Mich.* 9. *Car. Cro. Car.* 336. *per Curiam.*

(f) In ſuch an Action the Defendant pleaded non debet to the Informer, & de hoc ponit ſe ſuper patriam, and Iſſue was joined, & præd' the Informer ſimiliter, without mentioning the King; and after a Verdict for the Plaintiff, a Repleader was awarded. Reynell and Heal. 1 Vent. 122. where in the State of the Caſe it is called an Information, but yet concludes unde Actio, &c. And afterwards in the ſame Report it is called an Action, as I ſuppoſe it was, according to the Report of the ſame Caſe. 2 Keb. 788.

(B) For Fire.

1. **If my Fire by Misfortune burn the Goods of another Man, he ſhall have an Action upon the Caſe againſt me.** (a) 2 Hen. 4. 18. Bz. 30. S. C.

(a) Fitz. Action ſur le Caſe 25. S. C.

2. **If Fire (I knowing nothing of it) ſuddenly break out in my Houſe, and burns my Goods, and alſo the Houſe of my Neighbour, my Neighbour ſhall have an Action upon the Caſe againſt me.** (b) 42. Aſ. 9. **admit.** (c) **But it ſeems it was adjudged there the Action did not lie, becauſe it was** (d) Vi & armis.

(b) Fitz. Action ſur le Caſe 43. S.C. (c) Bz. Verdict 50. S. C. (d) 9 Co. 50. b. But for this vide the Subdiviſions of Declaration, Title Pleading.

3. **If my Servant puts a Candle or other Fire in any Place in my Houſe, and this falls, and burns all my Houſe and the Houſe of my Neighbour, an Action upon the Caſe lies for him againſt me.** (e) 2 H. 4. 18. **The ſame Law is if my Gueſt does it.** (f) 2 H. 4. 18.

(e) Poph. 143. S. C. cited Fitz. Action ſur le Caſe 25. S. C. Bz. 30. S. C. (f) Fitz. Action ſur le Caſe 25. S. C.

4. (g) **The ſame Law is of him that enters my Houſe with my Leave.** (h) 2 Hen. 4. 18.

(g) 1 Brownl. 197. L. P. ſaid. (h) Fitz. Action ſur le Caſe 25. S. C. Bz. 30. S. C.

5. **The ſame Law is of him that enters my Houſe with my Knowledge.** (i) 2 Hen. 4. 18.

(i) Fitz. Action ſur le Caſe 25. S.C.

6. (k) **But if a Stranger againſt my Will puts Fire in my Houſe, by which the Houſe of my Neighbour is burnt, no Action lies againſt me.** (l) 2 H. 4. 18. b.

(k) 1 Brown. Ent. 29. Such a Plea Fitz. Double Plea. 31. S. P. admitted by the Iſſue. (l) Fitz. Action ſur le Caſe 21. S. C. Bz. 30. S. C.

Fol. 2.

7. **An Action upon the Caſe does not lie againſt** (m) Baron **and** Feme **for negligent keeping their Fire in their Houſe, by which the Houſe of the Plaintiff was burnt; becauſe this Action lies upon the general Cuſtom of the Realm againſt** Patrem familiæ, **and** (n) **not againſt a Servant or** Feme Covert, **who is but in Nature of a Servant.** Mich. 1 Car. Regis, **at** Reading **Term, between** Shelly **and** Burr. per Curiam.

(m) In what Actions the Wife ſhall be made a Defendant together with her Husband. Vide 1 Rol. Abr. 348. (n) But Thompſon's Entr. 34. vide a Declaration againſt a Servant, and

and the Cuſtom laid, Quod quilibet homo ignem ſuum vel ignem aliorum qui curam hujuſmodi ignis ad eorum cautionem & gubernationem committeret ſalvo cuſtodire teneantur, &c.

8. If *I. S.* being at the Door of his Houſe, ſhoots at a Fowl with a Gun, and by this Means fireth his own Houſe, and the Houſe of his Neighbour, he ſhall have a general Action upon the Caſe againſt *I. S.* for the Injury is the ſame; tho' this Miſchance was not by common Negligence, but by Miſadventure. *Mich.* 24 & 25 *Eliz. Cro. Eliz.* 10. *per Curiam.* But he (o) muſt not declare upon the general Cuſtom of the Realm.

(o) Fitz. Action ſur le Caſe 25. Br. Action ſur le Caſe 30.

Who ſhall have it?

1. If *A.* leaſes a Stable to *B.* for one Week, and ſo from Week to Week *quam diu partibus placeret*, and leaſes five other Stables to ſeveral other Perſons for ſeveral Terms yet to come, by Virtue of which they are poſſeſſed; and being ſo poſſeſſed, ſix Weeks after by the Negligence of *B.* a Fire begins in his Stable, and burns down that and all the other Stables; *A. quoad* the five Stables may have an Action upon the Cuſtom of the Realm againſt *B.* for as to thoſe there is no Privity between them; and (p) tho' in reſpect of the Poſſeſſion the Leſſees may have an Action, yet may the Leſſor alſo for the Damage to his Inheritance. *Paſch.* 5 *Will. & Mar.* Between *Panton* and *Iſham*, 3 *Lev.* 359. adjudged upon a ſpecial Verdict, the Plaintiff having laid the Cuſtom to keep Fire *ne damnum alicui eveniat ullo modo.*

(p) Where for the ſame Fact or Thing ſeveral Perſons may have ſeveral Actions. Vide the Diviſions, Title Action.

Againſt whom it lies.

1. If *A.* leaſes a Stable to *B.* for one Week, and ſo from Week to Week *quam diu partibus placeret*, by Virtue whereof he is poſſeſſed, and ſix Weeks after by the Negligence of *B.* the Stable is burnt down; (q) an Action upon the Cuſtom of the Realm lies not againſt him, becauſe of the Privity, and the Leaſe was but for three Weeks at moſt, and after he was Tenant at Will, (r) againſt whom no Action lies for negligent Waſte. *Paſch.* 5 *Will. & Mar.* Between *Panton* and *Iſham.* 3 *Lev.* 259. adjudged upon a ſpecial Verdict.

(q) Therefore Act. Ent. 56. is a bad Precedent, and Act. Ent. 23. 1 Brown. Ent. 29. for burning the Houſe in which the Defendant Manſit are to be ſuſpected as ſuch. Q. (r) Counteſs of Salop and Crompton, S. P. Cro. El. 177, 784. adjudged. 5 Co. 13. b. adjudged, and there, Br. Waſt. 52. denied to be Law.

Pleading in Actions for Fire.

Of the Writ, Declaration, (s) Plea, &c.

1. In ſuch an Action the (t) Cuſtom may be laid (u) *quod quilibet ignem* (x) *ſuum ſalvo & ſecure Cuſtodire tenetur, ne pro defectu*, &c. *damnum aliquod alicui eveniat ullo modo*, &c. *Paſch.* 5 *Will. & Mar.* Between *Panton* and *Iſham*, 3 *Lev.* 359. adjudged the Writ was good, tho' not laid *ita quod damnum non eveniat vicino*, &c.

(s) Where a Plea that the Houſe, &c. was not burnt for want of good Cuſtody of his Fire, is a negative Pregnant; and how the Iſſue ſhall be taken, vide Br. Negative Pregnant 3. Fitz. Iſſue 88. Fitz. Double Plea 31. (t) There needs no venue where uſed, for conſuetudo Regni eſt lex Regni Fitz. Action ſur Caſe 25. Br. Action ſur Caſe 30. Cro. Eliz. 10. (u) The Cuſtom ſo laid. Act. Ent. 56. (x) This is well enough, tho' Br. Action ſur Caſe 30. it was objected a Man could not have Property in Fire.

(C) Againſt

(C) (a) Againſt a (b) Carrier.

(a) Againſt a common Ferry-man that refuſes to carry Paſſengers. Yard. 163. ſaid arguendo. (b) Rob. Ent. 103. vide a ſpecial Declaration againſt a Letter-Carrier, for the Non-delivery of a Letter delivered out to him at the General Poſt-Office. (c) But tho' no Carrier, yet if he takes Hire he may be charged upon his ſpecial Aſſumpſit. Cro. Jac. 262, 3. adjudged. (d) So if damaged. Palm. 523. Lerns. Pleder 76, 77.

1. **If a Man delivers Goods to a (c) Common Carrier, to carry them to a certain Place; if he (d) loſes them, an Action upon the Caſe lies againſt him: For, by the common Cuſtom of the Realm, he ought to carry them ſafely.**

(e) When Goods of Value are put into a Lighter, to be conveyed from the Ship to the Key, it is uſual for the Maſter to ſend a competent Number of his Men to look to the Merchandiſe; ſo that if any of the Goods are loſt and imbeziled, the Maſter is anſwerable, and not the Wharfinger: But if ſuch Goods are ſent aboard a Ship, the Wharfinger at his Peril muſt take care to preſerve them. Molloy 212. ſaid to have been ruled at Guildhall per Hale Chief Juſtice. (f) So if he does not pay him, or make any Agreement, for the Carrier may have his Quantum meruit. 1 Cro. Jac. 263. 1 Sid. 36. Bz. action upon the Caſe 78. (g) Hob. fol. 17. S. C. adjudged and affirmed upon Error. Cro. Jac. 330. S. C. adjudged and affirmed upon a Writ of Error.

2. **If a Man delivers Goods to a Common (e) Hoy-man (who is a Common Carrier of Goods) to carry them to a certain Place, and (f) pays him according to the Cuſtom for the Carriage of them, and after for Default of good Keeping they are loſt, an Action upon the Caſe lies againſt him; for, by the common Cuſtom of the Realm, he ought to have kept and carried them ſafely.** Mich. 12 Jac. B. **Between** (g) Keeling **and** Rich **adjudged.** Hob. Rep. 25. b. **the ſame Caſe.**

(h) Hob. fol. 17. S. C. adjudged and affirmed upon Error. Cro. Jac. 330. S. C. adjudged and affirmed upon a Writ of Error.

3. **If a Man delivers Goods to ſuch Common Hoy-man, to carry to a Place, and after delivers them (being of a good Value) to another to keep ſafely in the Boat, and does not diſcharge the Hoy-man, and after they are loſt through Negligence, an Action upon the Caſe lies againſt him.** Mich. 12 Jac. B. (h) **Between** Keeling **and** Rich **adjudged.** Hob. Rep. 25. b. **the ſame Caſe.**

(i) 4 Rep. 84. a. S. P. agreed. Owen 57. S. P. by Popham. 2 Sand. 380. S. P. by Sanders. 2 Mod. 270. S. P. adjudged.

4. *(i)* **If a Man deliver Goods to a Common Carrier to carry, and the Carrier is robb'd of them, yet he ſhall be charged for them, becauſe he had Hire for them, and ſo implicitly took upon himſelf the ſafe Delivery of the Goods ſo to him delivered, and therefore ſhall anſwer for the Value of them, if robb'd.** Hill. 36 Eliz. B. R. Rot. **Between** (k) Woodleeſe **and** Curties **reſolved.**

(k) Moor 462. Pl. 650. S. C. per Popham contra Gaudy. Dw. 57. S. C. per Popham contra Gaudy. Co. Lit. 89. S. C. cited as if adjudged.

5. If *A.* delivers Goods at *York* to *B.* (who is a Water-carrier between *Hull* and *London*) to carry them from *Hull* to *London*, tho' the Agreement is to carry the Goods from *Hull* to *London*, and no Mention is made of the Carriage to *Hull*; yet if the Goods are loſt, *B.* ſhall anſwer for them, for upon his (l) general Receipt of them at *York*, he is liable. *Paſch.* 13 *Car.* 2. Between *Nichols* and *Moor.* 1 *Sid.* 36.

(l) 1 Rol. Abr. 338. Pl. 3.

6. If a Merchant lades Goods aboard a Ship, to be tranſported at a reaſonable Reward of Fraight to be paid to the Owners, and in the Night-time, while the Ship rides in the River *Thames*, notwithſtanding a competent Number of Men are left aboard for the Guard of the Ship and Goods, yet ſeveral Perſons, under Pretence of preſſing Seamen, ſeize on the Men aboard, and take away the Goods, an Action will lie againſt the (m) Maſter; for in Effect he is paid by the Merchant, for the Merchant pays the Owners, and the Owners pay the Maſter; ſo that the Money of the Merchant is but handed over

(m) The Maſter is no more than a Servant to the Owners, and has no Property either general or ſpecial, but the Power he hath is given by the Civil Law. per 3 Mod. 323. Molloy 209.

over by them to the Maſter. *Hill.* 23. & 24 *Car.* 2. (n) Between *Mors* and *Sluce.* 1 *Ven.* 190, 238. upon a ſpecial Verdict adjudged *per totam Curiam*, and ſaid. Tho' by the Admiral-Law the Maſter is not chargeable *pro damno fatali*, as in caſe of Pirates, Storm, *&c.* where there is no Negligence in him; yet becauſe this Ship was *infra Corpus Comitatus*, (o) this Caſe muſt not be meaſured by the Rules of that Law.

(n) Raym. 220. S. C. 3 Keb. 72, 112, 135. S. C. 1 Mod. 85. S. C. But there ſaid the Verdict was given for the Defendant. 2 Lev. 69. S. C. adjudged. 3 Lev. 259. S. C. cited; and Holt Lord Chief Juſtice ſaid the Maſter is chargeable, in reſpect of his Wages; and the Proprietors, in reſpect of the Freight. Molloy 209, 210. S. C. For he muſt ſee all Things forth-coming which are delivered to him, let what will happen, (the Act of God, or an Enemy, Perils and Dangers of the Sea, only excepted) but for Fire, Thieves, &c. he muſt anſwer. (o) In an Action againſt a common Hoy-man from Walton to London, the Defendant pleads that the Boat and Goods ſuper Thamiſim were ſunk and loſt, abſq; hoc that they were loſt pro defectu bonæ cuſtodiæ, &c. and Iſſue thereupon joined. Vid. Ent. 37, 38.

Collateral Matter to Excuſe the Carrier.

1. If *A.* and ſeveral Others take their Paſſage in a Ferry boat, and being upon the Water a Tempeſt ariſes, ſo that they are in much Danger of being drowned; upon which, to preſerve their Lives, ſeveral of the Goods are caſt over-board, among which a Pack of Goods of *A.* of great Value is thrown over, (p) *A.* ſhall have no (q) Action againſt (r) the Barge-man. *Mich.* 12 *Jac.* 2. *Bulſ.* 280. *Coke* ſaid it had been ſo adjudged.

(p) But when and how by the Marine-Law he ſhall have Averidge, &c. vide Molloy 246, 247. (q) All. 93. L. P. cited con; but vide and Q. if not S. C. intended, being cited only as ruled upon the Point of Notice. (r) So if any Paſſenger ex neceſſitate, for the Safeguard of his Life, throws it over-board, no Action lies againſt him. 12 Co. 62.

2. (s) If *A.* delivers a Box to a Carrier to carry, and he asks (t) what is in it, and *A.* tells him a Book and Tobacco, and in Truth there is 100 *l.* beſides; yet if the Carrier is robbed, he ſhall anſwer for the Money; for *A.* was not bound to tell him all the Particulars in the Box: and it was on the Part of the Carrier to have made (u) a ſpecial Acceptance. *Mich.* 24 *Car. Kenrig* and *Eccleſton*, *All.* 93. ruled, by Roll at the *Niſi prius* at *Guild-hall*, *London.* But in regard of the intended Cheat to the Carrier, he told the Jury they might conſider of it in Damages; but yet the Jury gave the Plaintiff 97 *l.* Damages, abating 3 *l.* only for Carriage, *quod durum videbatur Circumſtantibus.*

(s) 1 Vent. 238. Hales ſaid a like Caſe had there lately been adjudged. (t) For a like Point, in caſe of an Hoſt, vide the Head, Collateral Matter to excuſe the Hoſtler, Title Action upon the Caſe. (u) Such a ſpecial Acceptance would have excuſed the Carrier. 1 Vent. 238. per Hales, 1 Keb. 135. But vide Dr. and Stud. 130.

Pleading in an Action againſt a Carrier,

Of the Declaration, &c.

1. If in an Action upon the Caſe againſt a Lighter-man, the Plaintiff declares that by the Common Law every Lighter-man ought ſo to direct his Lighter that the Goods of any Merchant therein laded ſhall not be loſt; and that the Plaintiff was a Merchant, and the Defendant a Lighter-man, who for Hire had carried Goods in his Lighter from *&c.* to *&c.* and that the Defendant had the Goods of the Plaintiff, *viz.* to carry for ſo much, but that he negligently, *&c.* This a good Declaration, tho' there was (a) no Promiſe, and tho' it is not (b) alledged he was a Common Lighter-man. *Paſch.* 4 *Car.* Between *Symons* and *Dorknol. Palm.* 523. *per Curiam.* But *vide*, for it is obſcurely reported.

(a) If founded upon a Promiſe, he need not ſhew that he is a Common Carrier, &c. Cro. Jac. 262. 1 Syd. 245. 1 Keb. 852, 870. And where Fire is taken, a Promiſe is implied. (b) Q. if not implied as laid, vide Hob. 245.

2. If in an Action upon the Caſe againſt a Lighter-man, the Plaintiff declares the Defendant ſo negligently governed his Lighter, that it took Water, and ſpoiled the Goods of the Plaintiff *ad damnum*, &c. The Declara-

(c) As in Herns. Pleader. 77.

tion is good, (c) without a more ſpecial Allegation how they were ſpoiled. *Paſch.* 4 *Car.* Between *Symons* and *Darknol. Palm.* 523. *per Curiam.*

(d) For tho' laid as a Cuſtom, yet in truth it is the Common Law. Hob. 18. —— And in ſuch Caſes it is uſual to declare quod Secundum legem & conſuetudinem Angliæ, &c. For it is not a Cuſtom confined to a particular Place, but extends to all the King's People. 3 Mod. 227. (e) But Q. if not meer Surpluſage, and vide Hard. 485, 486. (f) 1 Keb. 852, 870. S. C.

3. Tho' the Declaration againſt a Carrier may be good (d) without a Recital of the Cuſtom of the Realm, (e) yet the beſt way is to recite it. *Paſch.* 17 *Car.* 2. Between (f) *Matthews* and *Hopkins*, 1 *Syd.* 245. *per Curiam.*

(a) Fitz. Nat. Br. 94. b.

D. (a) Againſt an Inn-keeper.

Who ſhall be ſaid an Hoſt chargeable.

(b) 8 Rep. 32. a. S. P. Dyer 266. B. Margine, S. P. Raſt. 405.

1. HE must be a (b) Common Inn-keeper that may be charged for Goods ſtole in the Houſe. Paſch. 3 Hen. 4. B. R. Rot. 28. adjudged.

Iſſue joined upon this Point. So in Aſhton's Ent. 48, 49.

(c) For this vide the Diviſions, Title Idiot.

(d) Cro. Eliz. 622. S. C. adjudged.

2. If an Inn-keeper be ſo diſtempered that he is not of a ſound Memory, and a Gueſt knowing thereof inns there, where his Goods are ſtole, an Action upon the Caſe lies againſt the Inn-keeper; (c) for he cannot diſable himſelf by ſaying he was not then of a ſound Memory, Mich. 40 41. Eliz. B. R. (d) Between Croſs and Andrews adjudged, but not entered.

3. If an Inn comes to an Infant, and he keeps it, and his Gueſts are robb'd, yet no Action lies againſt the Infant. Mich. 40. and 41. Eliz. B. R. in Croſs and Andrew's Caſe agreed.

(e) New Dyer 158. Margine, the Record of the S. C. cited.

4. If one that is not a Common Hoſt be aſſign'd per Hoſpitatorem Domini Regis to harbour a Man, he is not bound to take Charge of the Goods of his Gueſt. (e) Mich. 3 Hen. 4. Rot. 28. adjudged.

1 Rol. Abr. 3. Pl. 5. S. C.

(f) Noy 79. S. C. adjudged. Latch 179. S. C. adjudged; but S. P. does not fully appear.

5 If in *London* the Goods of a Gueſt are ſtolen out of an Inn, the Hoſt muſt anſwer for them. *Paſch.* 2 *Car.* (f) Between *Drope* and *Thaire. Poph.* 178. adjudged.

Fol. 3.

(a) By the ancient Law the firſt Day he was called a Traveller, the ſecond Day a Hogenhind, and the third Day a Menial Servant, per Latch 88.

(E) Againſt an Hoſt.

Who ſhall be ſaid a (a) Gueſt to have an Action.

1. If my Goods are ſtole out of an Inn where I am a Gueſt, but my Goods were delivered to the Hoſt upon another Account, I ſhall have no Action againſt the Hoſt. Mich. 40. and 41. Eliz. B. R. Between Bemon and Watſon.

2. If

2. If a Man comes to an Inn with a Hamper, in which he hath several Goods, (viz. Hats, as the Case was) and goes away, leaving this with the Host, and (b) two Days after comes again, but in the Time of his Absence this is stole, he shall have no Action against the Host; for at the Time of the stealing he was not his Guest, and by the keeping of the Hamper the Host had no Benefit, and therefore (c) shall not be (d) charged for the Loss of it in his Absence. Mich. 5 Jac. B. R. Between (e) Jelly and Clerk adjudged. And Justice Williams said it was so adjudged at Hartford Term, which intratur Pasch. 4 Jac. Rot. 454.

(b) Otherways if he had return'd the same Night. Sir Edwin Sands, Moor 877. cited. Poph. 179. cited.

2 Brownl. 255. cited. New Dyer 158. b. Margine. Cro. Jac. 188. cited. Latch 127. cited. (c) Unless he makes a special Promise for the safe keeping of them, per Cro. Jac. 189. but Q. then if not *nudum pactum*, &c. And according to the Report of the same Case, Noy 126. the Host promised that they should be safe; but perhaps the Action was founded upon the Custom of the Realm, and not upon the Special Assumpsit. (d) Where a Man shall be charged with the safe Custody of Goods by a general Acceptance, vide Co. Lit. 89. a. b. 1 Rol. Abr. 338. Pl. 3. (e) Cro. Jac. 188. S. C. adjorn'. Nay 126. S. C. adjudged. Poph. 179. S. C. cited. Latch 127. S. C. cited. 2 Brownl. 255. S. C. cited.

3. But if a Man comes to an Inn with a Horse which he rides, and leaves it with the Host, and goes away from the Inn for several Days, and in his Absence the Horse is stole; yet shall the Host be charged for it, because he had Benefit by the Continuance of the Horse with him, inasmuch as he is to be paid for it, and so the Owner is a sufficient Guest to maintain an Action. Mich. 5 Jac B. R. in the said Case of (f) Jelly and Clerk it was so agreed per Curiam.

(f) Moor 877. S. C. cited, and S. P. said to be adjudged. Noy 126. S. C. and S. P. agreed.

4. (g) If an Host invites one to Supper, and the Night being far spent, invites him to stay all Night; if he is after robb'd, yet shall not the Host be charged, for this Guest was no Traveller. 25 Eliz. Car's Case adjudged, cited Pasch. 7. Jac.

(g) 2 Brownl. 214. like Point. 8 Co. 32. b. S. P.

5. If an Host be assigned per Hospitatorem Domini Regis to harbour I. S. he is not obliged to warrant his Goods; for he is no Traveller that is lodged for his Money, within the Intent of the Law. (h) Pasch. 3 H. 4. Rot. 28. adjudged. But it seems as if the Host there was no Common Host.

(h) New Dyer 158. b. Margine, the Record of the S. C. 1 Rol. Abr. 2. Pl. 4.

6. If a Man takes my Horse, and rides him to an Inn, where he is stole; tho' I am (i) the Owner, I shall not have an Action against the Host, (k) because I am not his Guest. Trin 15. Jac. B. R. Between Robinson and Waller, per Cro. and Dod. and Hought. but Mount. econtra.

(i) One Jointenant of Goods is robb'd, both may have an Action. Latch. 127. per Dod'. Poph. 179. per Dod'. (k) If a Common Carrier is robb'd in his Inn, the Owner, and not the Carrier, shall have the Action, per Dal. 8. per Brown and Portman. But this I take not to be Law, being founded upon a Supposition that the Carrier is not answerable to the Owner.

7. (l) But if my (m) Servant upon my Business comes to an Inn, and rides upon my Horse, and he is there stole, I may have an Action against the Host, because the absolute Property is in me. Trin. 15. Jac. B. R. Between Robinson and Waller, by Mount. Cro. and Dod.

(l) Dal. 8. S. P. cited. 3 Bulst. 271. S. P. per Mountague, Bedle and Morris, S. P. Cro. Jac. 224. adjudged. Yelv. 162. adjudged. Latch 127. cited New Dyer 158. b. Margine. Drope and Thaire, S. P. Noy 79. adjudged. Latch 127. adjudged. Poph. 178. adjudged. New Dyer 158. b. Margine. Br. Action upon the Case, 28 Fitz. Hostler 4. (m) So if A. sends Money by his Friend, and he is robb'd in his Inn, A. shall have the Action. Yelv. 162. per Curiam.

8. If *A.* comes with Goods to an Inn in *London*, and (n) stays there for a (o) Week, Month, or longer, and is there robb'd of them; he shall have an Action against his Host, tho' perhaps being at the End of his Journey he cannot then be said *transeuns*, according to the Writ in the Register. In the Case of (p) *Drope* and *Thaire*. *Latch* 127. *per Dod.* and *Jones*,

(n) If an Attorney hires a Chamber in an Inn for the whole Term, he is quasi a Lessee; and if robb'd, the Host not answerable. Moor 877. Warberton said it had been adjudged.—So if a Man upon a special Agreement boards or sojourns in an Inn, and is robb'd, the Host shall

ſhall not anſwer for it. Latch 127. per Dod. Poph. 179. per Dod. and Jones. Hetly 49. per Curiam.
(o) Latch 88. L. P. per Dod. con. But Q. for it ſeems not to be Law. Dier 158. b. L. P. Margine.
(p) Poph. 179. S. C. and S. P. per Jones, and not denied per Dod.

(F) Againſt an Hoſtler.

(a) 2 Brownl. 254. S. P. cited. 2 Rol. Rep. 343. S. P. by three Judges. Palm. 367. S. P. per Cur'. 374. S. P. per Cur'. Godb. 346. S. P. per Doderidge. Kelw. 50. S. P. per Cur'. But vide the Note at the latter End of the Caſe, Godb. 180 S. P. arguend'. Fitz. Hoſtler 3. Br. Action ſur le Caſe 76. (b) He is not bound to receive a Horſe, unleſs the Maſter be lodged there. 2 Brownl. 254. per Coke Chief Juſtice. — Nor bound to let him have Meat, unleſs paid beforehand; for the Hoſt is not bound to truſt. Br. Action ſur Caſe 76. Br. Contract 43. 9 Co. 87. b.

1. (a) **If an Hoſt (b) refuſes a Gueſt, under Pretence that his Houſe is already full of Gueſts; if this be falſe, an Action upon the Caſe lies.** Paſ. 4. 5. Ph. & Ma. Dyer 158. 32.

(c) 4 Leon. 96. S. P. adjudged. 2 Brownl. 255. S. P. per Cur'. Herns. Pleader 250. a like Entry. Rob. Ent. 24. a like Entry.

2. **If a Traveller comes to an Inn to lodge, and the Hoſt aſſigns him a Chamber to keep his Goods, and after the Gueſt is there robb'd of his Goods; he ſhall have an Action upon the Caſe againſt the Hoſt.** 42 Aſſ. 17. **adjudged; and there ſaid to be adjudg'd in the Counſel.** Co. 8. Caly's Caſe 32.

3. (c) **If a Man comes to a Common Inn to harbour, and deſires that his Horſe be put to Graſs, and the Hoſt puts him to Graſs accordingly, and the Horſe is ſtole; the Hoſt ſhall not be charged,** (d) **becauſe by the Law the Hoſt is not bound to anſwer for any thing out of his Inn, but only for thoſe Things** quæ ſunt infra hoſpitium. Co. 8. (e) Caly 32 b. **reſolved.** Hil. 37 Eliz. B. R. **Between** Dale **and** Gibſon **agreed; but there ſaid that before it had been held** contra per Curiam. Paſch. 40 Eliz. B. R. **Between** Moſley **and** Foſſet per Curiam.

(d) Fol. 4.

(e) Herns. Pleader 250. S. C. cited, and ſaid that it was held a good Plea by Wray and Anderſon, but otherways by Coke.

(f) 4 Leon. 96. S. P. per Cur'. 2 Brownl. 255. S. P. per Cur'.

4. (f) **But if the Owner does not require the Hoſt to put his Horſe to Graſs, but the Hoſt does it of his own head; if the Horſe be ſtole, he ſhall anſwer for it.** Co. 8. Calye 32. b.

(g) M. if not a ſpecial Action upon the Caſe intended, and not upon the Cuſtom of the Realm, for that extends only to Things infra hoſpitium, &c. And where the Defendant pleaded the Order of the Gueſt to put the Horſe to Graſs, Nota the Manner of the Traverſe, Absque hoc quod ſpat' pred' in hoſpitio predict' exiſtent' capt' & abduct' fuit ab eodem hoſpitio in defectu ipſius, the Defendant, &c. Rob. Ent. 23, 24. Herns. Pleader 250.

5. **If the Hoſt upon the Command of the Gueſt puts the Horſe to Graſs, and by the voluntary and wilful Negligence of the Hoſt the Horſe is ſtole; as if the Hoſt voluntarily leaves open the Gates of the Cloſe, by which means the Horſe ſtrays out, and ſo is ſtole or loſt,** (g) **an Action upon the Caſe lies againſt the Hoſt.** Paſch. 40 Eliz. B. R. **Between** Moſley **and** Foſſet, per Poph.

6. If the Gueſt be aſſaulted and beat within the Inn, he ſhall have no Action againſt his Hoſt; for the Charge of the Hoſt extends to the Moveables only, and not to the Perſon of his Gueſt, as 'tis ſaid in *Calye*'s Caſe. 8 Co. 32. B.

(G) Againſt an Hoſtler.

Collateral Matter to Excuſe the Hoſtler.

1. (a) IF an Hoſt refuſes a Gueſt becauſe his Houſe is full, and the Party ſays he will ſhift among the reſt of his Gueſts, and there he is robb'd, the Hoſt ſhall not be charged. 4, 5. Ph. & Ma. Dier 158. 32.

(a) Bendl. 60. Pl. 103. S. C. adjudged by all the Judges of the Common Pleas. 1 Ind. 29. S. C. adjudged.

2. If an Hoſt tells a Gueſt that he muſt go abroad, and therefore can't attend him; and upon this the Gueſt takes up his Lodging there at his Peril, If his Goods are ſtole the Hoſt ſhall not be charged. (b) 11 Hen. 4. 45.

(b) Fitz. Hoſtler 5. S. C. Br. Action ſur le Caſe 41. S. C.

3. If an Hoſt takes in a Gueſt, and of his own Head goes Abroad without Compulſion of Law, yet muſt he anſwer for the Goods of his Gueſt, for he ought to have a Servant to take care of them in his Abſence. (c) 11 H. 4. 45.

(c) Fitz. Hoſtler 5. S. C. Br. Action ſur le Caſe 41. S. C.

4. So it ſeems as if it would be if he was at another Place by Action of Law; for his Servants ought to take care in the mean Time. Contra (d) 11 H. 4. 45.

(d) Fitz. Hoſtler 5. S. C. Br. Action ſur le Caſe 41. S. C.

5. (e) If the Hoſt requires his Gueſt to put his Goods in ſuch a Chamber under Lock and Key, and that then he will warrant their Safety, or elſe not; and notwithſtanding the Gueſt ſuffers them to lie in an outer Court, where they are ſtole; no Action lies againſt the Hoſt, for they were not loſt thro' the Neglect of the Hoſt, but of the Gueſt. *Mich.* 9 and 10 *Eliz. Dyer* 266. b. (f) *Spencer's* Caſe.

(e) Moor 78. Pl. 207. like p. dubitatur 158. Pl. 299. like p. dub. 159. like Point cited. (f) 8 Co. 33. a. S. C. cited.

6. If an Hoſt (g) demands of his Gueſt what Money or Goods he has, and he (h) tells him none, or leſs in Truth than he has; if afterwards they are loſt, the Hoſt is not anſwerable. *Hill.* 26 *Eliz.* in the Caſe of *Brand* and *Glaſs*. *Moor* 158. *Pl.* 299. by *Anderſon*, but *Windham* and *Peryam contra.*

(g) The Hoſt liable, tho' the Gueſt does not acquaint him what Goods, &c. he has. 8 Co. 33. a. (h) For a like Point in Caſe of a Carrier, vide the Head where an Action lies againſt a Carrier, Title Action upon the Caſe.

7. (i) If the Hoſt delivers the Key of the Chamber where the Goods are to the Gueſt, and he leaves the Door open, and the Goods are ſtole, yet an Action lies againſt the Hoſt; for at his Peril he ought to keep ſafely the Goods of his Gueſt. 8 *Co.* 33. a. in *Caly's* Caſe.

(i) Fitz. Hoſtler 1. S. P.

8. (k) If the Gueſt is robbed by his Servant, or one that comes with him, or by one that he deſires may be lodged with him, he ſhall have no Action againſt the Hoſt; for it was the Folly of the Gueſt to keep ſuch Servant or Company, and there is no Default of good Cuſtody in the Hoſt. 8 *Co.* 33. a. in *Caly's* Caſe.

(k) Cro. El. 285. S. P. per Manwood Chief Baron. Fitz. Hoſtler 1, 2.

Which is a Common Inn.

(l) This is made a Quære, Palm 374. But for this vide 2 Rol. Abr. 843.

1. Tho' in ancient Times Inns (l) were allowed in the Eyre, yet if a Man puts a Sign at his Door, and harbours Gueſts, this makes his Houſe a Common Inn, and himſelf chargeable. (m) *Trin.* 21 *Jac.* 2 *Rol. Rep.* 345. *per Ley* Chief Juſtice, *Chamberlain* and *Doderidge*.

(m) Palm 374. S. C. and S. P. per Curiam.

(n) Palm. 374. S. C. and S. P. per Curiam. Godb. 346. S. C. and S. P.

2. But if he takes down his Sign again, he diſcharges himſelf of the Burthen. (n) *Trin.* 21 *Jac.* 2 *Rol. Rep.* 345, 346. by the ſame Judges.

(o) Palm. 374. S. C. and S. P. per Curiam. Godb. 346. S. C. and S. P.

3. But yet if after the taking down his Sign he uſes to harbour Men, it is as much a Common Inn as if he had a Sign. (o) *Trin.* 21 *Jac.* 2 *Rol. Rep.* 346. *per Ley* Chief Juſtice, and *Doderidge*.

Pleading in Actions againſt an Inn-keeper.

Of the Writ, Declaration, &c.

(p) For this vide Reg. 104. a. 105. a. F. N. B. 94. b. (q) This is the Courſe, for it is not a Cuſtom confined to a particular Place, but 'tis ſuch which is extenſive to all the King's People. 3 Mod. 227. Fitz. Hoſtler, 2 Br. Action ſur le Caſe 41. (r) He need not name them, becauſe by the Preſumption of Law he hath no Knowledge of them. Plowd. 129. a. (s) Per Hetl. 49. it ought to be ſhewn that the Gueſt tranſeuns hoſpitavit; yet Q. for perhaps he was at the End of his Journey. Lat. 127. Poph. 179. and all the Entries are otherways. (t) The Writ was 100 l. of the Plaintiff in hoſpitio, of the Defendant hoſpitati ceperunt, &c. and tho' objected, in hoſpitio referred to the Perſon, and not to the Money; and that he might harbour in the Houſe of the Defendant, and his Money be ſtole elſewhere, and that it ſhould have been ibidem invent' ceperunt; yet the Writ was adjudged good. Fitz. Hoſtler 2. Br. Action ſur le Caſe 58. (u) And this is well enough, tho' not ſhewn by what Authority or Licenſe held. 2 Rol. Rep. 346. Palm 374. Godb. 346.

1. The (p) Form of the Writ, *Cum ſecundum legem &* (q) *conſuetudinem Regni noſtri Angliæ Hoſpitatores qui hoſpitia Communia tenent ad hoſpitand' homines*, &c. *tranſeuntes & in eiſdem hoſpitantes eorum bona*, &c. *abſque ſubſtractione ſeu amiſſione cuſtodire tenentur* (r) *quidam Malefactores quendam equum* (s) *ipſius* A. &c. (t) *infra* (u) *hoſpitium ejuſdem* B. &c. *invent' pro defectu ipſius* B. *ceperunt*, &c. 8 Co. 32. b.

(x) In the Writ he may be named Yeoman, but in the Declaration it muſt be ſhewn that he is a Common Hoſtler. Br. General Brief 16. Br. Action ſur le Caſe 58. Fitz. Hoſtler 2. (y) Vide Dyer 266. Pl. 9. Hob. 245. the Quære there. 2 Leon. 162. Fitz. Hoſtler 5. Br. Action ſur le Caſe 41.

2. The Writ need not mention that the Defendant (x) keeps *Commune hoſpitium*, for it muſt be ſo intended; for the Recital of the Writ is *hoſpitatores qui communia hoſpitia tenent*, *&c.* and the latter Words depend upon the former: (y) But the Plaintiff ought to count that he kept *Commune hoſpitium*. *Paſch.* 26 *Eliz.* 8 *Co.* 32. a. b. *Caly's* Caſe, and there ſaid that ſo the Books are well reconciled.

(z) In this Caſe there is no direct Writ in the Regiſter, but by the Statute of Weſtm. 2. the Clerks ſhall agree to make a ſpecial Writ. Dal. 8. 9. (a) Yet Q. if in Judgment of Law the Maſter is not the Gueſt, and ſo proper enough to lay the General Cuſtom only. (b) Yelv. 162. S. C. But appears not that the Cuſtom was laid in this manner. Lat. 127. S. C. cited. Poph. 179. S. C. cited arguend' and ſaid

3. If in ſuch Action brought (z) by the Maſter for Goods ſtole from his Servant, the Plaintiff lays the Cuſtom that Inn-keepers ought ſafely to keep the Goods of their Gueſt, and (a) all other Goods into their Inns brought, *&c.* the Cuſtom is ſufficiently alledged to maintain the Action. *Trin.* 7 *Jac.* Between (b) *Beedle* and *Morris*, *Cro. Jac.* 224. adjudged, after a Verdict for the Plaintiff; notwithſtanding it was objected (c) there was no ſuch Cuſtom to keep the Goods of others ſafely.

ſaid it was therein reſolved, the Cuſtom ought to be particularly applied to the Maſter. But vide Co. Ent. 347. 348. the Entry of S. C. and Reſolutions thereupon. (c) The Miſrecital thereof is immaterial, for it is the Common Law. Lat. 127. per Jones and Dod. 1 Syd. 245. Hob. 18. 3 Mod. 227.

4. (d) If in his Declaration the Plaintiff lays the (e) Cuſtom for Common Inns, and then lays that he was *hoſpitatus in hoſpitio*, &c. this is well enough; for it muſt be intended that it was *Commune*, elſe it is *Domus & non hoſpitium. Trin.* 16 *Jac.* Between *Maſon* and *Grafton. Hob.* 245. adjudged upon a Motion in Arreſt of Judgment, after a Verdict for the Plaintiff.

(d) Raſt. Ent. 405. Pl. 4. a like Precedent. (e) Rob. Ent. 22. a Precedent where the Cuſtom is laid pro hoſpitiis only.

(H) For keeping a Dog accuſtomed to bite.

How the Action ſhall be brought.

1. IT is a good Writ and Declaration to ſay quod Defendens quendam (a) Canem ad mordendum (b) oves conſuetum, (c) Scienter retinuit, without ſaying quod retinuit quendam canem, Sciens canem Prædictum ad mordendum oves conſuetum, for this is tantamount; for the Word Scienter goes to all the precedent Matter, and the (d) Regiſt. 111. is accordingly, and the old Book of Entries Treſpaſs du Chien 2. And this is the conſtant Courſe de B. and within a Year before, adjudged good there, as was remembred by Juſtice Mallet. Mich. 17. Car. B. R. Between Cockeram and Davis adjudged per Curiam, this being moved in Arreſt of Judgment intratur. Trin. 16. Car. Rot. And the Court ſaid the Sciens was not (e) traverſable, but ought to be (f) proved in Evidence; and ſo in this Caſe, (g) otherways the Action does not lie.

(a) For keeping juvencam ad percutiend' conſuet. Thomp. Ent. 40. (b) An Action lies for keeping a Dog, &c. Sciens, that he is ad mordend' porcos conſuet'. Cro. Car. 254. adjudged. and vid. New Dyer 25. b. Margine. (c) Judgment upon ſuch a Declaration reverſed upon a Writ of Error, for perhaps Scientur retinuit, and yet might not know that he was Conſuet' ad mordend' &c. Cro. Car. 487. But 2 Syd. 127. the Caſe in Cro. denied to be Law, and adjudged con'. (d) Reg. 110. b. 111. a. vide 2 like Writs; and for like Entries vide Rob. 23. 77. 1 Brown. Ent. 29. Raſt. 616. (e) 4 Rep. 18. b. S. P. 2 Bulſ. 291. S. P. cited. 3 Bulſ. 76. S. P. cited. 1 Syd. 21. S. P. cited. 1 Rol. Rep. 43. S. P. cited. 193. S. P. cited; and vide Rob. Ent. 77. and the old Book of Entries there cited, and Aſhton Ent. 15. Br. Action ſur le Caſe 11. Br. Negative Pregnant 3. (f) All. 91. like Point. New Dyer 256. S. P. Margine; and vide Dyer 29. Pl. 195. Fitz. Barr. 290. (g) Dyer 25. b. Pl. 162. S. P. adjudged, and vide Margine.

(I) Upon a Trover and Converſion.

Who ſhall have a Trover and Converſion.

1. (a) IF a Common Carrier has Goods delivered to him to carry to a certain Place, and a Stranger takes them out of his Poſſeſſion, and converts them to his own Uſe, an Action of Trover and Converſion lies for the Carrier, (b) againſt him; for he had a ſpecial Property in the Goods, and is to make Satisfaction for them to the Owner. Trin. 15 Car. at Guildhall, upon Evidence in ſuch Action ruled per Brampt' Chief Juſtice. Between Godwin and Richardſon, upon a Trial there, upon Not guilty pleaded.

(a) 1 Mod. 31. S. P. per Curiam.

(b) Fol. 5.

2. If *A.* the Servant of *B.* ſells 20 Quarters of his Maſter's Corn for 20 *l.* and receives the Money, and converts it to his own Uſe, the Maſter ſhall have an Action of *Trover and Converſion* againſt his Servant; for the Poſſeſſion of

of the Servant was the Poſſeſſion of his Maſter. *Paſch.* 40 *Eliz.* Between (c) *Holyday* and *Hix. Cro. Eliz.* 638. adjudged. But 661, 746. this Judgment by the Opinion of all the Judges, except two, was reverſed in the *Exchequer-Chamber*; for Money being a Thing that could not be known, it was ſaid the Property was never in the Maſter but in the Servant.

(c) Ow. 131. S. C. cited, as firſt adjudged. Noy 12. S. C. cited, as firſt adjudged.

3. If *A.* is indebted unto *B.* in a certain Sum, and *C.* is indebted unto *A.* and it is agreed between *A. B.* and *C.* that *C.* in Diſcharge of his Debt to *A* ſhould diſcharge the Debt of *A.* to *B.* by Delivery of certain Goods to *B.* which *C.* had then in his Cuſtody, but were properly the Goods and Commodities of *A.* but *C.* does not deliver the Goods accordingly, but converts them to his own Uſe; *B.* (d) tho' he never had (e) the (f) Poſſeſſion, ſhall have an Action of *Trover and Converſion* againſt *C. Mich.* 8 *Jac.* Between *Flewelling* and *Rave*, 1 *Bul.* 68. adjudged. But *vide Librum*, for the Caſe is but obſcurely reported.

(d) Trover lies for a Stray before an actual Seizure, per 2 Keb. 589. per Keeling Chief Juſtice. (e) Trover brought by the Winner againſt him that held Stakes upon a Wager. Cro. Eliz. 870. (f) Trover by the Leſſor, for Timber Trees felled by the Leſſee, tho' he was never actually poſſeſs'd thereof. 2 Rol. Abr. 119. Pl. 2.

4. If upon a *Fieri facias* the Sheriff takes Goods in *Execution*, and before the Sale of them (g) a Stranger takes them away out of his Poſſeſſion, and converts them to his own Uſe; the Sheriff may have an Action of *Trover and Converſion*, for he had a lawful (h) Poſſeſſion, and is anſwerable for them. *Hill.* 21 *Car.* 2. Between (i) *Wilbraham* and *Snow*, 2 *Sand.* 47. adjudged *niſi*, and never moved after.

(g) By the Report of the Caſe. 1 Vent. 52. it appears the Goods were taken away by the Defendant in the Execution. (h) Poſſeſſion without Property is enough to maintain Treſpaſs, but not Trover, per 2 Bulſ. 135. per Dod'. (i) 1 Mod. 30. S. C. and the Court inclined accordingly. 2 Keb. 589. S. C. adjudged. 1 Syd. 438. S. C. adjudged. 1 Lev. 282. S. C. adjudged per totam Curiam. 1 Vent. 52. S. C. adjudged by three Judges. Twiſden hæſitante.

5. If Commiſſioners of Bankrupts actually ſeize any of the Goods of the Bankrupt, (as by Law they may) if ſuch Goods are taken out of their Poſſeſſion, &c. they may have an Action of *Trover and Converſion. Hill.* 21 *Car.* 2. Between (k) *Wilbraham* and *Snow*. 1 *Mod.* 31. *per Twiſden.*

(k) 2 Keb. 589. S. C. and S. P.

(K) For what Things it lies.

1. (a) TRover and Converſion lies for Money, tho' not in a Bag, becauſe the Thing it ſelf is not to be recovered, but Damages only for it. Mich. 3 Jac. B R. ſaid to have been often adjudged. Mich. 12 Jac. B. R. (b) Iſaac and Clerk. Hil. 13 Jac. B. R. between (c) Wood and Dr. Sutcliff adjudged, and admitted upon a Writ of Error. Hil. 9 Jac. B per Curiam. Trin. 17 Jac. between Sir Thomas Temple and Sims, for 100 l. of Money numbred in a Bag.

(a) Hall and Wood. S. P. Cro. El. 841. adjudged. Ow. 131. adjudged. Cro. Car. 89. S. P. adjudged and affirmed upon Error. Cro. El. 870. S. P. adjudged. 819. S. P. adjudged. Allen 91. S. P. ruled by Roll at the Niſi prius at Guildhall, tho not upon an actual Taking, but for Money delivered by the Plaintiff to the Defendant to keep.——Holyday and Hix. S. P. adjudged. Cro. El. 638, 661. But after 661, 746. for this Cauſe reverſed. Noy 12. cited as firſt adjudged. Owen 131. cited as firſt adjudged. Cro. El. 819. cited as reverſed. (b) 1 Rol. Rep. 59. S. C. and S. P. by two Judges. Godb. 210. S. C. and S. P. per Curiam. Moor 841. S. C. but was for Money in a Bag, and no Notice taken of this Point. 2 Bulſ. 306. S. C. being for Money in a Bag, and no Notice taken of this Point. (c) 1 Rol. Rep. 293. S. C. and S. P. admit. per Curiam. 3 Bulſ. 150. S. C. and S. P. ſeems to be admitted per Curiam.

2. Trover and Converſion lies for 40 l. of Money numbered in a Box, without ſaying the Box was ſealed or locked, as the Uſe is in Replevin. Hil. 15 Car. B. R. Between Weſtbury and Wakefield adjudged, upon a Writ of Error upon a Judgment in Briſtol and the firſt Judgment affirmed accordingly intratur. Trin. 15 Car. Rol. 501.

3. (a) Trover and Converſion lies for an (b) Obligation P. 14 Car. B. R. between Siddown and Miller, adjudged per Curiam upon a Writ of Error. Judges Con. Cro. Car. 262. S. P. appears. Goulſ. 90. S. P. appears. Cro. Jac. 637. S. P. appears. (b) For Letters Patents. Hard. 111. adjudged.

(a) Cro. El. 723. S. P. adjudged by 3

4. (c) No Trover and Converſion lies for a (d) Hawk, (e) without alledging it to be reclaimed, becauſe it is feræ naturæ, of which he had no Property, Tr. 15 Car. B. R. (f) between Sir Martin Liſter and Hone, per Curiam, agreed; but the Court doubted whether it was not good after a (g) Verdict for the Plaintiff, by which it was found that he was poſſeſſed of it as of his proper goods, as is alledged in (h) the Declaration; and note this was a Ramage Hawk, and it is alledged that he loſt it out of his Poſſeſſion, and ſo the Property gone.

(c) Diverſity between Trover and Treſpaſs, Cro. Car. 19. March 12. (d) But Trover lies for 60 Musk-cats and 100 Monkeys, without ſhewing they were reclaimed; So for a Parrot: for theſe are a Merchandize. Gyrnes and Shack. Cro. Jac. 262. adj. 1 Bulſ. 95. adjudged, and there Fleming Ch. Juſtice, took this Diverſity between Musk-cats, Parrots, &c. and Hawks.—So for Negroes, becauſe uſually Bought and Sold by Merchants, Buts and Penny. 2 Lev 201. 3 Keb. 785. (e) Thomp. Ent. 33. a Precedent without ſhewing he was reclaimed. (f) Cro. Car. 545. S. C. and S. P. dubitatur: but for more expedition the Plaintiff conſented that his Judgment ſhould be ſtaid; and he brought a new Action, March 12. S. C. Judgment arreſted. Dyer 306. S. P. upon Demurrer. Dubitatur. (g) Hapm. 16. Like Point adjudged. (h) Thomp. Ent. 37. Such a Declaration.

5. (i) Trover and Converſion lies for a Spaniel Dog, for he is (k) reclaimed, between Pells and Leman, adjudged in B. upon a Demurrer. Vide Hub. rep Caſe 363. between Pells and Leman, and a Writ of Error was brought in B. R. where no Opinion was given in it; but the Judgment was reſerved for another reaſon, viz. for want of an Original Intr'. Tr. 14 Car. B. R. Rot. 217.

(i) Treſpaſs for a Greyhound. Cro. Jac. 463. adjudged. Hob. 283. adjudged.—So Replevin lies for a Ferret, Cro. El. 126. cited, Cro. Jac. 463. cited, and vide 3 Lev. 336, 337. and the Caſes there cited. (k) He need not be averr'd to be ſo. Cro. El. 126. per Curiam.

(L) In what Caſes it lies.

(a) What ſhall be ſaid a Converſion.

1. If a Man take my Horſe and rides him, and after redelivers him to me, yet I may have this Action againſt him, for this is a Converſion, and (b) the Redelivery is no Bar of the Action, but ſhall be only in Mitigation of Damages, Trin. 38. El. B. R. per Curiam, in the Counteſs of Rutland's Caſe.

(a) If a Man finds a Garment and ſuffers it to be Moth-eaten, this is no Converſion: Secus, if of purpoſe he miſuſeth it; as if he finds Paper and puts it into Water, &c. Mulgrave and Ogden, Cro. El. 219. per Curiam, 1 Leon. 224. per Walmſly.——So if one finds an Horſe and gives him no Suſtenance, this is no Converſion per Cro. El. 219. per Curiam; yet Q. if he takes him into his Poſſeſſion. (b) 1 Leon. 223. like Point per Windham. Goulsb. 155. like Point per Popham. Stile 261. like Point ſaid. 1 Bulſ. 38. like Point per Williams.

2. If a Man find my Goods, and knows them to be mine, and he refuſes, and (c) denies to deliver them to me; this is a Converſion in Law. Mich. 38 39 El. B. R. between (d) Eaſton and Newman, per Cur' which intratur Hil. 37. El. B. R. Rot. 460. for the Denial makes him a (e) Treſpaſſer ab initio, for this ſhews his Intention to have been ſo, ab initio.

(c) But in ſuch caſe, if he anſwers, that he knows not whether I am the true Owner or not, and therefore refuſes to deliver them; this is no Converſion if he keeps them for me. 2 Bulſ. 312. per Coke Ch. Juſtice. (d) Moor 460. Pl. 640. S. C. by 3 Judges, abſente Poph. adjudged 843. S. C. cited Cro. El. 495. S. C. and the Court inclined accordingly, Poph. abſente; but being moved at another Day, Poph. held it no Converſion. But it was cited at the Bar that the 23 El. it was ruled to the contrary, and adjourn'. Goulſ. 152. S. C. adjourn'.—2 Bulſ. 310. S. C. cited and allowed per Dod'. 1 Rol. rep.

rep. 131. S. C. cited and denied per Coke, and ſaid, that the Denial being only a Non-feaſance, could not make him a Treſpaſſer ab initio. (e) For this, vide 2 Bulſ. 310. 2 Rol. Abr. 561. Pl. 1, 2, &c.

(f) Cro. Car. 262. S. P. per Cur'. Con. 10. Co. 56. b. 57. a. S. P. per Coke. Hut. 10. S. P. per Curiam. Hob. 187. S. P. per Hobert. 2 Mod. 244.

3. (f) If I deliver Goods or Money to another, and after upon my Demand, he refuſes to reſtore them; yet this is no Converſion, but only (g) Evidence of a Converſion, in as much as he came to them by my own Delivery. H. 12. Jac. B. R. between (h) Iſaac and Clerk, dubitatur.

But note in theſe Caſes, either there was an actual taking (which has ſince of it ſelf been held a Converſion, as Syd. 264.) or elſe it does not appear whether it was upon a Bailment or finding. (g) But 'tis no Evidence where, notwithſtanding the Demand and Refuſal, it is apparent the Defendant has made no Converſion, as if the Demand was of a Timber Tree lying in the Defendant's Ground, &c. for it is apparent that he has not converted it, if it continue in the Ground as before. Thimblethorp's Caſe, 1 Rol. Rep. 60. 131. cited 2 Bulſ. 310 cited 314. cited 2 Mod. 245. (h) Moor 841. Pl. 1136. S. C. adjudged, and note the Bailment there was as a Pledge, and the Condition of reſtoring not perform'd, 1 Rol. Rep. 59. 126, &c. S. C. and Dubitatur 2 Bulſ. 306, &c. 314. S. C. and S. P. per Cur' 2 Mod. 245. S. C. cited.

Fol. 6.

(i) 3 Keb. 422. S. P. per Hales and Wild; for if ſtole, or got away from him by a Cheat, 'tis no Converſion, but there muſt have been ſome Act of his own, more than a bare Delivery by a falſe Token; But Twisden Juſtice, ſaid and 'twas affirmed by the Bar to be a Common Practice in ſuch Caſes to bring Trover.

4. (i) If I deliver Goods to a Common Carrier to carry to a certain Place, and after the Goods are Stole from the Carrier, this is no Converſion in the Carrier, ſo as to charge him in a Trover and Converſion, but an Action upon the Caſe lies againſt him as a Carrier, upon the Cuſtom of the Realm, to carry Goods ſafely and them to deliver as he is appointed, Mich. 14. Car. B. R. between George and Wiburn, per Curiam, in Arreſt of Judgment.

(k) For if a Man does an act allowable by Law, it is no Converſion. 1 Brownl. 5 Hob. 187. Hut. 10.

5. If the King's Purveyor (k) takes Beds, and appoints the King's Servants to lie in them, this is no Converſion. Mich. 13. Jac. B. per Warberton. An Action of Trover lies when a Man finds Goods. 7 H. 6. 22.

(a) Yelv. 165. S. P. adjudged. Noy 126. S. P. by 3 Judges. 1 Leon. 312. S. P. adjudged. Noy 79. S. P. but vide Cro. Jac. 661. Jones 16. Palm. 343. Jones 444, and Q. if the Feme can make a Converſion in the Preſence and jointly with her Husband. Cro. Car. 254. 1 Brownl. 3. 1 Vent. 12. — It may be converterunt if ſhe was preſent, tho' what ſhe does is the Act of the Baron. 1 Vent. 24.

6. (a) An Action of Trover and Converſion for Goods lies (b) againſt Baron and Feme, ſuppoſing by the Declaration that they converted them to the uſe of the Baron: for the Feme (c) may be a Treſpaſſer, and may convert Goods to the Uſe of her Husband, or to the Uſe of a Stranger, tho' ſhe cannot convert them to her own Uſe, being a Feme Covert, Mich. 13. Car. B. R. Between Granger and Meader, adjudged, this being moved in Arreſt of Judgment. (d) But in an Action of Trover and Converſion againſt Baron and Feme if the Declaration be that they converted to their own Uſe, this is not good, becauſe the Feme cannot convert Goods to her own Uſe, Mich. 13. Car. B. R. in the Caſe of Granger and Meader agreed per Curiam Mich. 15 Car. B. R. Between (e) Hodges and Sampſon adjudged, upon good Advice in Arreſt of Judgment after they had given Judgment once, econtra, Intr' Hil. 14. Rot. 714. P. 1649. Between (f) Gallop and his Wife and Hole, adjudged in a Writ of Error upon a Judgment in B. where the Converſion was ſuppoſed by Baron and Feme and another Perſon, to their own Uſe, but is now reverſed per Curiam Intr' Paſ. 23. Car. B. R. Rot. 25.

(b) But Detinue lies againſt the Husband alone, 1 Leon. 312. per Cur'. (c) But upon a Sale of Goods to a Feme Covert, the Husband ſhall not be charged in Trover, becauſe the Delivery and Converſion being with the Conſent of the Owner, can be no Tort. 1 Syd. 129. by 8 Judges againſt 2. 1 Mod. 136, 137. 1 Levin. 5. Otherways, if the Owner did not know her to be a Feme Covert. per 1 Syd. 129. (d) Berry and Nevis Cro. Jac. 661. S. P. adjudged upon Error, and the firſt Judgment reverſed accordingly, Palm. 843. adjudged upon Error. 1 Jon. 16. adjudged upon Error 443, 444. cited, and vide Stil. 18. 3 Keb. 100. 1 Syd. 113. Ow. 48. March 82. and vide 2 Vent. 45. (e) Jones 443. S. C. adjudged Con. March 60. S. C. adjourn'. 82. Seems to be S. C. and held good being after Verdict. (f) Stil. 115. S. C. and the firſt Judgment reverſed Nil, &c.

7. In Trover and Converſion againſt Baron and Feme, Suppoſing that the (g) Feme converted (h) to the Uſe of (i) her ſelf and Husband, this is not good; becauſe the Feme cannot convert to her own uſe, Hil. 14. Car. B. R. Between (k) Diggs and Perry, adjudged in a Writ of Error upon a Judgment in Marleborrow, which was reverſed for this Cauſe Intr' Trin. 13. Car. Rot. 402. the Wife being found Guilty by Verdict; and ſo it was adjudged, Trin. 7. Car. B. R. Between (l) Remes and Humfry, Rot. 1202.

(g) The Converſion laid in the Feme only. Belv. 166. Noy 79. Dw. 48.

(h) Actions ſo laid. 1 Leon. 312.

(i) So if laid quod ad uſum proprium, or ad uſum ſuum Converterunt, for this muſt be intended to the Uſe of both, and not of the Husband only. 1 Vent. 33. per Cur'. (k) Cro. Car. 494. S.C. adjudged. (l) Cro. Car. 254. S.C. adjudged. 1 Rol. Abr. 348. Pl. 1 S.C.

Againſt whom it lies.

1. If the Bailiff of *A.* without any Command from him, takes the Beaſts of *B.* as for Heriots due to *A.* where none in truth are due, and after *A.* agrees thereto, and converts them to his own Uſe, *B.* may have an Action of Trover againſt *A.* for *B.* may qualifie the Tort done to himſelf, and (a) chuſe whether he will admit himſelf out of Poſſeſſion or not. *Paſch.* 42 *Eliz.* Between (b) *Biſhop* and the Vicounteſs *Mountague*, *Cro. Eliz.* 824. *per Anderſon* and *Warburton contra Walſmly* and *Kinſmill*.

(a) If A. takes my Goods, & B. takes them from A. I may have Treſpaſs or Trover againſt either of them at my Election. 1 Syd. 438. Upon which the Reporter makes a Nota & Vide, 1 Leon. 189. (b) Cro. Jac. 50. S.C. and S.P. per Anderſon, Walmſly and Kingſmill contra Daniel.

Pleading in Actions of Trover.

Of the (a) Declaration in general.

(a) Vide the Subdiviſions of Declaration, Title, Pleading.

1. If in Trover the Plaintiff declares that he delivered to the Defendant certain Wool to keep, and that the Defendant converted the ſame to his own Uſe; this is a good Declaration tho' it is not ſaid that the Wool was loſt, for the Converſion takes away the Property of the Plaintiff, and is the Offence for which the Action lies, *Mich.* 42 *Eliz.* Between (b) *Gumbleton* and *Grafton*, *Cro. Eliz.* 781. adjudged *per Gaudy* and *Fenner*, *cæteris abſentibus*.

(b) Moor 623. Pl. 852. S.C. But S.P. does not appear.

2. In this ſort of Action, the Plaintiff may declare upon a *Devenerunt ad manus* generally *Hill.* 12 *Jac.* 2 *Bulſ.* 313. *per Coke* Ch. Juſtice.

3 Or (c) ſpecially (d) *per* (e) *Inventionem*, tho' the Defendant came to the Goods by the Delivery of the Plaintiff himſelf, 2 *Bulſ.* 313. *per Coke* Ch. Juſtice.

(c) The Plaintiff declares he was poſſeſſed of a Chain of Gold and loſt it, Et quod per inventionem, it came to the hands of the Defendant, who ſold it and received and converted the Money to his own Uſe, &c. Dier 121. a. 1. And. 20 Raſt. Ent. a. Hern. 149, 251. Vid. Ent. 265. and Vid. 3 Lev. 192. (d) So that the Defendant fraudulently at Cards won the Money of the Plaintiff from the Wife of the Plaintiff, and converted it, &c. Vid. Ent. 65. (e) This is but Matter of Inducement; for the Converſion is the Point of the Action, and the only material thing. Iſaac and Clerk, 1 Bulſ. 306, &c. 1 Rol. rep. 59. 60. 126. Moor 841. Pl. 1136. And vide Cro. Jac. 255. Stil. 313. All. 91.

4. (f) In Trover for a Bond the Plaintiff need not ſhew the Date, for the Bond being loſt or converted, he may not know the Date; and if he ſhould miſtake it, it would be a Failure of his Suit, *Trin* 8 *Car.* Between *Wilſon* and *Chambers*, *Cro. Car.* 262. adjudged after a Verdict for the Plaintiff, and affirmed upon a Writ of Error.

(f) Cro. Jac. 638. S.P. Adjudged upon Demurrer. Hard. 111. like Point in Trover for Letters Patents, 1 Brown. Ent. 356. a like Precedent. Vid. Ent. 265. a like Precedent.

Declaration.

Of (a) Certainty (b) therein.

(a) Vide the Subdiviſions of Declaration, Title Pleading.

1. If in Trover the Plaintiff declares that the Defendant converted *decem Capſas & ciſtas*, without ſhewing in certain how many Cheſts, and how many Coffers, yet this is a good Declaration; for they ſhall be intended (c) all one *Paſch.* 43. *El.* between *Draycot* and *Pyot*, *Cro. Eliz.* 818. adjudged after a Verdict for the Plaintiff but ſaid *per Curiam*, if it ſhould be intended Cheſts and Coffers were diſtinct things, it would have been otherways.

(b) Cro. El. 817. 865, 866.

(c) Sic pro ducentis averiis, viz. bobus juvencis anglice Steers, juvencis anglice Runts, juvencis anglice Heifers, without ſhewing the particular Number of each, all being of the ſame Kind. Stil. 264. adjudged Niſi.—But it lies not pro 10 ovibus matricibus & vervicebus, without ſaying how many of each; per 3 Keb. 693.

2. If in Trover the Plaintiff declares upon a Converſion of 300 *toddas lanæ*, *Anglice*, Tods of Wool; this is a good Declaration; as *Barellas cervitiæ*, *Pipas Vini*, &c. and theſe are only *Vocabula artis*, *Paſch.* 8 *Jac.* between (d) *Proctor* and *Clifton*, 1 *Bulſ.* 126. adjudged and affirmed upon a Writ of Error.

(d) Cro. Jac. 307. S. C. With a ſingle D, viz. 176 Todas, adjudged and affirmed upon a Writ of Error, tho' todas is no proper Latin word, but framed on purpoſe to ſhew the Intent of the Parties.

(e) Palm. 393. like Point per 2 Judges.

3. (e) If in Trover the Plaintiff declares *pro ducentis* (f) (g) *ponderibus anglice*, Weights, *medicamenti*, *anglice*, Drugs; this is a good Declaration, and certain enough to deſcribe the Thing demanded to a Common Underſtanding. *Mich.* 1649. between *Ernly* and *Allen*, *Stil.* 224, 225. adjudged and affirmed upon a Writ of Error *Niſi.*

(f) But pondus is a word of an uncertain Senſe, and not good without an anglice. Stil. 224 247. Palm. 393. Latch. 216. & vide 3 Keb. 14. 2 Rol. rep. 369. (g) But Trover lies not de 20 menſuris without an anglice, or ſaying what Meaſures. 2 Lev. 11.

(h) If there be no proper word to expreſs it, and the Thing is ſo deſcribed, that the Jury may know what is meant thereby, it is well enough. Stil. 136. per Roll. Ch. Juſtice.

4. If in Trover for Timber Trees felled, the Plaintiff declares *de decem Arboribus*, this is a good Declaration; for tho' *arbor* properly ſignifies *a Tree growing*, for which Trover lies not, yet (h) where the Thing is well deſcribed, the Court ought not to be too Strict in Scanning the words. *Mich.* 1650. between *Popham* and *White*, *Stil.* 235. *per Roll.* Ch. Juſtice.

5. If in Trover the Plaintiff declares for two Pair of Pot-hooks, *&c.* and Hangers; this Declaration is not good, becauſe of the Uncertainty of the word *Hangers*, and they can't be intended ſuch upon which the Pot-hooks uſed to hang, becauſe they do not immediately follow the word *Pot-hooks*; but there are ſeveral other words between; *Mich.* 12 *Car.* 2. between *Seaman* and *Barns.* *Raym* 2. adjudged.

(i) Trover lies for a Library of Books, but not pro diverſis libris per 2 Keb. 765. Stil. 358. & vide Stil. 25. 1 Vent. 114. 1 Syd. 98.—So it lies not de diverſis veſtimentis, 1 Vent. 114. but it lies of a Trunk full of ſeveral Garments, 1 Vent. 106.—But Trover lies de tribus Struibus fœni, anglice, Ricks of Hay; tho' objected that it ought to be de tant' carectatis. Weſt and Davis, 1 Lev. 301. per Cur. 1 Mod. 289. adjudged.

6. If in Trover the Plaintiff declares *pro plancis granariis*, *anglice*, the Planks of a Granary, without mentioning (i) any certain Number of them; this is a good Declaration, and certain enough, becauſe of the Word *granariis*. *Mich.* 14 *Car.* 2. between *Mayhu* and *Flower*, 1 *Syd.* 98. adjudged after a Verdict for the Plaintiff.

7. But it had been otherways, if *pro* (k) *plancis* (l) generally. *Mich.* 14 *Car.* 2. 1 *Syd.* 98. *per Cur'.*

(k) So it lies not pro ampullis anglice, Bottles, without ſhewing the Number. 2 Lev. 176. (l) So Trover lies not for 6 Tuns, without ſaying of what. Stil. 482. — Nor for Sheafs, without ſaying of what. March 60. adjudged. — Nor doth an Action lie for Plundering viginti fardellas anglice Packs, without ſaying of what. per Stil. 358.

8. If in Trover the Plaintiff declares *pro decem* (m) *paribus velorum & tegulorum, Anglice,* Curtains and Valance; this is a good Declaration and certain enough, and ſhall be (n) intended for 10 Pair of Curtains, and 10 of Valence; and in ſuch artificial Things, there needs no other Deſcription than to Name them by their uſual Names by which they are commonly called, without ſhewing the Quantity of Yards or (o) Stuff of which they are made. *Paſch.* 22 *Car.* 2. between (p) *Taylor* and *Wells,* 2 *Sand.* 74. adjudged by *Keeling, Rainſford* and *Moreton,* after a Verdict for the Plaintiff; but *Twiſden Contra totis viribus,* and relied much upon the Caſe of (q) *Webb* and *Waſhborn,* in *Stil.* Reports; where (as he ſaid) it was adjudg'd that 4 Pair of Hangings was uncertain.

(m) So if Trover is brought for 4 Curtains and Valance, 2 Syd. 174. adjudged by 2 against 1. (n) For the Sticks and Balls of a Billiard Table, intended as many as will ſerve for one Table, 1 Syd. 263. cited Raym. 2. cited. and vide 3 Keb. 253. —— So Trover lies for a Ship cum Vergis & Remis, without ſhewing the Number thereof; but it lies not de Vergis alone, per 3 Keb. 507. — So it lies de pare ocreat' & calcar' anglice, Boots and Spurs, 3 Keb. 253. (o) For two Pieces of Cloth, without ſhewing whether Linen or Woollen. Stil. 419. — So for a Parcel of Wood, or Parcel of Cloth, but not for a Parcel of Wares; for that is too uncertain, per 1 Keb. 35. 508. But 1 Vent. 106. it is held a ſtrange Opinion, and for the Word Piece or Parcel, Vide Stil. 199. 1 Lev. 303. 2 Lev. 176. —— So it lies for Stockings, without ſhewing whether Silk or Woollen. Stil. 25. adjudged after a Verdict for the Plaintiff, & vide 1 Keb. 21. — So it lies de uno vaſe, anglice, a Veſſel, vini Hiſpanici, without ſhewing of what it is made. 2 Vent. 67. adjudged upon Demurrer. (p) 1 Syd. 445. S. C. adjudged per tot' Cur' contra Twiſden, 1 Mod. 46, S. C. adjudged by 3 Judges, contra Twiſden, who inſiſted much upon the Uncertainty of the Word Pair. 2 Keb. 623. 640. S. C. adjudged. (q) Stil. 352, 353, 361. S. C. the Court inclining accordingly, but gave no Judgment, but moved the Defendant to conſent that the Plaintiff might declare de novo, but what was done further appears not; but 1 Vent. 106. it is cited to have been adjudged accordingly.

9. If in Trover the Plaintiff declares for ſeveral particular Goods, & (r) *aliis utenſiliis, Anglice,* Implements; this is no good Declaration, becauſe of the Uncertainty of the Words *aliis utenſiliis quot quanta & qualia* they are, *Paſch.* 33. *Car.* 2. between *Blackhouſe* and *Moor.* 3 *Lev.* 18. Judgment ſtaid after a Verdict for the Plaintiff, and intire Damages.

(r) So it lies not de duobus albis nodis, anglice, white Knots, & aliis tæniolis anglice, ſmall Ribons; for that it appears not what or how many they are. 2 Lev. 85.

10. In Trover the Plaintiff declared *inter alia de Sex* (s) *catulis & quatuor catellis,* and tho' the Words ſignified Whelps of any Sort, as Dogs, Bears, *&c.* yet *Trin.* 4 *Will. & Mar.* between *Chambers* and *Warkhouſe,* 3 *Lev.* 336. after Verdict it was adjudged for the Plaintiff, and the Court intended them to be Dogs Whelps.

(s) But Trover de uno pullo is not made good by Verdict. Ellis and Yarrow, 1 Syd. 60. 1 Lev. 48. 1 Keb. 124. 176. and Vide Stil. 31. —— So if anglice a Colt, but ought to be pullo equino. 2 Lev. 48. 1 Syd. 60. 1 Keb. 176.

The Plea.

1. In Trover there is (t) no Plea, but a Releaſe or Not Guilty; (u) for every Plea in Juſtification is but Tantamount, *Trin.* 14 *Car.* 2. 1 *Keb.* 305. *per Twiſden.*

(t) For this, vide the Diviſions, Title Pleading, viz. What Pleas amount to the general Iſſue, and in what Actions Colour may be given. (u) In the Books of Entries there are many Precedents of Special Pleas, but moſt of them are not good, and amount but to the general Iſſue.

(M) Upon an Aſſumpſit.

(a) What Words will (b) make an Aſſumpſit.

(a) Where to warrant a Debtamounts to a Promiſe to pay. Vide 2 Rol. Abr. 738. Pl. 1.

1. If there be a Diſcourſe between the Father of A. and B. in relation to a Marriage between the ſaid A. and the Daughter of B. and B. *tunc & ibidem* (c) affirms, and publiſhes to the Father of A. quod daret ei qui maritaret his ſaid Daughter with his Conſent 100 l. and after A. marries the Daughter of B. with his Conſent; yet this Affirmance and Publication of B. ſhall raiſe no Promiſe, upon which an Action upon an Aſſumpſit may be brought, becauſe theſe Words do not include any Promiſe. Trin. 3 Jac. B. R. (d) between Week and Tibold, per Cur'.

(b) When a Promiſe firmam facere anglice, to make good a Portion, amounts to a Promiſe to pay, vide 2 Rol. Abr. 738. Pl. 2. (c) Bayly and Meril, like Point. 1 Rol. Rep. 275. 6. adjourn' and the ſame Caſe is in Cro. Jac. 386. 3 Bulſ. 94, 95. but no Notice taken of that Point. (d) Noy 11. S. C. adjudged where the Words of the Declaration were aſſeruit & publicavit, and it was not aver'd, or ſhewn to whom. 1 Rol. Abr. 30. Pl. 2.

(e) For this vide the Diviſions, Title Bill of Exchange.

(f) Cro. Jac. 306. S. C. and like Point appears.

2. By the Cuſtom of London, if any Merchant reſident at Middleburrough, and Trading between Middleburrough and London, directs (e) any Bill of Exchange to any Merchant reſiding in London, and Trading between London and Middleburrough, to be paid to any Merchant, or other Perſon, and the Merchant to whom it is directed Subſcribes it, this ſhall be an Aſſumpſit in Law, upon which an Action upon the Caſe lies. Mich. 10 Jac. B. R. between (f) Hoſt and Taylor, admit'.

3. If *A.* bargains with *B.* to ſell and deliver unto him 150 Stone of Wool for 114 *l.* to be paid at a certain Day to come, and *C.* in Conſideration that *A.* will deliver the Wool to *B.* becomes *Fidejuſſor* for *B. aſſumendo & ad tunc & ibidem promittendo* to pay *A.* the Money; this makes not any direct *Aſſumpſit* from *C.* but only as *Fidejuſſor*; ſo that a Default ought firſt to be made by *B.* the Principal, before *C.* the Surety is liable. *Mich.* 16 *Jac.* between *Batesby* and *Brooksbeck*, *Cro. Jac.* 500. adjudged; where after a Verdict for the Plaintiff upon ſuch a Declaration, Judgment was ſtaid for want of ſhewing a Default in the Principal.

Fol. 7.

(N) In what Caſes an Action upon the Caſe lies, (a) where Debt lies.

(a) Hard. 486. yet vide 1. Mod. 163.

What ſhall be an Aſſumpſit in Law to have an Action.

(b) Egles and Cro. Jac. 69. Vales S. P. adjudged. Yelv. 70. adjudged.

1. (b) If a Man Accounts, and upon the Account is found in Arrear to a certain Sum, and preſently in Conſideratione inde, aſſumes to pay the Debt at a Day; an Action upon the Caſe lies for this after the Day, for the Aſſumpſit commences with the Certainty of the Debt, 14 Jac. (c) Janſon againſt Colomore, 11 Jac. (d) Geſſon and Brier adjudged. Trin. 12 Jac. B. R. this was ſo adjudged alſo.

(c) 1 Rol. Rep. 396. S. C. adjudged. 3 Bul. 208.

2. (e) If a Man delivers Money to B. to my Uſe, I may have an Action upon the Caſe againſt B. for this Money, becauſe I may have

S. C. adjudged. Moor 854. Pl. 1169. S. C. adjudged. 1 Rol. Abr. 12. Pl. 17. S. C. (d) 1 Rol. Abr. 12. Stil. 17. S. C. (e) 1 Rol. Abr. 32. Pl. 13. 27, Pl. 51, 52. vide 30. Pl. 5. vide.

an Action of (f) Debt against him. Trin. 14 Jac. B. R. (g) Beckingham and Lambert against Vaghan adjudged.

(f) 1 Rol. Abr. 597. Pl. 3, 4. 10. 15.

vide. (g) Moor 854. Pl. 1168. S. C. and S. P. appears. 1 Rol. Rep. 391. S. C. adjudged.

3. (h) If two submit themselves to the Award of J. S. and he awards a collateral Matter to be done, and not Money to be paid; (i) No Action upon the (k) Case lies for the Non-performance thereof, nor any Action of Debt, in as much as it is not Money that is awarded. Mich. 10 Jac. B. between (l) Penruddock and the Lord Montegle. Resolv'd per Cur'.

(h) 2 Rol. Rep. 194. S. P. Quære. (i But where upon the Submission there were mutual Promises of Performance; perhaps an Assumpsit lies. Vid. 1 Keb. 601. 2 Rol. Rep. 194.——And vide Lit. Rep. 236. — But a Parol Submission implies no Promise to perform it. 1 Lev. 113. (k) Wilford and French S. P. 1 Keb. 599. agreed per Cur', 1 Lev. 113. adjudged; 1 Sid. 160. agreed per Cur', and there said when a Parol upon Submission, Manwood Ch. Baron, made a Parol award, by which Money was to be paid of the one Part, and a Release to be made of the other; He used to award further, That if the Release was not made by a Day, that then he that ought to have made it, should pay a certain Sum of Money; for which the Party had his Remedy. (l) 1 Keb. 600. S. C. adjudged, and there said, that in such Case Manwood used to award a Penalty to be paid upon the Non-performance of, &c. which Practice was approved by Coke Chief Justice.

4. If a Man by Grant of the King hath Fines *pro licentia concordandi*, and one will not pay a Fine, he may have an *Indebitatus Assumpsit* for it, *Trin.* 30 *Eliz.* (m) Lord *North*'s Case, 2 *Leon.* 179. by *Gaudy* and *Wray contra Fenner*.

(m) 2 Vent. 175. S. C. cited.

5. An (n) *Indebitatus Assumpsit* will not lie upon a Bill of Exchange accepted, but an Action upon the Custom only, *Mich.* 23 *Car.* 2. between (o) *Brown* and *London*, 1 *Vent.* 152. adjudged by *Hale* and *Rainsford*, *Twisden hæsitante*.

(n) So Debt lies not upon such Bill. Hard. 485, 486. adjudg'd. And Hale said, if Debt lay, an Indebitatus would lie. (o) 1 Mod. 285. S. C. and the Court inclined accordingly, but adjourned. 1 Lev. 298. S. C. but does not appear that S. P. was adjudged, but that the Judgment was arrested, because the Custom laid in the first Mar' did not extend to support the Action upon the second Mar'. 2 Keb. 695. 713. 758. 822. S. C.

6. But if *A.* delivers Money to *B.* to pay over to *C.* and gives *C.* a Bill of Exchange drawn upon *B.* and *B.* accepts it, *C.* may have an *Indebitatus Assumpsit* against *B.* (p) as having received Money to his Use, but must not declare only upon the Bill of Exchange accepted. *Mich.* 23 *Car.* 2. 1 *Vent.* 153. *per Hale* and *Rainsford*.

(p) So if Goods received. 1 Rol. Abr. 32. Z. 13.

7. An *Indebitatus Assumpsit* lies for Money by Custom due for Scavage, *Trin.* 28 *Car.* 2. between the (q) Mayor of *London* and *Gory*, 2 *Lev.* 174. adjudged upon a Special Verdict, by which it was found that the Sum demanded was due by Custom; but that there was no express Promise to pay it.

(q) 1 Vent. 298. S. C. adjudged. tho' objected, the Customs of the City are confirmed by Parliament; and so this is a Duty by Record.——An Assignee of Commissioners of Bankrupts may bring an Assumpsit, and yet the Debt is assigned by Vertue of an Act of Parliament. 1 Vent. 298. per Cur'. 3 Keb. 677.

8. (r) If the King grants the Office of Comptroller of the Customs to *A.* and *B. Durante beneplacito*, and *A.* dies, and afterwards the King grants the said Office to *C.* and yet *B.* under Pretence of Survivorship, exercises the said Office, and receives the Profits thereof, *C.* may have an *Indebitatus Assumpsit* for so much Money had and received to his Use. *Trin.* 29 *Car.* 2. between *Aris* and *Stukely*, 2 *Mod.* 260, 261, *&c.* adjudged upon a Special Verdict.

(r) Howard and Wood, like Point, where the Defendant under pretence of Title, received the Fees belonging to the Plaintiff, as Steward of a Court-Baron. 2 Lev. 245. adjourn'. 2 Jon. 126, 127. adjudged.

9. So if one receives my Rent under Pretence of Title, I may have an *Indebitatus Assumpsit* against him; for wherever an Account lies, an *Indebitatus* will lie. *Trin.* 29 *Car.* 2. 2 *Mod.* 263. *per Curiam*.

10. (s) An *Indebitatus Assumpsit* lies *pro diversis mercimoniis ante tunc ad requisitionem* of the Defendant *vendit' & deliberat'* (t) to a Stranger. *Trin.* 29 *Car.* 2.

(s) Stonehouse and Bodvill, like Point, Ray. 67. where the Plaintiff declared upon an Indebitatus for Physick, probided and delivered for

for the Daughter of the Defendant, at his Request. 1 Keb. 439. adjudged, but per Curiam, it had been otherways, if he had alledged a Sale to the Daughter. (t) But where Debt lies in such and like Cases. Vide 1 Rol. Abr. 593, 594.

(u) 3 Keb. 756. S. C. adjudged nisi.
(x) 1 Vent. 268. s. p. upon the Marriage of a Kinswoman, adjudged Con.

between (u) *Kent* and *Darby*. 1 Vent. 311. adjudged upon a Motion in Arrest of Judgment after a Verdict for the Plaintiff, and a Case was there cited, wherein it had been then (x) lately adjudged, that an *Indebitatus* lay for Money by the Defendant, promis'd in Marriage with his Sister.

11. An *Indebitatus Assumpsit* lies for 20 *l.* forfeited by the Constitutions and Ordinances of a Company, for not Serving in the Office of Steward of the Company, according to a By-Law by them made. *Pasch.* 31 *Car.* 2. between the *Barber-Surgeons* of *London* and *Pelson.* 2 Lev. 252. adjudged upon Demurrer.

(y) So where an Indebitatus was brought for 20 l. won at a Game called Hazard, 2 Vent. 175. it was adjudged it lay, and that it might as well, as if pro opere & labore.

12. The Plaintiff declared upon an *Indebitatus Assumpsit* for 20 l. *quas ei solvisse debuisset pro denar' per ipsum* (y) *ad jocum vocat' Chartas pictas de Defendente per Querent' lucrat' & acquisit'*, and whether such a general *Indebitatus* lay for Money won at Play. *Pasch.* 35 *Car.* 2. between *Eggleton* and *Levin*, 3 *Lev.* 118. *Dubitatur* upon a Writ of Error in *Cam' Scac* upon a Judgment by Default, and tho' a Case was cited, wherein in *B. R* 32 *Car* 2 it had been adjudged, that such Action lay, and the greater Part of the Justices now inclined to be of that Opinion; yet some of them said they would give no more Encouragement to such Actions than needs must.

(z) 3 Mod. 239. S. C. adjudged by the three Judges, and according to that Report, the Fine became due; but I suppose that to be the Mistake of the Reporter.

13. If a Lord of a Manor assesses a Fine upon a Copyholder for his Admittance, and dies, his Executor upon the *Assumpsit* in Law may bring an Action for it, because it depends not upon the Inheritance, but is *quasi* a Fruit fallen. *Trin.* 1 *Will. & Mar.* between (z) *Shuttleworth* and *Garret*, 3 *Lev.* 261. adjudged by *Dolben*, *Gregory* and *Eyres*, *contra Holt*, Ch. Justice, who said, That it being a Duty arising out of an Inheritance, Custom and Tenure, it was not fit to be thrust into a Declaration in an *Assumpsit*.

(O) Upon an Assumpsit in Nature of Debt.

It lies not where the Thing is Real.

(a) In the Original it is Heriot, and so plainly appears to be mis-printed.

1. If a Man leases for Years rendring Rent, he cannot have an Action upon the Case sur Assumpsit for this Rent, during the (a) Term, because it savours of the Realty. Mich. 15 Jac. B. R. between Nech and Gubb, per Curiam admit' Mich. 12 Jac. B. between White and Short, admit' per Curiam, Mich. 17. Jac. B per Curiam.

2. So the Lessor cannot have an Action upon the Case for the Rent after the Term ended, because it savours of the Realty. Mic. 15 Jac. B. R. between Nech and Gubb, agreed per totam Curiam Mich. 12 Jac. B. between White and Short, per Curiam.

3. If a Man brings an Action upon the Case, and declares that in Consideration that he promised to make a Lease for two Years to the

Defendant, and to repair the (a) Land during the Term, the Defendant promised proinde to pay to him 20 s. at every Quarter, &c. and avers that he made the Lease accordingly, and repaired the Land during the Term, but that the Defendant had not paid to him the several Sums at the said Quarters, this Action is well maintainable, tho' the Term is not ended; for it cannot appear upon this Declaration that this was a Rent, but only a Sum in Gross; for no Rent was reserved upon the making of the Lease, and the Assumpsit is not to pay it out of the Land, but as a Sum in gross. Mich. 15 Jac. B. R. between Neck and Gubb adjudged; this Matter being moved in Arrest of Judgment. But Hought' gave his Reason, because the Lessor promised to repair the Land, as well as to demise it.

(a) Rather the Houses.

4. But if the Declaration was, That the Plaintiff agreed with the Defendant, that he should hold certain Lands for certain Years; and that the Defendant proinde did promise to pay to him 20 s. at every Quarter, &c and for a certain Sum arrear at certain Quarters after the Term ended, he brought his Action; this Action is not maintainable; for it appears apparently upon the whole Matter to be a Rent, (b) in as much as he promises to pay it proinde, at the (c) same Time that the other did demise to him the Land, Mich. 12 Jac. B. between White and Short adjudged in Arrest of Judgment, Contra Mich. 3 Car. B. R. between Sir Miles Hubbard and Bowell adjudged, this being moved in Arrest of Judgment, the which Intratur Trin. 3 Car. Rot. 1267

(b) So where a Man covenants to pay, &c. 2 Rol. Abr. 449. Pl. 6. (c) Cro. Eliz. 786.

S. P. adjudged Con. but after reversed, because it was a meer Contract.

5. If (d) Rent upon a Lease for Years be behind, and after the Lessee without Consideration of Forbearance, or other Consideration, promises the Lessor to pay the Rent, no Action lies upon this Promise, because he may have an Action of Debt upon the real Contract, Mich. 17 Jac. between (e) Harrington and Green, per Curiam resolved Hill. 8 Car. B. R. between Mantel and Bret, in a Writ of Error upon a Judgment in Canterbur. held quod vide, Hob. Rep. 397.

Fol. 8.

(d) Leon. 293. like Point, per Curiam. Con. Cro. Jac. 668. Judgment pro Quer' upon such a Declaration, no Exception being taken as to this Matter. adjorn'. Hut. 34. S. C. and S. P. per Curiam.

(e) Hob. 284. S. C.

6. (f) The same Law is of the Promise of Payment of Money upon an Obligation, without a new Consideration, as Forbearance or the like; by which he might have an Action upon the collateral Promise. Mich. (g) 17 Jac. B. per Curiam.

(f) Cro. Eliz. 240. S. P. per Curiam Con. But Note, it did not appear there what was the Consideration of that Promise.

(g) Hut. 34. S. C. and S. P. per Curiam.

7. (h) In an Action upon the Case upon a Promise, if the Plaintiff declares that the Defendant, 22 Martii 6 Car. in Consideration that the Plaintiff, at the Request of the Defendant, would permit the Defendant to have and enjoy certain Lands, &c. from the 25th of March following, for one Year; the Defendant in Consideratione inde did assume to pay to the Plaintiff 5 l. at Michaelmas following, and avers, That the Defendant did enjoy it for One Year, yet the Defendant had not paid the 5 l. according to his Promise, in this Case the Action lies; for tho' this be an Agreement, and may amount to a Lease, yet when an (i) express Promise is laid, the Action lies; and it may be shewn in Evidence, that this was reserved upon a Lease upon non Assumpsit, pleaded P. 9. Car. B. R. between Potter and Fletcher, adjudged upon a Demurrer. Intratur Hil. 8 Car. Rot. 42.

(h) Cro. Eliz. 859. S. P. adjudged Con. Stile 463. S. P. per Glyn, Chief Justice. Kow and Norton, S. P. 1 Sid. 279. adjudged. 2 Keb. 8. adjudged. Cro. Car. 343. like Point cited.

(i) There is a Diversity where there is a general Enjoyment of Land without a Contract, and where the Enjoyment is upon an actual Contract or Assumpsit. 1 Sid. 279. per Curiam. — And if an express Assumpsit is laid, it will after Verdict be intended to have been proved. 1 Lev. 179. 3 Lev. 150.

8. In an Action upon the Case upon a Promise, if the Plaintiff declares that J. S was possessed of Land, &c. and by Indenture demised it to the Defendant from 25 of March, for 5 Years, rendring 22 l. Rent per Annum, at the four usual Feasts; and after the End of the 5 Years, J. S being dead, and the Plaintiff his Executor, viz. 1 May after the End of the Lease, which was at Lady-Day before, there was a Discourse between the Plaintiff and Defendant concerning the Enjoyment of it for a Year longer, from Lady-Day before; and thereupon, in Consideration that the Plaintiff would deduct and allow to the Defendant 5 l. 10 s. of the Rent of 22 l. for a Quarter of a Year, for the Premisses, and would agree with the Defendant, That the Defendant should have the Premisses for a Year from Lady-Day before, as in the said Indenture was expressed, the Defendant did promise to pay (deducting and allowing 5 l. 10 s. of the said Rent of 22 l.) the Remainder of the said Rent of 22 l.) this Action upon the Case lies, tho' this is called a Rent, and the Remainder of the said Rent of 22 l. and refers to the Indenture, for this is an express Promise; and if it was only a Promise in Law upon the Agreement, this might be shewn in Evidence. Pasch. 9 Car. B. R. between Rownceval and Lane adjudged, this being moved by my self in Arrest of Judgment after Verdict for the Plaintiff.

(k) Munday and Barly, S. P. Allen 29. adjudged after a Verdict for the Plaintiff. Stile 53. adjudged after a Verdict for the Plaintiff. — Upon an indebitatus Assumpsit, the Plaintiff can't give in

9. (k) In an Action upon the Case, if the Plaintiff declares, that whereas the Defendant was indebted to him in 9 l. 10 s. for the Rent of certain Lands, the Defendant in Consideratione inde, did promise to pay it; in this Case the Action does not lie, because it appears that this is for Rent, and no other Promise was made, than what the real Contract amounted to upon the making of the Lease, and it does not appear whether the Rent was for Life in Fee or for Years, so that it might be in Fee or for Life, for which Debt does not lie. Hil. 9 Car. B. R. between (l) Bret and Read adjudged per Curiam; this being moved in Arrest of Judgment after a Verdict for the Plaintiff, Intr' Tr. 9 Car. Rot. 644. Hub. Rep. Case 365. between (m) Green and Harrington.

Evidence that the Defendant was indebted to the Plaintiff for Rent Arrear. Read and Johnson. 1 Leon. 155, 156. Cro. Eliz. 242. So Moor 340. Pl. 460. (l) Cro. Car. 343. S. C. adjudged. Jones 329. S. C. adjudged. (m) Hob. fol. 284. S. C. adjorn'. Hut. 34. S. C. and S. P. per Curiam.

10. In an Action upon the Case, if the Plaintiff declares that the 25 Martii in Consideration that the Plaintiff at the Instance and Request of the Defendant, demitteret to the Defendant, certain Lands for 3 Years then next following, and for the yearly Rent of 25 l. per Annum, to be paid at Michaelmas and Lady-Day, by equal Portions, the Defendant did assume and promise to pay the said * yearly Rent during the Term, at the said Feasts for the said Land, and does aver in facto that he (n) after, viz. the said 25 Martii, did demise the said Land to the Defendant in forma prædicta, and that the said Defendant did enjoy the said Land for all the said Term, and yet the Defendant had not paid the said 25 l. yearly at the said Feasts for the said Lands, in toto amounting to 75 l. for which he brought his Action; to which the Defendant Pleads, that before this Lease was made, one W. L. was seised of the Premisses in Fee, and derives an Estate for Life from him to A. with whom the Plaintiff married; and that the Plaintiff being seised in the Right of A. his Wife for Life, did Surrender to him in the Reversion (p) before the Action brought; upon this the Plaintiff traverses the Surrender, and this by the Jury is found against the Defendant, and tho' in Arrest of Judgment it was moved that the Action did not lie, because it is grounded upon a real Con-

* Fol. 9.

(n) Note, the Promise must be made and aver'd to be so made, at or before the Time of the Demise. Stile 400. per Roll Ch. Justice.

(p) I suppose this should be before the Feasts upon which the Rent should grow due, according to the Report thereof. Cro. Car. 414, 415.

tract; (q) yet it was adjudged that the Action did lie, because it appears upon the whole Declaration, that it was intended by the parties that a Lease should be made, and a Rent reserved; and for the better Security of the Payment of it, according to the Reservation that the Lessor should have his Remedy for it by Action of Debt upon the Reservation, or an Action upon this collateral Promise at his Election, and this being the original Intent, the making of this Lease, tho' real, will not destroy this collateral Promise, (r) as a Man may covenant to accept a Lease under a certain Rent, and to pay the Rent according to the Reservation, for they are two Things; and so here the Promise of Payment is a Thing collateral to the Reservation, the which will continue, tho' the Lessee assign over, and the Lessor (s) accept the Rent from the Assignee being collateral, Mich. 11 Car. B. R. between (t) Acton and Symons per totam Curiam præter Croke, adjudged, this being moved in Arrest of Judgment; I my self being de Concilio Querentis Intrat' Mich. 10 Car. Rot. 83.

(q) Hard. 366. like Point, adjornatur. Chapman and Southwick like P. 1 Sid. 323. per Curiam. 2 Keb. 182. adjudged 291. like P. adjudged.

(r) And this Promise is of the same Effect as an express Covenant in a Deed. 3 Lev. 150. per Curiam.

(s) 1 Rol. Abr. 522. Pl. 1. vide. (t) Cro. Car. 414. S. C. adjudged per totam Curiam præter Croke, qui dubitavit. Jones 364. S. C. adjudged per Curiam, contra Croke, who strongly held the contrary. 3 Mod. 73. S. C. cited.

11. In an Action upon the Case, if the Plaintiff declares, that he and the Defendant did account insimul (u) for the Arrears of a certain Rent, reserved upon a Lease of certain Land, and upon this Account, the (x) Defendant was found in Arrear 10 l. and upon this he did promise to pay it, and for Non-payment the Action is brought, (y) this Action lies; for this lies in Accompt, and upon the Accompt is (z) made a personal Debt, and a Man may make an express Promise for Payment of a Rent, and yet an Action of Debt may lie for the Rent also, Pasch. 14 Car. B. R. between Luther and Malyn, per Curiam; tho' it was said, that it had been adjudged contra twice in B. in the same Term, and this has since been adjudged in B. R. econtra, viz. that the Action does not lie.

(u) These are certain, and Things uncertain only lie in Account. Br. Accompt 81. (x) Vide Davison and Hanslop, Raym. 211. 2 Keb. 813. (y) Diversity where the Account was for Rent alone, and where for that inter alia. Stile 131. per Curiam vide Cro. Jac. 602. (z) If the Account alters not the Nature of the Debt. Q. vide All. 73. Stile 473. 283. per Roll, 2 Lev. 110, 111. 1 Vent. 268.

12. If *A.* is possessed of a Term for Years, in certain Lands under a certain Rent, the Inheritance whereof is in the Wife of *B.* and *C.* in Consideration that *B.* will procure *A.* to assign this Lease to him, assumes and promises that he will pay the Rent to *B.* during the Remainder of the said Term, if *B.* accordingly does procure *A.* to assign, and Rent is afterwards Arrear; *B.* upon this Promise may have an Action against *C.* in his own Right, notwithstanding the Rent grew due in the Right of his Wife. *Mich.* 28 and 29 *Eliz.* *Carter's* Case, 1 *Leon.* 43. adjudged.

13. If in an Action upon the Case the Plaintiff declares *quod locasset* to the Defendant a certain Warehouse, the Defendant promised to pay 8 *s.* for every Week he occupied the same; and avers, that he occupied the same for 27 Weeks and had not paid, *&c.* the Action lies; for this is not a Rent, but a meer Promise in Consideration of the Occupation, *Mich.* 18 *Jac.* between *Dartnal* and *Morgan*, *Cro. Jac.* 598. adjudged upon a Motion in Arrest of Judgment after a Verdict for the Plaintiff.

(P) Upon an Aſſumpſit.

(a) In what Caſes it lies.

(a) Where every Executory Contract implies a mutual Promiſe, 4 Co. 94. Arb.

1. (b) If one Promiſe to build a Mill or Houſe for me within a certain Time, if he fails, no Action lies for it, unleſs there be a Conſideration alledged for it; otherways it ſounds merely in Covenant, and is nudum pactum. 2 H. 4. (c) 34. (d) 11 H. 4. 33. 19 H. 6. 49. (e) 20 H. 6. 34. contra (f) 14 H. 7. Action ſur le Caſe 45. (g) 21 H. 7. 41. contra. (h) 3 H. 6. 36. (i) 14 H. 6. 18. b.

(b) Kelw. 50. a. S. P. per Curiam, 78. a. vide

(c) This is miſprinted, for there are not ſo many fol. in that Year; I ſuppoſe it ſhould be 2 H. 4. 3 & 4. which vide Fitz. Action ſur le Caſe, 23. Br. 27. (d) Br. Action ſur le Caſe 40. S. C. (e) Br. Action ſur le Caſe 10. S. C. Fitz. Diſceit 14. S. C. Br. 2. S. C. (f) Q. If Fitz. is not miſprinted, and if not. 14 H. 6. 18. b. (g) Br. Action ſur le Caſe, 72. S. C. (h) Br. Action ſur le Caſe 7. S. C. Br. Contract. 5. S. C. (i) Fitz. Action ſur le Caſe. 8. S. C. Br. 69. S. C.

2. If a Carpenter promiſes to Mend my Houſe before a certain Day, if he does not do it, by which my Houſe falls, I ſhall have an Action upon the Caſe. 19 H. 6. 49. b.

(k) Kelw. 78. a. S. P. arguend' 50. S. P. per Cur'.

3. (k) If a Carpenter undertakes to build a Houſe for me, and does it ill, an Action upon the Caſe lies againſt him.

4. If there be a Bargain between two, That one ſhall marry the Daughter of the other, and the other ſhall enfeoff him and the Daughter; if he marries his Daughter to another, no Action upon the Caſe lies for want of Conſideration. 7 H. 6. 1.

Fol. 10.

5. If a Farrier undertakes to cure my Horſe that is gravell'd in his Feet, and after ita negligenter & improvide heals the ſaid Horſe that he dies; an Action upon the Caſe lies upon this Matter, without alledging any Conſideration, for his Negligence is the Cauſe of the Action, and not the Aſſumpſit, Trin. 39 Eliz. B R. between (l) Powtuary and Walton.

(l) 1 Rol. Abr. 91. Pl. 16. S. C.

6. If I retain a Man of the Law to be my Counſel at Guildhall in London ſuch a Day, at which Day he does not come, by which my Cauſe miſcarries; I ſhall have a Writ of Diſceit againſt him. (m) 20 H. 6. 34. b.

(m) 1 Rol. Abr. 91. Pl. 11. S. C.

7. If a Man of the Law for a certain Sum promiſes to be of the Counſel of another, and to obtain ſuch a Manor for him, if he voluntarily breaks his Aſſumpſit, viz. by diſcovering his Counſel to another, by which he gets not the Manor, this Action lies againſt him. (n) 11 H. 6. 18. 24. 55. b.

(n) Br. Action ſur le Caſe 108. S. C.

8. The Law would be the ſame, tho' he had done his Endeavour to obtain it; for that he had expreſly bound himſelf to obtain it. (o) 11 H. 6. 18. 56.

(o) Br. Action ſur le Caſe 108. S. C.

9. If a Man bargains and ſells Lands for a certain Sum, and promiſes to procure certain Men to releaſe to him, if he does not perform it, an Action upon the Caſe lies againſt him. (p) 14 H. 6. 18. b.

(p) Fitz Action ſur le Caſe 8. S. C. Br. 69. S. C.

10. If a Man ſells Lands to another for a certain Sum, and promiſes to enfeoff him of the Land within a certain Time; if he does not enfeoff him, but enfeoffs another, an Action upon the Caſe lies againſt him for the Diſceit. (q) 20 H. 6. 34.

(q) Br. Action ſur le Caſe 10. S. C. Fitz Diſceit 14. Br. 2. S. C.

11. So if in this Caſe the Vendor enfeoffs a Stranger, and after diſſeiſes him, and enfeoffs the Vendee, and the Diſſeiſee enters upon him, he ſhall have Diſceit againſt him. (r) 20 H. 6. 34. b.

(r) Br. Action ſur le Caſe 10. S. C. Fitz

12. So if he had retaken an Eſtate Tail from the Feoffee, and had enfeoff'd the Vendee, yet he ſhould have had a Writ of Diſceit. Diſceit 14. Br. 2. S. C. 20 H. 6. 34. b.

13. (s) So

13. (s) So if after the Bargain he had acknowledged a Statute, and after enfeoffed the Bargainee; the Bargainee should have had a Writ of Diſceit against him. 20 H. 6. 25.

(s) 1 Rol. Abr. 101. Pl. 14. S. P.

14. So if he had granted a Rent-charge out of the Land before the Feoffment contra (t) 20 H. 6. 34. b.

(t) Br. Diſceit 2. S. C. Fitz. 14. S. C.

15. If a Man ſells certain Lands for a certain Sum, and promiſes to enfeoff him, if he does not enfeoff him, tho' he does not enfeoff any other, but keeps it himſelf, yet Diſceit lies againſt him. (u) 21 H. 7. 41. per Fineux contra, 20 H. 6. 34.

(u) Br. Action ſur le Caſe 72. S. C. Fitz. 45. S. C.

16. If a Man be retained of my Counſel to buy the Manor of D. from J. S. and he falſly Purchaſes the Manor for himſelf, an Action upon the Caſe lies againſt him. 16 H. 6. Action ſur le Caſe 44.

17. If a Man for a certain Sum undertakes to ſolicit J. for me, for a Leaſe for Years of certain Lands, and he ſolicites J. for a Leaſe for himſelf, an Action upon the Caſe lies againſt him for this Diſceit, 3 H. 7. 14 Curia.

18. If a Man undertakes to carry my Pack over the River Humber ſafely, but he (x) ſurcharges his Boat with other Goods, by which Means my Pack is loſt; I ſhall have an Action upon the Caſe, tho' this ſounds in Covenant. (y) 22 Aſſ. 41. adjudged.

(x) For this, vide the Subdiviſions of Actions againſt a Carrier, viz. Collateral Matter to excuſe a Carrier. Title, Action upon the Caſe.

(y) 1 Rol. Abr. 96. Pl. 11. S. C. Br. Action ſur le Caſe 78. S. C. Fitz 40. S. C.

19. If a Man ſells certain Cocks of Hay in a certain Meadow to another for a certain Sum, and the Vendee promiſes to carry them away by a certain Time, and notwithſtanding the Vendee ſuffers them to lie there to rot the Soil of the Vendor, ſo that he loſes the Profit of his Herbage for a certain Time; he may have an Action upon the Caſe againſt the Vendee. 13 H. 4. Action ſur le Caſe 48. admit per Iſſue.

20. If a Man for a good Conſideration promiſes by his Deed not to do a certain Thing; no Action upon the Caſe lies upon this Promiſe, but a Writ of Covenant. Mich. 16 Jac. B. R. between (z) Bemiſh and Hilderſly, adjudged.

Fol. 11.

(z) 1 Rol. Abr. 517. Pl. 3. S. C. Cro. Jac. 505, 506. S. C. adjudged per tot' Curiam.

21. If A. recovers a Debt againſt B. and B. pays him the Condemnation, upon which A. releaſes all Actions, Executions, &c. to B. by Deed, and by the ſame Deed promiſes that he will withdraw and diſcharge all Writs of Execution againſt B. upon the ſaid Judgment, and after A. ſues Execution againſt B. upon the ſaid Judgment; yet no Action upon the Caſe lies upon this Promiſe, becauſe it is made by Deed, and ſo he ought to have a Writ of Covenant, Mich. 16 Jac. B. R. between (*) Bemiſh and Hilderſly, adjudged.

(*) 1 Rol. Abr. 517. Pl. 3. S. C. Cro. Jac. 505, 506. S. C. adjudged, per tot' Curiam.

(Q) Conſideration.

What ſhall be a good Conſideration.

Conſideration executed.

(a) Moor 220. Pl. 357. S. P. adjudged. Godb. 13. like Point, adjudged, but darkly reported.

1. (a) A Conſideration altogether paſt is not good. If a Man has diſburſed ſeveral Sums of Money about my Buſineſs (b) without my (c) Requeſt; and after I ſay to him in Conſideration that he has diſburſed the ſaid Sums (d) for me, I promiſe to pay to him 20 l. this is no good Conſideration, becauſe it was executed before. Paſch. 11 Jac. B. R. between Weſt and Weſt.

(b) Otherways if the Diſburſement was at my Requeſt. Cro. Eliz. 282. adjudged; and this is the common Courſe of Declaring. (c) The Plaintiff declared, quod per appunctuationem & pro debito ad defendentis paulo ante ſolviſſet, to J. S. 60 l. in Conſideration whereof, the Defendant aſſumed, &c. Cro. Eliz. 741. after a Verdict for the Plaintiff Judgment was ſtaid, (as the Book ſays) becauſe the Conſideration was paſt. (d) In the Original 'tis pur luy, and ſo plainly appears to be miſprinted.

(e) 2 Leon. 225. S. C. cited. Ow. 144. S. C. cited. Yelv. 41. S. C. cited.

2. If the Servant of A. be arreſted in London for a Treſpaſs, and J. S. who knows A. bails him; and after A. for his Friendſhip promiſes to ſave him harmleſs of the Damages and Coſts, &c. and after J. S. is charged, yet is this no good Conſideration of an Aſſumpſit, becauſe the Bailing, which was the Conſideration, was paſt and executed before. (e) Dyer 10 Eliz. 272.

3. (f) But it had been otherways, if the Maſter had before requeſted him to become Bail for his Servant, and the Bailing had been after. (g) Dyer 10 Eliz. 272.

(f) Dogget and Howel like Point. Owen 144. adjudged Con. per totam Curiam, præter Warberton, Cro. Eliz. 885. adjudged Con. Moor 643. Pl. 886. adjudged Con. But in Moo. the Conſideration was not laid to have been done at the Defendant's Requeſt. (g) Hob. 106. S. C. and S. P. cited and agreed, becauſe the Promiſe is not naked, but couples it ſelf with the precedent Requeſt, and the Merits of the Party procured by that Requeſt. 2 Leon. 225. S. C. and S. P. cited and agreed. Cro. Car. 409. S. C. and S. P. cited and agreed per two Juſtices arguendo.

(h) Cro. Eliz. 42. S. C. adjudged, per tot' Curiam. 2 Leon. 224. S. C. adjudged. Godb. 31. S. C. adjudged.

4. If A. comes to B. and intreats him to become bound in an Obligation for one of his Friends; and B. is contented at his Requeſt to become bound, and becomes bound accordingly; and after B. comes to A. and ſays to him, I was content at your Requeſt to become bound to ſuch a one, &c. I hope you will ſave me harmleſs, and A. ſays, that he will; this is a good Conſideration to maintain an Action, tho' he was bound before, in as much as it was at his Requeſt. (h) Worthington's Caſe cited. Paſch. 42 Eliz. B. R. to be adjudged.

5. But where a Man requeſts another to do a Thing, there after the Thing done, it will be a good Conſideration, viz. that he has done the Thing upon his Requeſt, and that he promiſed, &c. Trin. 14 Jac. (i) Braithwait's Caſe and Lampe, my Reports.

(i) Moor 866. Pl. 1197. S.C. adjudged. Hob. 105. 6. S. C. adjudged. 1 Brownl. 8. S. C. adjudged.

6. (k) As if a Man requeſts another to labour for his Pardon, &c. and after he has done his Endeavour, if the other ſays, in Conſideration that he has laboured for his Pardon at his own Charge, he promiſes to pay him ſo much, &c. this is a good Conſideration. Trin. 14 Jac. (l) Brathwait's Caſe adjudged.

7. (m) If A. in Conſideration that B. has married his Daughter at his Requeſt, promiſes to pay him 20 l. this is a good Conſideration. Dyer 10 Eliz. 272.

(k) Stile 465. like Point, adjudged niſi. Dier 355. b. like Point appears. (l) Moor 866. Pl. 1197. S. C. adjudged. Hob. 105, 106. S. C. adjudged. 1 Brownl. 8. S. C. adjudged. (m) Sandhil and Jenny, new Dier 272. b. Margine S. P. adjudged, but reverſed upon a Writ of Error in the Exchequer Chamber.

8. (n) If A. in Consideration that B. (o) Barganizasset & Vendidisset to him certain Tuns of strong Beer, at the Request of A. assumed and promised to B. to pay to him 4 l. for every Tun super deliberationem inde of 30 Tun of strong Beer; this is a good Consideration, tho' passed, because the Sale was at the Request of him who made the Promise. Mich. 12 Jac. (*) in Camera Scaccarii, between Field and Dale adjudged quod vide. Mich. 12 Jac. B.

(n) Cro. Eliz. 715. like Point adjudged.

*Fol. 12.

(o) If the Plaintiff declares quod deliberasset & dedisset to the Defendant, &c. but says not at his Request, the Declaration is naught. Cro. Eliz. 442. Judgment staid after a Verdict for the Plaintiff; But 2 Leon. 111. it is said to be the common Practice to declare quod deliberasset, &c. M. If not intended at the Defendant's Request; yet indeed the Book seems otherways, &c. and if upon a Sale, perhaps the Debt is a continuing Consideration. Post. 4. Pl. 15. 21. vide.

9. If A. being seised of a Shop, bargains with B. to demise it to him for 5 Years, rendring 40 s. Rent, and 12 d. of both Sides is given for the Performance of this Agreement; and after in Consideration that A. will make the Lease according to the said Promise, B. promises to pay him 30 l. upon which A. leases the Shop accordingly, this is a good Consideration to have an Action for the 30 l. tho' there was a perfect Bargain before this Promise was made, in as much as the Lease was not made according to the Agreement, before this Promise was made. Pasch. 11. B. R. between Jones and Clerk adjudged.

10. (p) If I request a Man to Board another for one Year, as he had Boarded him before, to which the other agrees, and before the End of the Year, (q) he that made the Request, promises in Consideration that he will Board him throughout the Year, he will pay him for the Whole, if he Boards him accordingly; this is a good Consideration for the Board of the whole Year, tho' Part of the Consideration be passed; for perhaps he would not have Boarded him throughout the Year, if it had not been for the Promise. My Rep. 14 Jac (r) Cotton against Westcot.

(p) Cro. Eliz. 755, 756. S.P. adjudged.

(q) This is Translated according to the Original, tho' not true English.

11. If I become Bail for J. S. at the Request of J. D. if before the Action determined, J. D. promises in Consideration thereof, to Discharge (s) me; this is good. My Rep. (t) 14 Jac.

(r) 1 Rol. Rep. 381. S. C. adjudged. 3 Bulst. 187. S.C. adjudged. (s) In the Original 'tis a lup discharger, and so appears to be misprinted. (t) 1 Rol. Rep. 382. S. C. and S. P. per Dod' and Coke. 3 Bulst. 187. S. C. and S. P. per Dod' and Coke.

12. (u) If the Son contracts with B. for 20 Weigh of Cheese for 20 l. of which 10 l. was in Hand paid, and the rest to be paid at Michaelmas after, and after the Son comes to B. for the Cheese, but he refuses to deliver it; and after the Father of the Son comes to D. and requests him to deliver it to his Son, and promises that if his Son does not pay the 10 l. at the Day, that he himself will, upon which B. delivers the Cheese; B. may have an Action upon the Case upon this Assumpsit against the Father, if the Son does not pay the Money; for this is a good Consideration. Mich. 41, 42. Eliz. B. R. between Sherwood and Woodward.

(u) Hut. 76. S. P. cited.

13. (x) If A. in Consideration that B. had sold to him such a Thing upon such a Day, ad tunc & ibidem promised to pay him 10 l. this Consideration is good, and continued at the Time of the Promise. Pasch. 8 Jac. B. Andrews's Case.

(x) Moor 367. Pl. 505. like Point adjudged.

14. (y) If a Man be indebted to another for Goods sold, & postea eodem die, promises in Consideratione inde to pay it at a Day to come, this is a good Consideration to make an Assumpsit. (z) for the Continuance of the Debt is a Consideration continuing. My Rep. 14 Jac. (a) Hodge and Vavisor.

(y) Latch. 150, 151. S.P. per Curiam, because there shall be no Division of a Day.

(z) Post. Pl. 21. like Point. (a) 1 Rol. Rep. 413. S. C. and S. P. agreed per Curiam, and said per Haughton, that it is the Common Form of Declaring.

15. So

15. So if he makes such Assumpsit at a Day after the Contract made, and before Payment; for the Continuance of the Debt is a good Consideration continuing. My Rep. 14 Jac. (b) Hodge and Vavisor adjudged.

(b) 1 Rol. Rep. 413. S. C. adjudged.

But a Query is there made by the Reporter, in as much as there is no Consideration for a new Promise for to forbear, per paululum tempus is no good Consideration, &c. vide 3 Bulst. 222, 223. S. C. adjudged.

16. So if the Defendant 30 Junii was indebted to the Plaintiff in 20 l. for Money lent by the Plaintiff to him, and the Defendant being so indebted after, viz. the 30 Julii after Promises to pay it at a Day to come, this is good, for this is a Consideration continuing. Mich. 15 Car. B. R. between Barton and Shurly, adjudged in a Writ of Error. Intra Hil. 14. Rot. 913.

17. If A. and B. account together, and B. is found 9 l. in Arrears, upon which B. in Consideratione inde, promises to pay it at a Day; this is a good Consideration not executed before, in as much as it is made upon the Account, and the Debt before the Account is uncertain, in as much as Allowances ought to be made. Mich 11 Jac. B. R. between (c) Jesson & Brier per Curiam adjudged. Trin 12 Jac. B. R. also per Curiam. 14 Jac. B. R. between (d) Janson and Colomore.

(c) 1 Rol. Abr. 7. Pl. 1. S. C.

18. If A. in Consideration that B. at his Request had solicited several Suits for him, and had done divers Businesses for him, assumes and promises to convey to him his Manor of D. or to give him as much as the (*) Manor is worth; this is a good Consideration tho' passed, because it was done at his Request. Mich. 10 Car. B. between Henne Plaintiff, and Rolph, and others, Executors of one Smith, Defendants, adjudged, this being moved in Arrest of Judgment. Mich. 22 Car. B. R. between Leach and Bromsal, per Curiam, in Consideration that before at the Request of the Defendant, ille habuisset Magnam Curiam de negociis defendentis in Lege & Preservasset Desendentem a multis periculis, &c.

(d) 1 Rol. Abr. 7. Pl. 1. S. C.

* Fol. 13.

19. In an Action upon a Promise, if the Plaintiff declare that whereas 60 l. was given him for a Legacy, and that all this except 7 l. was paid him by the Defendant, who was Executor in the Right of his Wife, and so bound to pay it, and that 23 September, the Plaintiff at the Request of the Defendant released the said 7 l. and after 28 September, the Defendant in Consideration of the said Release, promised to pay the said 7 l. at the Death of his Wife if he does not pay it, tho' the Release which was the Consideration was passed, viz. 5 Days before the Promise was made; yet in as much as this was made at the Request of the Defendant, this is a good Consideration dubitatur. Trin. 11 Car. B. R. between (e) Townsend & Hunt, Intratur Hill. 10 Car. Rot. 774. But Mich. 11 Car. the Case was argued at the Bar and Bench, & per totam Curiam adjudged, that the Action lies; for the Request made the Act that was done to be meritorious, and to deserve a good Turn of the other Part; and then Croke said that the 28 Eliz. in (f) Rainsford's Case B. R. and in 44 Eliz. B. R. in (g) Rigg's Case, this was adjudged accordingly, and affirmed upon a Writ of Error. Mich. 14 Car. B. R. between Keene and Pearson, adjudged in Consideration that the Plaintiff upon an Agreement before made, concerning the Melting of certain Bells, &c. and Casting them at the Request of the Defendant, had made certain Molds to make them, the Defendant did promise to pay him for the making of them, and for his Labour and Expences about them; this is a good Promise, tho' upon a Consideration past, because it was done at the Request of the Defendant, adjudged, this being moved in Arrest of Judgment, Intratur Trin. 14 Car. Rot. 506.

(e) Cro. Car. 408. S. C. adjudged per tot' Curiam, Jones 365. S. C. adjudged, per tot' Curiam.

(f) Cro. Eliz. 59. S. C. and S. P. per Egerton and Foster.

2 Leon. 111. S. C. and S. P. per Wray.

(g) Cro. Eliz. 715. S. C. adjudged.

20. If A. in Consideration that B. according to an Agreement before made between A. and B. concerning the new Casting of certain Bells of the Church of S. had before at the Request and Instance

of A. and Cuſts of B. made certain Moulds for this Purpoſe, promiſes to pay him for the ſaid Moulds, and for his Pains in making them when he ſhould be required; this is a good Conſideration for B. to maintain an Action againſt A. for tho' the Conſideration be paſt, yet in as much as it was done at the Requeſt of A. the Action lies, for the Conſideration continues. Paſch. 15 Car. B. R. between Pearſon and Keene adjudged per Curiam; this being moved in Arreſt of Judgment. Intratur Trin. 14 Car. B. R. Rot. 506.

21. In an Action upon the Caſe upon a Promiſe, if the Plaintiff declares, that whereas the Defendant was indebted to him for ſeveral Sums of Money at ſeveral Times ante tunc accommodat' to him by A. S. adtunc & adhuc his Wife, & adtunc due and unpaid, the Defendant did promiſe to become bound with a Surety in an Obligation, for the Payment of it at a certain Time; this is a good Conſideration tho' paſt, becauſe the Debt is a (h) continuing Conſideration, and therefore good without any other Conſideration of Forbearance to proſecute any Suit for it, or any other new Conſideration. Trin. 1650. between Cogdon and Ham, adjudged per Curiam. Intratur Hill. 1649. Rot. 170.

(h) Ante Pl. 15. like Point.

22. (i) If *A.* Serves *B.* for a Year, but has nothing for his Service, and afterwards at the End of the Year, *B.* for his good and faithful Services, aſſumes to pay him 10 *l.* *A.* may have an Action upon the Caſe upon this Promiſe againſt *B.* for the Conſideration is good. *Paſch.* 27 *Eliz.* in the Caſe of (k) *Sidnam* and *Worthington.* 2 *Leon.* 225. agreed *per Curiam.*

(i) Hut. 84. S. P. adjudged. But note, it does not there appear, whether the Servant had Wages or not.

23. But if a Servant has Wages given him, and after his Service ended, his Maſter *ex abundantia* promiſes to pay him 10 *l.* more; he ſhall not have an Action upon this Promiſe, becauſe there is no precedent Conſideration. *Paſch.* 27 *Eliz.* in the Caſe of (l) *Sidnam* and *Worthington.* 2 *Leon.* 225. agreed *per Curiam.*

(k) Godb. 32. bis S. C. and S. P. per Rhode and Peryam. Cro. Eliz. 42. S.C. and S. P. per Rhodes.

24. If *A.* Leaſes Lands to *B.* for a certain Term of Years, rendring Rent, and after ſome of the Years expired and the Rent paid; *A.* in Conſideration that *B.* had occupied the Land and paid his Rent, aſſumes to ſave him harmleſs againſt all Perſons for his Occupation paſt and to come; if afterwards the Cattle of *B.* are diſtrained *Damage feaſant*, &c. he may have an Action upon this Promiſe againſt *A* for the Occupation, which is the Conſideration, continues. *Paſch.* 30 *Eliz.* between (m) *Pearl* and *Edwards.* 1 *Leon.* 102. adjudged.

(l) Godb. 32. bis S. C. and S. P. per Rhodes and Peryam. Cro. Eliz. 42. S.C. and S. P. per Rhodes.

25. (n) If there be a Communication between *A.* and *B.* concerning a Marriage to be had between *A.* and the Daughter of *B.* upon which *B.* offers him 200 l. with his Daughter in Marriage, but they cannot agree upon the Day of Payment, and afterwards *A.* ſteals away the Daughter of *B.* and marries her without the Conſent or Knowledge of *B.* and after *B.* agrees thereto, and in Conſideration of this Marriage aſſumes to pay 100 *l.* to *A.* This is a good Promiſe, upon which *A.* may have an Action againſt *B.* for the (o) Natural Affection of the Father, and the (p) Advancement of the Daughter, makes this a Conſideration (q) continuing. *Trin.* 30 *Eliz.* between *March* and *Rainsford*, 2 *Leon.* 111. adjudged.

(m) Cro. Eliz. 94. S. C. adjudged and ſaid the Conſideration, that he was in Poſſeſſion, and had paid, and was to pay his Rent, 2 Leon. 111.

was a ſufficient Cauſe for A. to defend his Poſſeſſion for the Time to come. (n) 1 Leon. 102. S. P. per Clinch, but Godfry Con. (o) A good Conſideration to raiſe an Uſe, but not an Aſſumpſit. Cro. Eliz. 756. agreed per Curiam. Cart. 141. arguendo. (p) Marriage is always a continuing Conſideration. 2 Leon. 224. per Anderſon at the bottom. Godb. 31. bis per Anderſon. Cro. Car. 409. per Barkly. Hut. 84. ſaid. Cro. Eliz. 741. per Walmſly. (q) A Serjeant at Law gives Counſel to A. and afterwards in Conſideration thereof, he aſſumes to pay him 20 l. an Action lies thereupon. per Poph. Cro. Eliz. 59. ſaid.

26. If in an *Aſſumpſit* the Plaintiff declares, That whereas the 10th Day of *December*, &c. he bought of the Defendant 3 Parcels of Land, the Defendant afterwards, *viz.* the 19th Day of *December*, in Conſideration thereof, did aſſume and Promiſe before ſuch a Day to make to the Plaintiff a ſufficient

Assurance thereof, &c. this is a good Consideration, for the Assurance is the Substance of the Sale and Matter. *Trin.* 31 *Eliz.* between *Worcop* and *Morse. Cro. Eliz.* 138. adjudged.

27. If *A.* desires *B.* to procure Credit for *C.* for two Tuns of Wine, amounting to 50 *l.* and *C. Super credentiam & per medium* of *B.* Buys 2 Tuns of Wine of *D.* for 50 *l* and thereupon *B.* together with *C.* enters into a Bond of 100 *l.* to *D.* for Payment thereof, and Default being made at the Day, *D.* sues *B.* and recovers; and thereupon *B.* pays 67 *l.* and thereof gives Notice to *A.* who promises in Consideration thereof, to repay the said Money to *B.* at a Day to come; if *A.* does not repay it accordingly, an Action upon this Promise will lie against him; for tho' the Request was only to procure Credit for 2 Tuns of Wine, amounting to 50 *l.* perhaps *D.* would take no other Security than by Obligation of 100 *l.* for the Payment of 50 *l.* and this being afterwards signified to *A.* he agreed thereto, and this Promise to repay the 67 *l.* shall charge him, because it had its Essence and Commencement from the first Request made by him, *Mich.* 1 *Jac.* between (r) *Bosden* and Sir *John Thinne*, *Yelv.* 40. upon a Motion in Arrest of Judgment after a Verdict for the Plaintiff, adjudged by three Judges against *Yelverton*, who held the Promise could have no Relation to the first Request, because that was only to procure Credit for 2 Tuns of Wine, amounting to 50 *l.* and the Promise was for Payment of 67 *l.*

(r) Cro. Jac. 18. S. C. adjudged.

Fol. 14.

(R) Upon an Assumpsit.

In what Cases the Action lies upon a Collateral Promise.

1. (a) AN Action upon the Case **lies against an Executor upon a Promise in Nature of a Debt,** Mich. 4 Jac. B. R. **between Sir** Myle Finch **and** Richardson, **resolved** per Curiam, Pasch. 8 Jac. 1. in Camera Scaccarii, **between** Meane **and** Peacher, Mich. 11 Jac. B. R. **between** Cock **and** Thoroughgood, per Curiam.

(a) Pinchon and Legat. S. P. 9. Co. 86, 87. adjudged. 2. Brownl. 137. adjudged.

Cro. Jac. 293, 294. adjudged and affirmed upon a Writ of Error in Camera Scaccarii. 1 Rol. Abr. 924. Pl. 5. 10. Co. 77. a. S. P. per Coke, Ch. Justice.

2. (b) **An** Action upon the Case **lies against an Executor or Administrator as well upon a collateral Promise, as where the Promise is for a Debt.** Hill. 14 Jac. B. R. (c) Small **and** Boyer **adjudged.** My Rep. 14 Jac. (d) Beresford **and** Goodrouse **adjudged.** Pasch. 16 Jac. B. R. **between** (e) Bidwell **and** Cotton, per Curiam. Pasch. 15 Car. B. R. **between** Mason **and** Thursby **adjudged.** Contra Mich. 4 Jac. B. R. **Sir** Moyle Finch **and** Richardson. Contra (f) Hob. Rep. c. 278.

(b) Fawcet and Charter. S.P. Cro. Jac. 662, 663. adjudged, and upon a Writ of Error in Cam' Scac' affirmed by all Contra Tanfield, Ch. Baron. and there said, tho' several such Judgments in the Time of Queen Elizabeth had been reversed, yet the Opinions since have been otherways. 1 Jon. 16. Upon a Writ of Error in Cam' Scac' affirmed by all contra Tanfield. Palm. 329. adjudged, and upon a Writ of Error in Cam' Scac' affirmed by all contra Tanfield (who totis viribus opposed it) but yet it was allowed there had been several Precedents according to the Opinion of Tanfield. Vide Poph. 32. (c) 3 Bulst. 248. S. C. and S. P. agreed per Curiam. (d) Cro. Jac. 404. S. C. adjudged and affirm'd upon Error, 1 Rol. Rep. 433. S. C. adjudged. 3 Bulst. 235. S. C. adjudg'd and affirm'd upon Error, in Cam' Scac'. (e) Hob. fol. 216. S. C. but S. P. per Curiam Con. (f) Hob. fol. 216.

3. **As if a Man promises another, That in Consideration that he will marry his Daughter, to give him as much as he hath given, or should give with any of his other Daughters, if after he gives such a Sum with another of his Daughters, and dies, an Action upon this Assumpsit, lies against the Administrator, notwithstanding it be**

Collateral. Hil. 14 Jac. B. R. per Curiam, for Costs after Nonsuit of the Plaintiff. But Mich. 15 Jac. it was adjudged.

4. So if the Promise be in Consideration (g), &c. to leave so much to him at his Death as he should leave to his Wife or any of his Children. My Rep. 13 Jac. (h) Saunders and Easterby adjudged, and Hill. 14 Jac. affirm'd in Scaccario.

5. So if the Promise be in Consideration of Marriage, to pay so much for the Marriage, and so much for the Marriage Dinner, and so much at his Decease. My Rep. 14 Jac. (i) Beresford and Goodrouse adjudged.

(g) In the Original this Ar. is wanting, without which, or other Words at large, the Sense seems imperfect.

(h) 1 Rol. Rep. 193. 266. S. C. adjudged and affirmed upon a Writ of Error, in Cam' Scac'. Cro. Jac. 417. S. C. adjudged and affirm'd upon Error. But it is there said, the Court was once of Opinion to reverse it. 1 Rol. Rep. 433. S. C. cited 3 Bulst. 236. S. C. cited, in which last Books it is said the Opinion of the Court upon the Writ of Error was contra, tho' the Judgment was not revers'd. Cro. Jac. 405. S. C. cited and there said, that upon the Writ of Error no Judgment was given, because the Party died.

(i) Cro. Jac. 404. S. C. adjudged and affirmed upon a Writ of Error. 1 Rol. Rep. 433. S. C. adjudged. 3 Bulst. 235. S. C. adjudged and affirmed upon a Writ of Error in Cam' Scac'.

6. If A. buys Goods of B. and because B. distrusts the Payment of A. J. S. promises that if A. does not pay him at such a Day, he himself will pay it; J. S. dies, and the Money is not paid at the Day, the Executors of J. S. may be charged in an Action upon this Promise, tho' it be collateral. Hil. 38 Eliz. B. R. between Saymond and Gent adjudged.

7. In an Action upon the Case against an Executor, if he declares that whereas he had sued an Action against B. the Testator of the Defendant, B. in Consideration that the Defendant would forbear to prosecute the said Writ further against him, did promise to pay 50 l. to the Plaintiff, the Action lies against the Executor upon this Promise, because this is not Collateral, for that an Action of Debt would have lain against the Testator upon this Promise. Hob. R. c. 278. between (k) Bedwell and Cotton adjudged.

(k) Hob. fol. 216. S. C. adjudged.

(S) What shall be a good Assumpsit for want of Certainty.

1. If a Man promises another, in Consideration that he will assign to him a certain Term to pay him 10 l. this is a good Assumpsit, tho' the Time of Assignment and Payment be not appointed, for the 10 l. shall be paid in a convenient Time after the Assignment, which also must be done in convenient Time, and he shall not have Time during his Life. Mich. 14 Jac. at Serjeants Inn, between Barnard (*) and Simon adjudged, and the Judgment affirmed, contra the Opinion of Altham.

* Fol. 15.

2. If A. be indebted to B. for certain Things to him sold, and C. comes to B. and promises him that if A. shall not pay him the Money, that then he himself will pay it; an Action upon the Case lies for B. against C. upon this Promise, if A. does not pay the Money in a convenient Time; for so shall the Promise be taken, viz. if A. does not pay it in a convenient Time, that then he will pay it. Mich. 42 & 43 Eliz. B. R. between (a) Sadler and Hawkes adjudged, and that the Declaration so generally laid was good also.

(a) 1 Rol. Abr. 27. Pl. 49. S. C.

3. If a Man declares upon a Promise against an Administrator, that the Testator was indebted to him in 10 l. by Obligation, and died, and the Defendant being his Administrator in Consideratione præmissorum

miſſorum & quod querens parceret him till a certain Time after in certain, he would pay him the Debt, and avers that he pepercet him till the Time, and the Defendant had not paid him, &c. tho' he did not ſay that he parceret him the Debt, or to ſue him, yet ſhall it be ſo intended, and therefore the Conſideration is good. Hill. 22 Jac. B. R. between Gardiner and Fenner and his Wife, Adminiſtrators of one Baud, per Curiam.

4. In an Action upon the Caſe upon a Promiſe by A. againſt B. if the Plaintiff declares that in Conſideration he ſold and deliver'd to the Defendant a Steer for 53 s. 4 d. the (b) Defendant Super ſe Aſſumpſit, & (c) eidem B. fideliter promiſit, to pay the ſaid 53 s. 4 d. upon Requeſt, tho' by the Words B. aſſumes and promiſes to himſelf, and not to the Plaintiff, yet this is a good Promiſe to the Plaintiff. Hill. 8 Car. B. R. between Lodyman and Saunders, per Curiam, adjudged in a Writ of Error, this being moved for Error. Intratur Paſch. 8 Car. B. R. Rot. 245. and the Judgment given in B. affirmed.

(b) The Plaintiff declares that the Defendant was indebted to him in ſo much, the pred' which A. (who was the Plaintiff) promiſed to pay, and after a Verdict for the Plaintiff it was amended, becauſe he had well declared that the Defendant was indebted to him. 1 Sid. 306. (c) So tho' not laid to whom the Promiſe was made. 1 Rol. Abr. 30. Pl. 1. vide.

5. If A. promiſes B. in Conſideration that B. will permit him to have certain Sheep at (d) Foldage in certain Land, that he will pay to B. tantum quantum mereret, and avers that he meruit ſo much, this is not good to have tantum quantum mereret for ſuch Things, becauſe it is but in Nature of a Treſpaſs, and not like a Taylor, or ſuch like. Trin. 10 Car. B. R. between Mutton and Boughton adjudged per Curiam, in a Writ of Error upon a Judgment in an inferior Court in the Town of Northampton, and the Judgment there given reverſed accordingly, which ſeems no Law.

(d) It lies for the Agiſtment of Cattle. 1 Rol. Rep. 435.

6. If A. is indebted to B in 10 l. and upon this, C. promiſes B. that in Conſideration that he will forbear A. till ſuch a Day, if A. does not pay him the ſaid Day, he himſelf will pay him the ſaid Day, this is a good Promiſe, upon which B. may have an Action againſt C. for tho' A. had the whole Day to pay it, and ſo it was impoſſible for C. to pay it the ſame Day if he did not pay it; yet the Subſtance of the Promiſe is to pay, and the Time limited being unpoſſible, is void, and then it ought to be paid upon Requeſt. Mich. 10 Car. B. R. between Rowlandſon and Simpſon adjudged per Curiam in a Writ of Error upon a Judgment in Durham, and the Judgment affirmed accordingly. Intratur Hill. 9. Car. Rot. 201.

7. If *A.* is indebted to *B.* in 20 *l.* by Obligation, and *A.* dies and makes *C.* his Executor, and *C.* in Conſideration *quod* B. *daret diem Solutionis pro uno anno* promiſes Payment; if *C.* does not pay it, an Action upon this Promiſe will lie againſt him, (e) for tho' in proper Senſe a Day cannot be given upon the Bond, yet it ſhall be taken according to common Parlance, *viz.* Deferring the Day of Payment, *Mich.* 40 *Eliz.* between *Chambers* and *Leverſage*. *Cro. Eliz.* 643. adjudged.

(e) The Plaintiff declared upon a Promiſe to aſſign the Shop of the Defendant & transferre negotiationem, &c. All. 67. Stil. 111.

8. If *A.* in Conſideration that *B.* will marry his Daughter, aſſumes and promiſes to give with her a Child's Part, and that at the Time of his Death he will give to her as much as to any of his Children, except his eldeſt Son; this is a good Promiſe: For tho' a (f) Child's Part in it ſelf is altogether uncertain, yet being to give as much as to any of his Children, the Promiſe is certain enough, it being averr'd what the younger Son had. *Trin.* 17 *Jac.* (g) *Silveſter's* Caſe, *Popb.* 148. adjudged.

(f) But if a Citizen of London promiſes a Child's Portion, this of it ſelf is certain enough, for by the Cuſtom there it is known how much each Child ſhall have. 2 Rol. Rep. 104. per Mountague, Ch. Juſtice. (g) 2 Rol. Rep. 104. S. C. adjudged and reſolved, that by the latter Words the Promiſe was made certain enough.

9. If *A.* in Conſideration that *B.* will Marry his Daughter aſſumes and promiſes to give to *B.* 20 French Pieces; this is a good Promiſe, for this according to our uſual Speech, ſhall be intended French Crowns, which are the Common Coin of *France*, and here known. *Trin.* 6 *Car.* between *Poynter* and *Poynter*. *Cro. Car.* 194. adjudged.

10. If the Plaintiff declares that whereas there was a Communication between the Plaintiff and Defendant, concerning the Bark of certain Wood, and that thereupon it was agreed, that the Defendant ſhould give to the Plaintiff 2 *s. per* Seame for all the Bark of ſuch Wood as the Plaintiff ſhould cut, and that thereupon the Defendant aſſumed and promiſed to have ready upon a certain Day Articles purporting the Agreement, and an Obligation for Performance thereof, *&c.* the Declaration is not good, becauſe not ſaid in what Sum the Obligation was to be, and a certain Sum cannot be intended, becauſe the Number of Seams are altogether uncertain, *Trin.* 17 *Car.* between (d) *Pleaſe* and *Palfry*, 1 *Syd.* 270. *per Curiam*; but being (e) after Verdict upon the General Iſſue, it was adjudged for the Plaintiff, but *per Curiam* upon Demurrer or the Special Iſſue it had been naught.

(d) 1 Keb. 776. S. C. adjudged.

(e) Hob. 69, 70. like Point adjudged. 1 Brownl. 11. like Point adjudged. Mod. 70. like Point adjudged. Cro. Jac. 652. S. P. adjudged.

11. But if there be an (f) Agreement to enter into an Obligation for Performance of a Thing of certain Value, without mentioning in what Sum it ſhall be, it ſhall be intended (g) according to the Value. *Trin.* 17 *Car.* 1 *Syd.* 270. *per Curiam.*

(f) So upon a Covenant to enter into a Bond that

12. In an Aſſumpſit the Plaintiff declared that the Defendant in Conſideration, *&c.* 6 Months before the Return of King *Charles* the Second, aſſumed to pay 20 *l.* to the Plaintiff, if *Charles Stewart foret rex Angliæ infra* 12 *Menſes tunc prox' Sequent'*, &c. *Paſch.* 12 *Car.* 2. between (h) *Andrews* and *Hern*, 1 *Lev.* 33. adjudged a good Promiſe; for the words ſhall be taken according to the Subject Matter, *viz.* That the King that was then out of Poſſeſſion ſhould be in Poſſeſſion within 6 Months.

Samon's Caſe, 5 Co. 78. a. Cro. Eliz. 432. (g) Of double Value. Cro. Jac. 116. adjudged. Hetl. 89, 90. like Point dubitatur.— When for Payment of Money. 1 Lev. 88. (h) 1 Keb. 56. 65. S. C.

(T) What will be a good Conſideration to Maintain the Action.

Fol. 16.

1. If the Conſideration of an Aſſumpſit to the Attorney of the Plaintiff be, that in an Action after Judgment, (a) when his Warrant is determined he ſhall acknowledge Satisfaction of the Judgment; this is not ſufficient to maintain an Action upon the Caſe becauſe it is againſt Law for him to acknowledge Satisfaction after the Warrant determined, without the Conſent of the Plaintiff himſelf. My Rep. 14 Jac. (b) Payn againſt Chute.

(a) His Warrant is not determined by the Judgment per Stile 426. per Roll, Ch. Juſtice. But for this, vide 1 Rol. Abr. 291. Pl. 4, 5.

2. If a Man for Money given Promiſes to ſerve certain Proceſs, this is no good Conſideration, becauſe it is againſt Law; for it is Extortion. My Rep. 13 Jac. (c) Sherly againſt Parker adjudged. For this is Extortion in the Sheriff to take it, and therefore unlawful in the Donor of it, contra Hill. 10 Jac. B. between Boothby & Alport.

(b) 1 Rol. Rep. 365. S. C. dubitatur. (c) 1 Rol. Rep. 313. S. C. adjudged, the Conſideration being that he would Serve a ne exeat regnum, &c.

3. If an Executor ſues Execution by Elegit, and B. a Stranger, as a Friend to the Executor, in Conſideration that the Sheriff would forthwith execute the ſaid Elegit, and of 6 d. to him by the Sheriff paid, promiſes to pay him 60 l. upon which the Sheriff executes the Writ: yet no Action lies becauſe the Conſideration is againſt Law;

for the Sheriff ought to do his Duty without Reward, and this 60 l. is no Diſcharge of the Fees due to the Sheriff by the Statute, being given by (d) a Stranger, and not expreſſed for them, Mich. 3 Jac. B. between (e) Bridge & Cage adjudged.

(d) Otherways where given by the Plaintiff himſelf. 1 Rol. Abr. 26. Pl. 41.

(e) Cro. Jac. 103. S. C. adjudged.

4. If a Man brings a Capias that he has againſt A. to the Sheriff, and prays him that he will make J. S. his Special Bailiff, and promiſes him, that if he will make him his Special Bailiff, that if (f) A. eſcapes from the Bailiff, that he will bring no Action for the Eſcape againſt him; this is an Aſſumpſit upon which an Action lies, if he brings any Action againſt the Sheriff for the Eſcape. Paſch. 32 Eliz. B. R. between (g) Paumer & Smalbroke adjudged, and 34 Eliz. the ſame Caſe affirm'd in a Writ of Error, and there in 32 Eliz. ſaid that it was ſo adjudged. Trin. 32 Eliz. B. R. between Shoobroke and Selman.

(f) In the Original, 'tis if J. S eſcapes, and ſo appears plainly to be miſprinted.

(g) 1 Leon. 132. S. C. adjudged. 3 Leon. 227. S. C. adjudged. Dabridge Court and Smalbrook, S. C. Cro. Eliz. 178. adjudged upon Error in Cam' Scac' Owen 97. S. C. adjudged.

5. If A. be outlawed at the Suit of B. upon a Proceſs for Debt, and B. promiſes in Conſideration that C. a Stranger, will Arreſt A. upon a Capias allegatum upon this Outlawry, that he will pay him 40 s. This is no good Conſideration to have an Action, tho' he ſhews in his Declaration that he was after, by a Warrant to him directed, made a Special Bailiff to the Sheriff to Arreſt him thereupon, for this is Extortion, and the Sheriff by ſuch means might extort from the Subject great Fees for the doing his Duty. Mich. 22 Jac. B. R. between (h) Faldoe & Salter per Curiam (i) in Arreſt, and after Paſch. 1 Car. this being moved again, it was adjudged per totam Curiam againſt the Plaintiff, becauſe the Bailiff is the Officer of the Sheriff and his Servant. This is entered Trin. 22 Jac. B. R. Rot.

(h) Bagſhaw and Salter, S. C. Noy 76. adjudged; but the Caſe of one Audley was there cited and agreed, that an Aſſumpſit made to a Stranger, in Conſideration that he would aſſiſt the Sheriff is good. Badow and Salter. 1 Jones 65. S. C. adjudged. (i) In the Original 'tis an Arreſt, and ſo miſprinted.

6. (k) If A. keeps a Mercer's Shop in a Town, and B. comes there, and will ſet up, and takes all the Shop-rid-Ware of A. at a certain Price, and in Conſideration thereof, A. promiſes B. not to keep any Mercer's Shop after within the ſaid Town; This is a good Conſideration to maintain an Action upon the Caſe if he after keeps a Shop there, for the Reſtraint of his Trade is but in one Place, and every Man may for a Conſideration ſell the Liberty that the Law gives him; but otherways it is where the Reſtraint is by Compulſion as by By-Laws, as it ſeems * it was, 2 Hill. 5. Mich. 18 Jac. B. R. between (l) Jolliffe & Broad adjudged per Curiam contra to the Opinion of Houghton, Mich. 19 Jac. This Judgment was affirm'd upon a Writ of Error in Camera Scaccarii Trin. 24. Car. B. R. between (m) Goſſe & Pragnel adjudged in a Writ of Error upon a Judgment in the Common Pleas, where it was ſo adjudged alſo, where the Promiſe was in Conſideration of the Plaintiff's Marriage with the Daughter of the Defendant, who made the Promiſe. Intratur Paſch. 24 Car. Rot. 217.

(k) Rogers and Parry like Point, 2 Bulſ. 136. adjudged. Cro. Jac. 326. adjudged.

Fol. 17.

(l) Cro. Jac. 596. S. C. adjudged and affirm'd upon Error. 1 Jones 13. S. C. adjudged, March 77. S. C. adjudged. 2 Rol. Rep. 201. S. C. adjudged and affirmed upon Error, contra the Opinion of Houghton.

7. (n) If A. and B. play at Tables, and upon this in Conſideration the Plaintiff promiſes to give his Mare to the Defendant, if he wins 5 Games at Tables, the Defendant promiſes to pay 5 l. to the Plaintiff if he wins 5 Games, this is a good Conſideration in reſpect of the Hazard, tho' this is no lawful Game for every Per-

(m) All. 67. S. C. adjudged, and a Diverſity taken where the Reſtraint extends to a particular Place only, and where it is general throughout England. Stile 111. S. C. adjudged, and vide 2 Rol. Rep. 202. (n) 2 Rol. 133. like Point appears, 1 Keb. 216. vide 1 Rol. Abr. 28. Pl. 59.

ſon. Mich. 9 Car. B. R. between Sutton and Jones per Curiam, Intratur Mich. 9. Rot.

8. (o) If an Action upon the Caſe if the Plaintiff declares, that whereas he had been requeſted by the Defendant to ſolicit and proſecute a Suit in B. R. in Treſpaſs, in which the Defendant was Plaintiff againſt B. the Defendant promiſed to pay the now Plaintiff 100 l. This is a good Conſideration and not againſt Law; for it is lawful for a Man to be a Solicitor upon a Special Retainer; ſo that it be not for Maintenance. Hub. Rep. 93. between (p) Worthington & Garſton. Mich. 22. and 23 Eliz. Rot. 378.

(o) Cro. Eliz. 766. like Point adjudged. Owen 123. like Point cited Com. Dier. 356. a. b. like Point.

2 Judges againſt 1 Con.

(p) Hob. fol. 67. S. C. adjudged.

9. If A. makes a Leaſe to B. and the Leſſee Covenants to pay Quit-Rents and to Repair, and B. and C. at the requeſt of B. enter into an Obligation of 1000 l. joyntly and ſeverally to A. for the Performance of the Covenants, and after the Quit Rents are behind, and the Houſe is not Repaired, upon which A. Arreſts C upon the Obligation, upon which C. pays all that was behind, viz. 33 l. and promiſes to Repair the Houſe before a certain Day after, and in Conſideration thereof, A promiſes C. to ſue B. upon the ſaid Obligation, and to pay to him ſo much as he ſhould recover upon the ſaid Obligation, or ſhould have by Compoſition with B. and after ſues B. and Compounds for 34 l. An Action upon the Caſe lies for C. againſt A. upon this Promiſe, for it is no Maintenance in C. for all that he did and paid ought to have been perform'd by B. himſelf, who was the Principal, Trin. 19 Jac. B. R. between (q) Morris & Badger, adjudged, this being moved in Arreſt of Judgment.

(q) Palm. 168, 189. S. C. adjudged.

10. (r) If A. promiſes B. an Attorney de B. that in Conſideration that he will ſolicit a Suit that J. S. has in Chancery, that he will give him 3 s. and 4 d. every Term, this Conſideration is not againſt Law; (s) for an Attorney of one Court may be a particular Solicitor in another Court; but not a general one. Mich. 12. Jac. B. between Leach & Penton, per Curiam.

(r) Thurſby and Warren, S. P. Cro Car. 159. adjudged. Jones 208. adjudged. March 78. adjudged.

11. If A. ſolicites a Suit for B. in Chancery, at his requeſt, and after they reckon inſimul, and upon the reckoning the Fees of the Solicitor, and the Money laid out by him comes to 6 l. and upon this B. ſays in Conſideration that A. will ſue for him a Latitat out of the King's-Bench againſt J. S. he promiſes to pay him the ſaid 6 l. tho' it ſhould be admitted the Ground is ill, viz. that the 6 l. was not due becauſe the Solicitation is againſt Law, and Maintainance, yet it ſeems — the Suing the Latitat will be a good Conſideration. Mich. 13 Jac. B. dubitatur, between Leach & Penton.

(s) Moor 656. Pl. 899. S. P. per Egerton Lord Keeper. Con.

12. If A. be obliged to B. in an Obligation for 40 l. conditioned for the Payment of 20 l. and A. (t) Eloigns himſelf, ſo that B knows not how to come at his Debt; upon which C. a Stranger, in Conſideration of certain Herrings given to him by B. and that B. ſhould aſſign the ſaid Obligation to C. with a Letter of Attorney to put it in Suit, promiſes to pay the ſaid 20 l. this is a good Conſideration to have an Action; tho it was objected that the Buying of Debts is againſt Law; but if that be void, (u) yet the Gift of the Herrings is (*) a Conſideration. Mich. 7 Car. B. R. between Michael & Carden adjudged, this being moved in Arreſt of Judgment.

(t) In the Original 'tis ſun Eſſoigne, and ſo appears to be miſprinted.

(u) 1 Rol. Abr. 30. Pl. 1. 2,

* Fol. 18.

13. If A. being a Clerk, promiſes B. in Conſideration that B. will procure him to be Rector of a Donative Church with Cure of Souls of the Gift of the King (as the Caſe was) to pay to B. 10 l. this is no good Conſideration to maintain an Action, for this is Simony, and againſt the Law of God and Man. Mich. 9 Car. B. R. between (x) Mackaller & Toddrick per Curiam, in a Writ of Error upon a Judgment in the Court of the Tower of London, upon this Promiſe which was to procure him to be Rector of the Tower, which is a Donative with Cure of Souls of the King's Gift. Intratur

(x) Cro. Car. 337. 353. 361. S. C. adjudged upon a Writ of Error. So Jones 341. S. C. adjudged.

ror, and the firſt Judgment reverſed accordingly.

Trin.

Trin. 9 Car. Rot. 714. Paſch. 10 Car. this was ſo reſolv'd again by all the Court, and the Judgment given in the Tower revers'd accordingly.

(y) Cro. Car. 273. S. P. per Curiam Con. Palm. 293. S. P. dubitatur. And vide Stil. 411. Winch. 114. 120, 121. and 1 Vent. 198. per Dod' & Whit', but Noy arguend' Con.

14. (y) If a Man promiſes to pay Uſe for the Forbearance of Money according to the Rate of 10 l. for the 100 l. per Annum, tho' this is not made void by any Statute, yet is it made void by the (z) Common Law, and no good Conſideration to maintain the Action. Mich. 22 Jac. B. R. in the Caſe of (a) Oliver & Oliver, agreed per Dod' & Whitlock.

(z) 2 Rol. Rep. 240. S. P. arguend'. (a) 2 Rol. Rep. 469. S. C. and S. P.

(b) In the Original' tis A. and ſo appears plainly to be miſprinted.

15. If A. promiſes B. in Conſideration of a Marriage between A. and C. the Daughter of B. that he will pay to (b) B. 100 l. at a certain time after; and in the mean time, to pay him according to the Rate of 8 l. for the Intereſt thereof; this is a good Conſideration, eſpecially being upon a Marriage, and not for Money Lent. Trin. 10 Car. B. R. between Chaplyn & Diſpline adjudged in a Writ of Error upon a Judgment in B. and the firſt Judgment affirmed. Intratur Paſch. 10 Car. B. R. Rot. 202. and then cited Paſch. 5 Car. Rot. 134 B. R. between Norton & Hinchly, adjudged accordingly.

16. If A. ſurrenders a Copyhold to B. upon Condition that if he pays 80 l. to B. at a certain Day, that then the Surrender ſhall be void, and after it is agreed between them, that A. ſhall not pay the Money, but ſhall forfeit it, Et in Conſideratione inde B. promiſes to pay to A. at a certain Day 60 l. or 6 l. per Annum from the ſaid Day pro uſu & intereſſe of the ſaid 60 l. till it be paid. In an Action upon the Caſe upon this Promiſe this is a good Conſideration; for this 6 l. ſhall be taken to be intereſſe damnorum and not lucri, and but limited as a Penalty for Nonpayment of the 60 l. as a Nomine pœnæ in an Obligation with Condition. Mich. 22 Jac. B. R. between (c) Oliver & Oliver adjudged, this being moved in Arreſt of Judgment, the which Intratur Trin. 21 Jac.

(c) 2 Rol. Rep. 469. S. C.

17. If *A.* Levies a Plaint in the Court of *Stepney* againſt *B.* upon which a Precept is directed to *C.* the Bailiff there to Attach the Goods of *B.* and thereupon *C.* Attaches certain of the Goods of *B.* and *A.* in Conſideration that *C.* will deliver thoſe Goods to him to deliver at the next Court, aſſumes and promiſes to ſave *C.* harmleſs, *&c.* The Conſideration is Void and againſt Law, for the Bailiff ought not to deliver them to the Plaintiff. *Paſch.* 33 *Eliz.* between (a) *Mead* and *Bigot. Cro. Eliz.* 230. adjudged.

(a) 3 Leon. 236. S. C. adjudged.

18. If *A.* being ſeiſed of Lands in Fee enters into a Recogniſance to *B.* and after makes a Feoffment of theſe Lands to *C.* who in Conſideration that *B.* will aſſign to him the Recogniſance aſſumes and Promiſes to pay him 80 *l.* this is a good Promiſe, for the Conſideration being to aſſign to the Tertenant it operates by way of Diſcharge, and is clearly lawful; otherways of an Aſſignment to a Stranger. *Paſch.* 38 *Eliz.* between *Barrow* and *Gray. Cro. Eliz.* 551. adjudged.

19. If *A.* brings *B.* to a Common Inn of which *C.* is Hoſt, and affirms to *C.* that he hath Arreſted *B.* by vertue of a Commiſſion of Rebellion, and in Conſideration that *C.* will keep *B.* as a Priſoner by the Space of one Night, aſſumes and promiſes to ſave *C.* harmleſs, *&c.* if *B.* recovers againſt *C.* in an Action of falſe Impriſonment, *C.* may have an Action againſt *A.* upon this Promiſe; for tho' the Conſideration, *viz.* the keeping of *B.* was unlawful, yet becauſe it did not appear to C. to be ſo, the Promiſe to ſave him harmleſs was good. *Mich.* 20 *Jac.* between (c) *Fletcher* and *Harcourt. Hut.* 55. adjudged.

(c) Winch. 48. S. C. adjudged, but Hob. ſaid (perhaps there may be a Diverſity where a publick Officer and where a private Man (as in the principal Caſe) makes the Arreſt; but becauſe the Defendant had pleaded Non Aſſumpſit, which implied the Impriſonment was lawful, he agreed Judgment ſhould be given for the Plaintiff.

20. (a) But if it appears that the Act which is to be done is unlawful, as if *A.* in Conſideration that *B.* will beat *C.* promiſes to ſave *B.* harmleſs, the Conſideration is void. *Hut.* 56. *per Curiam.*

(a) Winch. 49. S. C. and S. P. per Hutton. 2 Lev. 174. like Point adjudged, where the Defendant in Conſideration of 20 s. aſſumed to pay 40 s. if he did not beat J. S. out of ſuch a Cloſe.

21. (b) If *A.* is in Execution at the Suit of *B.* and *C.* in Conſideration that the Gaoler will permit *A.* to go at large, aſſumes and promiſes to (c) him that *A.* ſhall pay the Debt by a certain Day, and that he the ſaid *C.* will ſave the Gaoler harmleſs, the Promiſe is void, becauſe the Conſideration is againſt Law. *Hill.* 8 *Jac.* between (d) *Martin* and *Blithman.* *Yelv.* 197. adjudged.

(b) Hetl. 175. S. P. adjudged. 10 Co. 102. S. P. agreed per Wray Chief Juſtice; and that if ſuch Promiſe was not void by the Common Law, it is made void by the Statute 23 H. 6. Fetherſtone and Hutchinſon. like Point. Cro. Eliz. 199. adjudged. 3 Leon. 208. adjudged. (c) But ſuch Promiſe to the Plaintiff is good, for that he may lawfully Diſcharge him. Cro. Eliz. 190. adjudged. (d) 2 Bulſ. 213. S. C. adjudged per tot' Curiam. Godb. 250. S. C. adjudged, the Promiſe being to pay the Gaoler Money according to the Report of theſe Books.

22. (e) If *A.* is arreſted, and *C.* in Conſideration that the Bailiff will ſuffer *A.* to continue in the Houſe of *C.* till the next Morning, aſſumes and promiſes then to deliver him in ſafe Cuſtody to the Bailiff, the Conſideration is good and not againſt Law. *Paſch.* 15 *Car.* 2. Between (f) *Benskin* and *French*, 1 *Sid.* 132. adjudged *niſi, &c.* upon a Motion in Arreſt of Judgment after a Verdict for the Plaintiff, and the Court ſaid they would not intend the Bailiff was ever abſent from *B.* ſo that it could be no Eſcape.

(e) Freak and Clark, S. P. 2 Lev. 17. dubitatur, but adjudged. Where the Promiſe was made to the Bailiff in Conſideration that he would permit the Priſoner to continue at the Houſe of J. D. for three Days, &c. 2 Keb. 805. ſaid the Court inclined that the Conſideration was not good. (f) 1 Lev. 98. S. C. adjudged niſi, the Promiſe being to deliver him, or pay 10 l. and the Action being brought by the Plaintiff himſelf, who declared upon a Promiſe to the Bailiff, ex parte Quer'. ſo that if he was out of Cuſtody, it muſt be intended by the Aſſent of the Plaintiff, becauſe the Promiſe was made to the Bailiff ex parte Quer', and by bringing the Action he has affirmed his Aſſent. 1 Keb. 483. S. C. the Action being brought by the Plaintiff, and laid as in Lev.

23. If *A.* enters into a Recognizance to *B.* and *B.* imploys *C.* an Attorney, to ſue Execution thereupon; upon which *A.* in Conſideration that *C.* will forbear to proſecute him thereupon, promiſes, *&c.* the Conſideration is good, for it ſhall be intended he had Authority from his Client to proceed or not, as he thought requiſite. *Trin.* 18 *Car.* 2. between (g) *Ruſſel* and *Haddock.* 1 *Sid.* 294. adjudged upon Demurrer.

(g) 1 Lev. 188. S. C. adjudged, but differs much in the Report; for the Plaintiff declared, whereas J. S. had recovered a Judgment againſt the Defendant, and J. S. had made a Letter of Attorney to the Plaintiff to recover and receive it to his own Uſe, &c. 2 Keb. 75. 80. S. C. adjudged niſi, and ſtated as in Sid.

24. If (h) the Father of *A.* was indebted to *B.* and *A.* promiſes *B.* that if *B.* will bring two Witneſſes before a Juſtice of Peace, who upon their Oaths ſhall depoſe that the Father of *A.* was ſo indebted to *B.* that then he will pay it, if *B.* does produce his Witneſſes, *&c.* he may have an Action upon this Promiſe againſt *A.* for the Conſideration is not unlawful, nor the Oath Prophane. *Mich.* 25 *Car.* 2. between *Amy* and *Andrews*, 1 *Mod.* 166. adjudged by *Windham* and *Adkins*, contra *Vaughan*, who held that ſuch an Oath illegally adminiſtred and taken, was within the Statute of Prophane Swearing.

(h) Cro. Eliz. 469, 470. bis. like Point, where the Conſideration was to take ſuch Oath before the Mayor of London. Wyet and Prettiman, like Point, 1 Sid. 283. adjudged. Raym. 153. adjudged. 1 Keb. 26. 44. adjudged, where the Conſideration was to take ſuch Oath before a Maſter in Chancery. 2 Sid. 123. like Point adjudged, where the Oath was to be taken before a Maſter in Chancery, and a like Point there cited to have been adjudged, where the Oath was to be taken before a Judge of Aſſiſe.

(U) Upon an Assumpsit.

Consideration.

1. If an Infant takes up certain Commodities of a Mercer in London, at a certain Price, who after for Non-payment of the Money, threatens to sue him, and the Mother of the Infant promises to pay him if he will not sue him; this is not any Consideration to maintain the Action, in as much as the Infant was not by Law chargeable for the Money. (a) Withipolle's Case adjudged; cited Pasch. 42 Eliz. B. R.

(a) Poph. 178. S. C. cited as adjudg'd Con. but said to have been reversed after in the Exchequer Chamber. New Dier 272. a Margine S. C. cited Con. the Promise being there laid to be made by the Infant himself. Latch. 21. S. C. adjudged. Cro. Eliz. 126. S. C. adjudged. 1 Leon. 113. S. C. adjudged. Owen 94. S. C. adjudged, according to the Report of which Books, the Promise was made by the Executrix of the Infant, in Consideration of Forbearance of her; and according to the Report by Owen, the Infant had entered into Bond for Payment thereof.

2. (b) If an Infant enters into an Obligation for a certain Sum of Money, and after the Obligee brings Debt upon the Obligation, and procures a Latitat to arrest him, and the Obligor being of full Age, and having Notice thereof, comes to the Obligee, and says to him, That if he would not Arrest him, he would pay him the Money; this is not any Consideration to maintain an Action, in as much as the Infant might have avoided the Obligation by Plea. Pasch. 42 Eliz. B. R. between (c) Monnings and Knoppe.

(b) Burton and Edmunds like Point. 3 Leon. 164. adjudged con. 4 Leon. 5. adjudged con. Godb. 158. adjudged con. 1 Leon. 114. cited con. New Dier 172. a Margine con. Cro. Eliz. 127. cited con. (c) Cro. Eliz. 700. S. C. and the Opinion of Fenner according, but Clinch con. & adjornatur.

Fol. 19.

3. If A. a Feme covert makes an Agreement with B. to pay him 100 l. in Marriage with C. her Daughter, and upon this D. the Brother of A. promises B. in Consideration that he will marry C. the Daughter of A. that he will procure A. to perform the said Agreement with B. upon which B. marries C. this is a good Promise, upon which B. may bring an Action upon the Case against D. tho' the Agreement between A. and B. was not of any Force, or binding between A. and B. A. being a Feme covert, for this was an Agreement made, tho' of no Effect in Law. Pasch. 14 Car. B. R. between Marsh and Farrant, per Curiam præter Bark; who held contra, because the Agreement was void; Adjudged in a Writ of Error upon a Judgment in Exeter, and the Judgment affirmed accordingly. Intratur Pasch. 13 Car. Rot. 102.

4. If an Infant delivers to B. 20 l. and in Consideration thereof B. promises to build him an House, this is no good Consideration; for tho' the 20 l. was delivered by the Hand of the Infant, yet this is voidable by him. Mich. 13 Jac. B. per Winch. But vide the same Case as it seems for a Horse. Hob. Rep. 105. between (d) Austen and Gervas per Hob. because it is but voidable to be recovered back by Action of Account.

(d) Hob. fol. 77. S. C.

5. If A. exhibits a Bill in Chancery against B. supposing thereby that he had delivered 300 l. to B. in Trust, upon which B. in Consideration that A. would end all (e) Suits against him in Chancery, promises to pay him 100 l. tho' A. has Remedy for it at Common Law by Writ of Account; yet this is a good Consideration, so as to have an Action upon the Case upon the Assumpsit, because the Money was delivered in Trust, which is proper for the Chancery, and the Suit there is a Matter of Charge. Mich. 10 Jac. B. R. between Sir J. Pooly and Gilbert, adjudged.

(e) In the Original 'tis touts faits, and so appears to be misprinted.

6. (f) If

6. (f) If A. ſues a Writ of Privilege againſt B. and B. in Conſideration that A. will at the Requeſt of B. forbear further to proſecute the ſaid Writ, promiſes 50 l. to A. this is a good Promiſe (g) tho' it be not averr'd that the Plaintiff had any good Cauſe of Action; for the Promiſe implies a Cauſe in as much as B. deſired a Stay, this alſo requires a Loſs of the Writ and a Delay of the Suit. Hob. Rep. c. 278. between (h) Bedwell and Cotton adjudged.

(f) So if the Plaintiff declares that whereas he was about to ſue the Defendant, the Defendant in Conſideration he would forbear, &c. aſſumed, &c. this is a good Declaration, tho' it does not appear that he was about to Sue in a Court that had Juriſdiction. Raym. 203, 204. — But where the Conſideration was, that the Plaintiff ſhould ſtay his Suit upon, a Subpena which he had taken out of Chancery, &c. but it appeared that the Plaintiff was not intitled to any Relief, it was held the Conſideration was void. Tolp and Windham. 2 Leon. 105. adjudged. Cro. Eliz. 206. adjudged. (h) Hob. fol. 216. S. C. adjudged.

(7) (*) If A. has in his Cuſtody 33 Cloaks of the Goods of J. S. the which 33 Cloaks he intends to retain in his Cuſtody till J. S. pays him 14 l. which he owes him; upon which B. comes to A. and in Conſideration he would deliver the 33 Cloaks to him, to diſpoſe of them according to his Pleaſure, he promiſes to pay to A. the ſaid 14 l. this is a good Conſideration for A. to have an Action againſt B. tho' it was objected, perhaps A. had no Cauſe to retain the Cloaks, becauſe A. is chargeable in Detinue by J. S. Paſch. 6 Car. B. R. between Grimett and Powle adjudg'd, this being moved in Arreſt.

(*) Hut. 101. like Point. vide 1 Rol. Rep. 27.

8. (i) If L. be indebted to M. and L. delivers to M. certain Goods to the Value of 100 l. as a Pawn till he pays him the Debt, and after J. S. comes to M. and promiſes to pay him the Debt in Conſideration that he will deliver to him the ſaid Pawn, upon which he delivers it to him accordingly; this is a good Conſideration to have an Action upon the Caſe againſt him. Mich. 7 Jac. B. between Levett & Moys, per Curiam.

(i) Moze and Conham, S.P. 2 Brownl. 273. dubitatur. Owen 123. by three Judges againſt 1. adjudged, 1 Brown. Ent. 54. a like Precedent.

9. If B. the Daughter of A. be Heir apparent to C. and D. promiſes to A. the Mother, in Conſideration that ſhe would (k) conſent and agree that the ſaid B. her Daughter ſhould marry his Son, that he would give to the ſaid A. 100 l. upon which A. conſents, and the Marriage takes Effect; this is a good Conſideration, for Nature has given the Power of Diſpoſing to Parents, and in Nature their Children are bound to obey them. Paſch. 12 Jac. B. between (l) Greiſly and Loudher adjudged. Hob. R. 15. the ſame Caſe.

(k) In Conſideration the Plaintiff would give his good Will and Furtherance to a Marriage, &c. Moor 595. Pl. 808. appears. — In Conſideration the Plaintiff would procure the Conſent of her Maſter for the Defendant to have a Shop in his Houſe, &c. a good Conſideration. Godb. 216. —— In Conſideration the Plaintiff would procure the Conſent of the Leſſor, that the Leſſee might aſſign his Term, &c. Hut. 39. adjudged. (l) Moor 857. Pl. 1176. S. C. adjudged by 3 againſt 1. 1 Brownl. 18. S. C. adjudged. Hob. fol. 10. S. C. adjudged by 3 againſt 1. Hut. 39. S. C. cited.

10. If A. in Conſideration that B. the Mother of C. at the Inſtance and Requeſt of A. would permit her Son to ſerve him for ſuch a Time, promiſes B. to pay her 10 l. &c. this is a good Conſideration for B. to have an Action upon this Promiſe againſt A. tho' it does not appear that C. was within Age or within the Government of B. or of what Age he was, viz. of the Age of 50, or more; for there is a Conſideration of Nature and Reſpect that the Son owes to the Mother, and it is a good Conſideration for her not to hinder her Son to ſerve, and this is done at the Requeſt of A. Mich. 15 Car. B. R. between Coppinge and Toulove, per Curiam adjudged; this being moved in Arreſt of Judgment. Intratur Trin. 15 Car. Rot. 223.

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11. (m) If A. is indebted to B. in 20 l. and upon this B. makes a Letter of Attorney to C. to ſue him for it, and to recover the Debt to his own Uſe, and to releaſe it at his Pleaſure, and after A. in Judgment would forbear to take out Execution, &c. Hard. 71. &c. adjudged a good Promiſe. Ruſſel and Haddock. 1 Lev. 188. adjudged. But vide the great Difference of the Report of that Caſe. 2 Keb. 75, 80. 1 Sid. 294.

(m) So in Conſideration the Aſſignee of a

Conſideration that C. will forbear to ſue him for a certain Time, Promiſes C. to pay the Debt, this is a good Conſideration, for the Forbearance of the Suit of which he had Power, is a meritorious Conſideration. 1651. Between (n) Pit and Bridgwater, adjudged per Curiam; this being moved upon a Writ of Error.

(n) Hard. 74. S. C. cited.

12. (o) If A. be indebted to B. by Bill, and B. is indebted to C. and B. in Diſcharge of his Debt due to C. aſſigns the Bill of A. to him, and before the Day of Payment of the Money, A. comes to C. and promiſes him, that if he will forbear him the Payment of the Money for a Week, that then he will pay him, upon which C. forbears him; yet is not this any Conſideration to maintain an Action upon this Promiſe; for that notwithſtanding the Aſſignment of the Bill, yet the Property of the Debt remained always in the Aſſignor Paſch. 42 Eliz. B. R. between Mowſe and Edney, per Curiam.

(o) Potter and Turner, like Point. Palm. 185. adjudged. Winch. 7. adjudged, tho' the Aſſignee had Power to Releaſe and Compound, &c.

13. If B. is indebted to A. and C. is indebted to B. by a (p) Statute, and B. delivers the Statute of C. to A. for the Security of his Debt, but without any Aſſignment of the Statute or Letter of Attorney to ſue thereupon, and after B. dies, and D. pretending to be his Executor, promiſes A. in Conſideration that A. would deliver the ſaid Statute to him, that he himſelf would pay the ſaid Debt that was due to him by B. tho' it does not appear that (q) D. can have any Benefit by this Statute, in as much as it does not appear that he is Executor; yet becauſe he pretends to be Executor, and the Statute was in the Power of A. ſo that he might have cancelled it; this is a good Conſideration to found an Action upon, this Aſſumpſit. My Rep. Paſch. 12 Jac. in Camera Scaccarii. between (r) Lane and Sir Henry Mallory, adjudged upon a Writ of Error. Vide the ſame Caſe. Paſch. 12 Jac. B. Hob. Rep. 6.

(p) Cro. Eliz. 821. like Point in Caſe of a Bond adjudged by two againſt one, and ſaid, that by the Delivery, an Intereſt in the Deed paſt tho' the Debt it ſelf could not.

(q) In the Original 'tis C. and ſo appears plainly to be miſprinted. (r) Cro. Jac. 342. S. C. adjudged. Hob. fol. 4. S. C. adjudged.

14. If there be a Diſcourſe between A. and B. of a Bargain for certain Cattle, and C. ſays to A. that if he ſells any Cattle to B. for a certain Sum of Money to be paid at a Day to come; that if B. does not pay it, that then he himſelf will pay it; and thereupon the ſaid A. ſells certain Cattle to B. for 20 l. Part thereof to be paid preſently, and the Reſidue at a Day to come; this is a good Conſideration for A. to have an Action againſt C. if B. does not pay the Money at the Day, tho' all the Money was not to be paid at a Day to come. Hill. 43 Eliz. B. R. between (s) Turner and Philips.

(s) Cro. Eliz. 807. S. C. adjudged. per totam Cur' preter Poph.

15. If S. and B. are bound in an Obligation to J. S. to pay a certain Debt for J. D. and the Obligation being forfeited, B. ſays to S. that if he will pay all the Principal to J. S. he promiſes to pay him one Moiety, and thereupon S. pays all accordingly to J. S. S. may have an Action upon the Caſe upon the Promiſe againſt B. if he will not pay him the Moiety; for tho' he might have been charged for the whole Debt by the Obligee, yet the Payment thereof without Suit, and in Diſcharge of B. is a good Conſideration to maintain the Action. Paſch. 14 Jac. B. R. between (t) Bagg and Slade adjudged in a Writ of Error.

(t) 1 Rol. Rep. 354. S. C. adjudged. and 3 Bulſ. 162. S. C. adjudged per tot' Cur'.

16. Upon a Communication of a Marriage between the Son of J. S. and the Daughter of J. D. J. S. offers 80 l. to the ſaid Son in Marriage with his Daughter; but the Son ſays he will not marry his Daughter unleſs he will give him 90 l. with her; upon which the Daughter of J. D. perſwades her Father that he ſhould give the 90 l. according to the Requeſt of the Son, and ſhe promiſes her Father that ſhe will ſo manage it, that after the Marriage ſhe will repay the 10 l. back to her Father; upon which J. D. pays the 90 l. and the Marriage takes Effect; yet no Action lies for the Father of the Wife, againſt the Son and his Wife, upon the ſaid Promiſe; for the Conſideration is not good, but the Promiſe was fraudulent

Fol. 21.

dulent and Covinous, to defraud the Son of his Portion, and if this should be allowed, every Man might be cheated of his Wife's Portion. Mich. 24. 43. Eliz. B. R. (u) Collin's Case adjudged.

(u) Moor 468. Pl. 668. S. C. and there held the Action ex rigore was maintainable; but because of the Practice, after a Verdict for the Plaintiff, the Judgment was staid; and Popham said, that if the Defendant had pleaded the Covin between the Father and the Daughter, this would have destroyed the Action vide.

17. If A. and C. are bound jointly and severally to D. in an Obligation of 80 l. for the Payment of 47 l. and A. gives a Counterbond to C. to pay the Money to D. at the Day of Payment, but does not pay it, by which the principal Bond and Counterbond are forfeited, and upon this D. sues C. and has Judgment against him upon the said Obligation of 80 l. and before the Judgment A. had paid to D. 7 l. Parcel of the said 47 l. principal Debt, and after the said Judgment in Consideration of the Premisses, and that the said A. at the Instance and Request of D. then paid to D. the said 47 l. principal Debt, the Defendant promised not to proceed in the said Suit against the said C. this is a good Consideration; So if he takes C. in Execution after upon the Judgment, an Action upon the Case lies tho' A. had forfeited the said Obligation of 80 l. and so was bound by the Obligation to pay more than he did pay; for it is a good Consideration for D. to have the Money in his Purse, being before but a Chose in Action. Hill. 10 Car. in Camera Scaccarii, between Stubbard & Farrer, adjudged per Curiam, in a Writ of Error upon a Judgment in B. R. and the Judgment affirmed accordingly. Intratur Trin. 9 Car. Rot. 20.

18. If A. being indebted to B. in 10 l. makes C. his Executor and dies, C. being but of the Age of 14 Years, and upon this B. intends to procure Administration during the Minority of C. to be granted to him, and thereof gives Notice to E. the Wife of A. and Mother of C. and upon this E. in Consideration that B. at the Request of E. will permit Letters of Administration during the Minority of C. to be granted to her, and would give Day to E. for the Payment of the said Debt till the Return of C. out of the Realm of Ireland into England, she does promise to pay B. upon Request, after the Return of the said C. out of Ireland into England, this is a good Consideration for (x) this Administration durante Minoritate differs from another Administration where the Ordinary is by the Statute under the Penalty of 10 l. bound to grant it to the (y) Wife; but this to prevent the Vexation is a good Consideration, for what Remedy could she have if the Ordinary would not grant it her? and tho' C. might return after his full Age, and when the said E. should not have Assets in her Hands yet is not this material, in as much as she ought to pay it out of her own Estate, being upon her own Promise. Pasch. 12 Car. B. R. between Turton & Gardener adjudged, this being moved in Arrest of Judgment. Intratur Hill. 11 Car. Rot.

(x) 1 Brownl. 31. S. P. agreed. Hob. 250. S. P. per Curiam.

(y) Therefore such a Promise by the Wife in such a Case is void. Holt and Tilcock. Moor 685. Pl. 946. adjudged. 1 Leon. 240. per Curiam. Clark and Spurden, March 55. appears. Yet vide 1 Brown. Ent. 34.

19. If A. be seised in Fee of Lands, and there being a Communication between A. and B. touching the Purchase of this Land from A. by B. and upon this B. comes to C. the Wife of A. and promises her in Consideration that she would not hinder the Bargain, that he would give her 10 l. or a Riding Suit, the Husband and Wife may have an Action upon this Promise, for this is a good Consideration not to hinder the Bargain to have the Assistance of the Wife, and her good will to the Bargain. Pasch. 11 Car. B. R. (*) between (z) Fawcett & Childers adjudged per Curiam; this being moved in Arrest of Judgment.

* Fol 22.

(z) 1 Rol. Abr. 32. Z. 12. S. C.

20. (a) If

20. (a) If A. in Consideration that B. promised him to take him to be her Husband, promises to take B. to be his Wife infra breve tempus after, and after A. Marries another Woman, B. may have an Action upon the Case against A. upon this Promise, for this is a good Consideration; tho' it was objected that it was a Spiritual Consideration; Pasch. 14 Car. B. R. between Stretch and Parker, adjudged per Curiam in a Writ of Error out of Alcester Court, and the first Judgment affirmed. Intratur Mich. 12 Car. Rot. 21.

(a) Cart. 233. S. P. adjudged by 3 against 1. Rutter and Hebden S. P. 1 Leon. 147. adjudged. 1 Sid. 18. adjudged. Stile 295. 303. like Point adjudged. And vide 1 Keb. 866. S. P. appears.

21. If A. be indebted to B. in 200 l. and A. appoints B. to receive it from C. and for the better Satisfaction of B. A. delivers certain Bills of Exchange to one D. the Factor of B. for Payment thereof; and upon this C. promises B. that in Consideration that (b) he would deliver to him the said Bills of Exchange so delivered to D. the Factor of B. that he would pay the said 200 l. due by A. to B. this is a good Promise, for the Consideration is valuable, for tho' C. can do nothing with the Bills, being a Stranger to them, yet it may be some Advantage to him to have the Possession of them, at least it may be some Prejudice to B. and therefore the Consideration is good. Trin. 15 Car. B. R. between Paynter and Chamberlyn, per Curiam adjudged; this being moved in Arrest.

(b) In the Original these Words, viz. he would deliver, are wanting, without which the Sense seems imperfect, and the Book misprinted.

22. If B. in Consideration that A. at the special Instance and Request of B. would permit B. to have and hold a Messuage and Land, then in the Occupation of B. una cum proficuis & commoditatibus inde provenientibus to his own Use, promises A. to pay to him 13 s. at Michaelmas after, for Rent for the Premisses, and also at the said Feast to deliver the Possession of the Premisses to A. in as good Repairs as it was at the Time of the Demise aforesaid; this is a good Consideration to maintain an Action, tho' it does not appear that A. had (c) any Estate therein at the Time of the Promise, and tho' it appears that B. was then in Possession thereof. Pasch. 16 Car. B. R. between Adas and Ayers adjudged, this being moved in Arrest of Judgment. Intratur Hill. 15 Car. Rot. 343.

(c) Cro. Eliz. 859. S. P. adjudged Con. 2 Rol. Rep. 435. like Point adjudged. 1 Vent. 211, 212. like Point adjudged. Hard. 366. S. P. dubitatur. 4 Leon. 2. like Point adjudged. vide 2 Keb. 81. 82. 1 Sid. 323. Chapman and Southwick, like Point. 1 Sid. 323. adjudged. 2 Keb. 182. adjorn', 1 Lev. 204. adjudged, and vide 2 Lev. 33.——But upon Evidence it must be proved what Estate the Plaintiff had; So that it may appear that there was a Consideration. 2 Rol. Rep. 435. but after a Verdict for the Plaintiff the Court will intend it was proved. 1 Vent. 211, 212. 1 Lev. 179.

23. (d) In an Action upon the Case, if the Plaintiff declares that A. the Husband of the Defendant was indebted to him, and died possessed of divers Goods, the (e) which Goods after his Death came to the Defendant legitimo modo, and that the Defendant in Consideration that the Plaintiff would forbear the said Debt for a certain Time, assumed and promised to pay the Debt; this is a good Consideration; for tho' there be not any (f) sufficient Matter shewn, by which it may appear that the Defendant could have any Benefit by this Promise; yet in as much as the Words are, that he will (g) forbear the Debt and not the Defendant; so that the Promise is to forbear all the World, and every Stranger that may be sued, viz. the Executor or Ordinary; this is a good Consideration, for it is a Prejudice to the Plaintiff, and an Advantage to a Stranger. Mich. 22 Jac. B. R. between Hill and Baylie, per Curiam affirmed, the which intratur Hill. 21 Jac. Rot. 836. M. 1651. between (h) Hume and Hinton, adjudged per Curiam, this being moved in Arrest of Judgment. Intratur. 1651. Rot. 1446. But in this Case it was not alledged that any Goods came to the Hands of the Defendant which were the Goods of the Debtor; and in this Case the Consideration was to stay for his Money till, &c.

(d) Goodwin & Willoughby, like Point. Poph. 177. dubitatur. Latch. 141. dubitatur. Palm. 441. dubitatur. Hard. 73. cited.

(e) Post. Pl. 58.

(f) But if the Plaintiff declares that the Defendant in Consideration the Plaintiff would forbear to sue the Defendant ut Administratrix of J. S. did assume, &c. This is a good Declaration, and a sufficient Averment that she is Administratrix. Downs and Beck, 1 Lev. 222. adjudged. 1 Sid. 337. adjudged. Therefore Stil. 405. can't be Law. (g) The same Diversity Raym. 32. per Twisden, 1 Sid. 242. per Curiam. Post Pl. 33. (h) Stile 304. S. C. adjudged. Hard. 73. S. C. cited Con. Raym. 32. S. C. cited.

24. (i) If

24. (i) If A. be bound in an Obligation of 60 l. to B. conditioned for Payment of 30 l. at a Day to come, and after the Day of Payment, the 30 l. not being paid, in Consideration that A. would pay the 30 l. (*) to B. in Satisfaction of the Obligation, B. promises that he will accept it in Satisfaction, and that he will deliver up the Obligation, if B. does not deliver up the Obligation to A. he may have an Action upon the Case upon this Promise; for tho' legally after the Obligation forfeited, 30 l. can be no Satisfaction of 60 l. yet to have the Money in his Hands (k) without Suit, is a good Consideration to maintain this Action upon the Promise. Trin. 15 Car. between Rawlins and Lockey adjudged, this being moved in Arrest.

(i) Cook and Helvet. S. P. 1 Leon. 238. cited and agreed per Curiam. Cro. Eliz. 194. cited and agreed per Gaudy.

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—Greanleaf and Baker, like Point, where the Promise was to deliver to the Plaintiff a Bond, in which J. S. was bound to the Defendant, and a Letter of Attorney to the Plaintiff to sue J. S. thereupon. 1 Leon. 238. by 2 Judges Con. Cro. Eliz. 193. by 2 Judges Con. Post Pl. 53. — So Flight and Crasden like Point, where the Consideration was to pay the Money at the Day. Cro. Car. 8. adjudged. Hut. 76. adjudged. Hut. 101. cited. (k) 1 Lev. 198, 199.

25. (l) If A. be indebted to B. in 20 l. and B. says to A. that he will sue him for the Debt, upon which A. says to him, that if he will forbear him per paululum tempus, that he will pay him; this is no good Consideration of an Assumpsit, for that he may sue him presently. Pasch. 6 Jac. B. between Brian and Salter adjudged. Pasch. 8 Car. B. R. between (m) Brooke and Dowse, adjudged in a Writ of Error upon a Judgment given econtra in the Cheny Court at Winchester, and the Judgment there given reversed. Pasch. 15 Car. B. R. between Stiles and Rowland, adjudged in a Writ of Error upon such a Judgment in B. and this reversed accordingly for this Error. Intratur Mich. 14 Car. Rot.

(l) Gill and and Horwood S. P. because the Debt it self is a good Consideration. 1 Leon. 61. adjudged con. Goulf. 48. adjudged con. Post Pl. 30. vide. Tolhurst and Brickenden, like Point. Cro. Jac. 250. adjudged. 1 Bulf. 91. adjudged. 3 Leon. 200. like Point per Curiam Con. 2 Rol. Rep. 368. like Point, adjudged. Cro. Eliz. 19. like Point, adjudged. Post Pl. 46. like Point, Con. 47. vide. —In Consideration that he would forbear him per aliquo parvo tempore, viz. a Fortnight, &c. is good. Baker and Jacob. 1 Bulf. 41. (m) Cook and Dowse. Cro. Car. 241. S. C. and there said that Rule was given that the Judgment should be affirm'd. 1 Sid. 45. the Case of Cook and Dowse cited, as adjudged in Cro. Car. and denied to be Law.

26. If A. promises B. that in Consideration that he will forbear to sue him for a certain Debt, (n) pro aliquo tempore that he will pay him, and avers that he forbore him per unum annum, this is not a good Consideration; for aliquod tempus is as little as paululum tempus. Hill. 11 Car. B. R. between (o) Tilston and Clarke per Curiam, in a Writ of Error upon a Judgment in Shaftsbury, and the Judgment reversed accordingly. Intratur Trin. 11 Car. Rot. 687.

(n) Post Pl. 44, 45.—In Consideration the Plaintiff would give to the Defendant a Day of Payment, &c. adjudged a good Consideration. Cro. Eliz. 665. (o) Cro. Car. 438. S. C. adjudged, and the first Judgment reversed accordingly.

27. If A. leases Lands to B. at Will, and A. in Consideration that B will surrender to him the said Estate at Will, assumes and promises to B. that he will provide a Parsonage for J. S. this is no good Consideration to maintain an Action; for that he might have determined this Estate at Will at his Pleasure. Mich. 8 Jac. B. between (p) Kent and Prat per Curiam, where it was put in the Declaration that he was (q) possess'd of a Term, without shewing what Term, and therefore the Court took it to be a (r) Lease at Will.

28. But if in this Case it had been alledged that there was a Controversy between A. and B. whether this was a Lease at Will or for Years, and upon this the Assumpsit had been made as before; this had been a good Consideration. Mich. 8 Jac. B. per Coke.

29. (s) If A. in Consideration that B. will make an Estate at Will to him, such as Counsel shall devise, promises, &c. this is no good Consideration, for that he may presently after the Estate made, determine

(p) 1 Brownl. 6. S. C. and S. P. moved. (q) Hanf. Ent. 51. (r) Cro. Eliz. 565. like Point adjudged. (s) Cro. Eliz. 565. 6. S. P. adjudged.

(t) Poph. 183. S. C. and S. P. cited.

mine it. Mich. 12 Jac. B. between (t) Kelle and Tisdale, per Curiam.

30. In an Action upon the Case by A. against B. if the Plaintiff declares that they accounted insimul concerning, &c. and upon this Account B. was found 10 l. in Arrear to the Plaintiff; and upon this B. affirmed that he had paid it to J. S. to the Use of the Plaintiff, and upon this B. promised, that if he could not prove in a short Time, that he had paid it to J. S. to the Use of the Plaintiff, he would pay it to the Plaintiff, and avers that he had not proved it from the Time of the Promise to the Time of the Action brought, which was a Year; this is a good Consideration, for here he is found in Arrear (u) 10 l. and the Law makes a Promise to pay it, and tho' here a further Time is given him for his Advantage, and that it should be admitted that this Time is no considerable Time, and therefore void, (x) yet the Promise in Law stands good; But this Time is considerable, for the Time ought not to be so short, but that he may make his Proof within it, and here it was per unum annum, for here by the Words (short Time) is to be intended a reasonable Time to make his Proof. Trin. 1649. between Vigorous and Drake (*) adjudged per Curiam, in a Writ of Error upon a Judgment in Exeter. But the Judgment was reversed for another Error. Intratur Hill. 16 Car. Rot. 696. B. R.

(u) This in the Original is 16 l. and so appears plainly to be misprinted.

(x) Ante Pl. 26. vide. Gill and Horwood like Point. 1 Leon. 61. adjudged. Gouldf. 48. adjudged.

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31. If A. and B. at the Request of A. and for the proper Debt of A. are bound in an Obligation of 10 l. to C. and after A. makes D. his Executor and dies; and after B. and D. at the Request of D. Mange Anglice spend a Quarter of Lamb, Bread and Drink, to the Value of 5 s. in the House of J. S. and upon this there being a Discourse between them concerning the said Obligation, D. assumes and promises to B. in Consideration that B. would pay one half of the Reckoning for the said Quarter of Lamb, Bread and Drink, that he would pay the said 10 l. due upon the said Obligation, and upon this B. pays one half of the Reckoning; B. may well maintain an Action against D. upon this Assumpsit, for it appears that he is Executor of A. who was the Principal in the Obligation; and also he invited B. to eat and drink this for which the said 5 s. was to be paid; so that in Equity he ought to pay the Obligation and Reckoning also: And tho' as to the Host both are liable to pay the Reckoning, unless the Host knows B. to be invited, yet when a Debt is due jointly by two, it is a good Consideration that if the other will pay one Moiety, he himself will discharge the other of an Obligation for 10 l. for tho' the Benefit be but small, yet it is a Benefit, for when it was joint both might be sued; and if one does not appear, but is outlawed, the other may be compelled to pay all, and if the Judgment be against both, yet upon an Execution one may be taken in Execution. And upon such a Reckoning if one departs without Payment, the Host may compel the other to pay all before he goes, and so he has a Benefit by the Payment of a Moiety. Mich. 9 Car. B. R. between Moore and Bray adjudged; this being moved in Arrest of Judgment. Intratur Trin. 9 Car. Rot. 1144.

(y) Fowel and Trevinian. S.P. Con. Upon a Promise by an Executor. Cro. Eliz. 91. adjudged, for the Debt of the Testator makes a good Consideration. 1 Leon. 94. adjudged; but by this Report the Promise was to deliver Goods, &c. And vide 3 Leon. 129. Co. Ent. 2. b.

32. (y) If B. as Administrator to J. D. is indebted to A. in 20 l. and upon this, B. in Consideration that Administration is granted to him, and that he has Assets in his Hands, assumes and promises to pay the Debt tam cito as any Debt due to the Intestate comes to his Hands to the Value of the Debt, and after such a Debt comes to his Hands, yet no Action lies upon this Promise, for here is no Consideration to maintain this Action by which the Administrator should be charged out of his own Estate; for here the Consideration is not to forbear to sue, or any other Consideration. Trin. 14 Car. B. R. between Kitchinman and the Bishop of Ossory in Ireland, in a Writ of Error upon a Judgment in Ireland, and the Judgment reversed accordingly for this Error among others. Intratur Hill. 13 Car. Rot. 1141.

33. If A. (to whom the Teſtator was indebted) comes to the Executor, and ſays that he intends to ſue him for the Debt; upon which the Executor promiſes in Conſideration that the Plaintiff will forbear him for a reaſonable Time, he will pay him, and A. forbears to ſue him for a (a) reaſonable Time; this is a good Conſideration to charge the Defendant in an Action upon the Caſe out of his own Eſtate without Aſſets; for by this Promiſe it is intended as well to forbear to ſue the Executor, as to (b) forbear the Debt, and a Forbearance of Suit is a good Conſideration without (c) Aſſets (d) at the Time of the Promiſe. Mich. 14 Car. B. R. between Johnſon and Whitchcott, per Curiam, upon a Demurrer where the (e) Defendant pleaded that he had not Aſſets at the Time of the Promiſe made. Intratur Mich. 14. Rot. 588. the Word in Latin was toleraret.

(a) Poſt. Pl. 44. vide.

(b) Ante Pl. 22. vide.

(c) 9 Co. 94. b. S. P. Con. and that if there be no Aſſets, the Defendant may give it in Evidence; but yet 2 Bulſ. 278. it was ſaid by Coke, Chief Juſtice, that it had been ſeveral Times ſaid by Wray Chief Juſtice, that it is not needful to prove Aſſets, and that ſuch Promiſe is good without. Vide 3 Leon. 67. 1 Vent. 152. (d) So where a Bailiff aſſumes to pay the Debt of his Maſter, and it doth not appear he hath Aſſets in his Hand at the Time. Davison and Heyſlop. 2 Lev. 20. adjudged. 1 Vent. 152. adjudged, and ſaid it ſhould be intended after Verdict. Raym. 211, 212. adjudged. (e) Davis and Wright S. P. 1 Vent. 121. adjudged; but ſaid by the Chief Juſtice, if it had appeared upon the Declaration, it had been naught. 2 Lev. 3. adjudged.

34. (f) In an Action upon the Caſe by A. againſt B. if the Plaintiff declares that (*) C. the Husband of B. was indebted to him in 10 l. and after his Death B. his Wife being big with Child, in Conſideration that A. the Plaintiff would forbear to ſue her as Adminiſtrator of C. till ſuch a Day, B. promiſed to pay the Debt, and it is not ſaid in the Declaration that B. was the Adminiſtrator of C. this is no good Conſideration to have an Action upon the Caſe; for it does not appear that B. had any Thing to do with it, or to be charged for the Debt more than a meer Stranger. Mich. 9 Car. B. R. between Whitcher and Daves per Curiam, adjudged in Arreſt of Judgment after Verdict for the Plaintiff.

* Fol. 25.

(f) Quick and Coppleſton, 1 Sid. 243. S. P. agreed per Curiam. 1 Keb. 866.

35. In an Action upon the Caſe, if the Plaintiff declares, that whereas he had delivered 100 l. to the Defendant, the Defendant did promiſe to repay to the Plaintiff at a Day after (g) eaſdem 100 l. with a Recompence for it; Tho' if it ſhould be intended that he ſhould repay the ſame 100 l. in ſpecie, this could not be any Conſideration for the Promiſe, becauſe the Defendant could have no Benefit thereby, yet ſhall it be intended the ſame in Value, and not in Specie, and therefore a good Conſideration. Mich. 9 Car. B. R. between Cruſe and Berry adjudged in a Writ of Error. Intratur Trin. 9. Rot. 1163.

(g) So where the Declaration was to repay pred' 100 l. Yelv. 50. adjudged.

36. If A. and B. are bound in an Obligation of 10 l. to C. for the proper Debt of A. and after A. dies; and after E. being the Wife of A. promiſes B. in Conſideration that B. will pay the 10 l. to C. that ſhe will repay it to B. upon which B. pays it to C. No Action upon the Caſe lies againſt E. upon this Promiſe, becauſe there is no Conſideration why E. ſhould make ſuch Promiſe, and B. was before bound to pay it, and not E. Mich. 9 Car. between Weſtbie and Cockaine, adjudged in Camera Scaccarii in a Writ of Error, and the Judgment given in B. R. reverſed accordingly. Intratur Trin. 7 Car. B. R. Rot. 347.

37. In an Action upon the Caſe upon an Aſſumpſit by A. againſt B. if the Plaintiff declares that whereas he, viz. A. and Eliz. his Wife, the Adminiſtratrix of C. recovered by Judgment a certain Debt againſt J. S. and after the ſaid Eliz. died, and after Adminiſtration of the Goods of C. unadminiſtred was granted to the Plaintiff, and after the Plaintiff ſued out an Elegit upon the ſaid Judgment, and thereupon the Sheriff took an Inquiſition, whereby it was found that he had divers Lands, &c. ſubject to the Execution, and

this Inquisition was reduced into Writing, upon which there was a Colloquium between the Plaintiff and Defendant, concerning the Delivery of this Instrument, containing the said Inquisition to the Defendant, and upon this the Defendant did promise in Consideration thereof, to redeliver the said Instrument to the Plaintiff; upon which he did deliver it to the Defendant, who tho' requested, had not redelivered it; this is a good Consideration, tho' it appears by the Inducement, that the Plaintiff had no Cause to have the Elegit, in as much as the Judgment was in the Right of his Wife as Administratrix; so that the Husband upon the new Administration comes Paramount the Judgment, yet because the Action is grounded upon the Delivery and Redelivery of the Instrument, containing the Inquisition, this is a good Consideration to maintain the Action. Hill. 9 Car. B. R. between Cowche and Jefferys, adjudged upon a Writ of Error upon a Judgment in Lanceston, and the first Judgment affirmed accordingly. Intratur Hill. 7 Car. Rot. 993.

38. In an Action upon the Case upon a Promise, if the Plaintiff declares, that whereas the Defendant such a Day, had demised a Messuage to the Plaintiff for certain Years, in Consideration of 10 l. Rent per Annum, to be paid by the Plaintiff according to his Promise thereof made, the Defendant in Consideration thereof, did then promise to Dress the Meat (*) of the Plaintiff, after the Rate of 2 d. the Joint, from Time to Time during the Term, and to (a) find other Necessaries for him; this is a good Promise and a good Consideration, for the Acceptance of the Lease by the Plaintiff under the said Rent, was the Consideration of this Promise, for perhaps he would not have accepted this Lease under the said Rent, if it had not been for this Promise. Mich. 11 Car. B. R. between Arundel and Rowden dubitatur, this being moved in Arrest of Judgment. But after per Curiam this is a good Consideration. But after Judgment was given against the Plaintiff for another Cause, and Fault in the Declaration.

* Fol. 26.

(a) In the Original 'tis Viewer, and so appears plainly to be misprinted.

39. If A. makes a void Promise to B. and after a Stranger comes to B. and in Consideration that B. will relinquish the Promise made to him by A. he promises to pay him 10 l. This is no good Consideration to charge him, because the first Promise was void. Mich. 14 Jac. upon a Writ of Error at Serjeant's-Inn, between Bernard and Simons, put by Altham, and agreed per Curiam.

40. (b) If a Man sues a (c) Fieri facias to have Execution, and says to the Sheriff, Such are the Goods of the Party, shewing them to him; upon which, in Consideration that the Sheriff will execute the Execution upon those Goods he promises to save him harmless, this is no good Assumpsit, because he ought (d) to take Notice of them at his Peril. Mich. 14 Jac. B. R. in Sutheman's Case, held by Dod and Houghr'.

(b) Cro. Jac. 652. S. P. adjudged Con.

(c) In the Original 'tis Scire facias, and so appears plainly to be misprinted.

(d) Moor 457. Pl. 629. like Point adjudged, vide.

41. If A. delivers an Execution to the Sheriff at his Suit against B. and in Consideration that the Sheriff without any Fee will execute it, he promises to pay to him a certain Sum, which is as much as the Sheriff is allowed to take by the Statute of 28 Eliz. tho' it be admitted that the Sheriff can have no Remedy for his Fees; yet because it was lawful for the Sheriff to take his Fees, and he made the Execution at his Request, and this is for his Benefit, this is a good Consideration. Hill. 41 Eliz. B. R. between (e) Staunton and Suliard.

(e) Moor 468. Pl. 669. S. C. and 8. P. appears. Cro. Eliz. 654. S. C. adjudged.

42. If B. is oblig'd to A. in 200 l. and A. being indebted in so much to the King, assigns the Obligation to the King, and after B. in Consideration that A. will forbear to procure any Process against him for the said Debt till Hillary Term next following, assumes and promises to pay to A. 200 l. this is no good Consideration to maintain an Action, because by the Assignment the

Debt was transferr'd to the King, and therefore the Forbearance by A. to procure Process, is no Benefit or Ease to B. (e) because it may be awarded against him for the King, notwithstanding his Promise. Hill. 41 Eliz. B. R. between (f) Bowes and Pawlet adjudged upon a Writ of Error.

(e) But to stay the Execution of a Cap' Utlegat' which he had taken out against the Defendant, &c. is a good Consideration, because the Cap' Utlegat' is founded upon a Suit commenced by the Party, Jennings and Hetly. Cro. Eliz. 909. adjudged by three against one. Yelv. 19. adjudged by three against one. (f) Cro. Eliz. S. C. 653. adjudged by all the Justices and Barons upon a Writ of Error in Cam' Scac'. Moor 701. Pl. 974. S. C. adjudged, and the first Judgment revers'd accordingly.

43. If A. promises B. in Consideration that he will not sue an Attachment out of Chancery upon a Decree which is there against him, that then he will pay him 20 l. (it seems it is intended that the Decree was at his Suit) this is a good Consideration to maintain an Action upon the Case; for hereby shall he avoid the Imprisonment of his Body, of which the Chancery had Power for the Contempt of the Decree. Hill. 42 Eliz. B. R. between (g) Colston and Carre, per Curiam præter Popham, and there was cited the Case of (h) Cowly and Windham, to be adjudged in Point.

(g) Cro. Eliz. 847. S. C. adjudged per totam Curiam præter Fenner. 1 Rol. Abr. 30. Pl. 1. (h) Dowdenay and Bland. S. C. Cro. Eliz. 768. adjudged 848. cited.

44. (i) If A. is indebted in 20 l. to B. and dies, and his Executor in Consideration that B. will forbear him for a (k) reasonable Time, promises to pay him the Debt; this is a good Consideration to have an Action with an Averment, that he forbore him for a certain Time, viz. 8 Years. Pasch. 14 Jac. B. R. between (l) Linghen and Broughton, per Curiam. Trin. 18 Jac. B. R. 1307. Between Whitty and Browne, adjudged in a Writ of Error upon a Judgment in Dartmouth. Mich. 15 Car. B. R. Between (m) Johnson and Whitchcott, admitted upon a Demurrer. Intratur Mich. 14. Rot. 588.

(i) Hut. 108. S. P. adjudged. Lit. Rep. 304. S. P. adjudged. 1 Sid. 45. S. P. per Curiam. (k) Diversity between tempus Convenies & paululum tempus. 1 Bulst. 92. per Croke, Justice. (l) Moor 853. Pl. 1167. S. C. adjudged. 1 Rol. Rep. 379. S. C. adjudged. (m) Ante Pl. 33.

45. (n) If A. be indeted to B. in 100 l. and B. was about to commence a Suit for the Recovery thereof, and C. a Stranger comes to him and says, That if he will forbear him, he himself will pay it; This is a good Consideration for this Assumpsit to B. averring that he had abstained, and forbore to sue A. Et adhuc did abstain and forbear, tho' no certain Time was appointed for the Forbearance; for it seems a perpetual Forbearance is intended, the which he hath performed. Mich. 37, 38 Eliz. B. R. between (o) Sackford and Phillips adjudged.

Fol. 27.

(n) 1 Sid. 45. S. P. per Curiam. 294. S. P. per Curiam. Hob. 219. S. P. dubitatur. Poph. 183. like Point. dubitatur. 1 Leon. 118. like Point adjudged. Godb. 72. like Point, dubitatur. 1 Brown. Ent. 56. a like Precedent. Mapes and Sidny. S. P. Cro. Jac. 683. adjudged. Hut. 46. adjudged. Winch. 22. adjornatur. (o) But Moor 689. Pl. 952. S. C. reversed upon Error in the Exchequer Chamber. Cro. Eliz. 455. S. C. reversed upon Error in Exchequer Chamber.

46. So if A. be indebted to B. and C. a Stranger says to him, that if he will forbear him per paululum temporis that he himself will pay him, this is a good Consideration of an Assumpsit, averring a certain Time of Forbearance. Pasch. 41 Eliz. B. R. between (p) Scovell and Covell, cited to be adjudged. Mich. 37, 38 Eliz. B. R.

(p) Ante Pl. 25, 26. vide.

47. If A. is indebted to B. upon which B. arrests him, and while he is under the Arrest, a Stranger comes to B. and says, That if he will forbear A. per paululum temporis he will pay him, upon which B. suffers A. to go at large, this is a good Consideration for an Assumpsit, though he arrests A. within an Hour after,

(q) So if the Plaintiff declares, after, for the Deliverance from (q) the preſent Danger is a good Conſideration. Paſch. 41 Eliz. B. R. in Covell's Caſe per Popham.

whereas he had an Intent to arreſt the Defendant in Conſideration the Plaintiff would forbear to Arreſt him at that Time, &c. this is a good Conſideration. Stile 459. adjudged.

48. If J. S. makes W. and his Wife Executors, and after ſeveral Suits and Controverſies ariſe between them, and T. for and concerning the Right of Executorſhip in the Eccleſiaſtical Court, and T. in Conſideration that the ſaid W. at his Requeſt had ſubmitted to the Award of L. theſe Matters, &c. does promiſe that the ſaid W. ſhould not be troubled or moleſted, for or concerning this Right of the ſaid Executorſhip, this is a good Conſideration, viz. the Submiſſion to the Award, tho' he might immediately have revoked it. Paſch. 38 Eliz. B. R. between (r) Line and Neale, adjudged in a Writ of Error upon ſuch a Judgment in B.

(r) Cro. Eliz. 460. S. C. adjudged, and there ſaid this muſt be intended a Submiſſion with an abiding to the Award; and that if the Plaintiff had revoked it, the Defendant ought to have pleaded it.

49. If A. is indebted to B. and C. promiſes B. that if A. will not pay him, that then he himſelf will, if A. does not pay it within a convenient Time, this will be a good Conſideration for B. to have an Action againſt A. upon this Promiſe. Mich. 42, 43 Eliz. B. R. between (s) Sadler and Hawkes adjudged, it muſt be intended there was a Promiſe to forbear to ſue A. in the mean Time.

(s) 1 Rol. Abr. 15. Pl. 2. S. C.

50. If A. contracts with B. for Money paid, to deliver to him a Pig of Lead, and dies, and after C. his Adminiſtrator delivers Lead Oar to D. to make a Pigg of Lead thereof, to be delivered to B. in Satisfaction of the Pigg promiſed by the Teſtator, and after B. demands his Pigg of C. who ſays that he had delivered Oar to D. &c. and then D. being preſent in Conſideration thereof, promiſes to deliver the Pigg to B. at a certain Day after, this is a good Conſideration. Mich. 18 Jac. B. R. between Jackſon and Froſt adjudged, this being moved in Arreſt of Judgment.

51. If A. delivers (t) Money to B. to pay to C. and B. promiſes C. to pay it to him, (u) yet C. (x) can have no Action againſt B. upon this Aſſumpſit, (y) becauſe there is no Conſideration between them. Hill. 37 Eliz. between Howlet and Hallet adjudged per Curiam.

(t) This Word is wanting in the Original.

(u) In the Original tis A. and ſo I take it to be miſprinted, vide.

52. (z) But if in this Caſe he had given Day to B. to pay it, this had been a good Conſideration, upon which he might have had an Action upon the Caſe per Walmſly.

(x) 1 Rol. Abr. 7. Pl. 2. vide. (y) If A. being indebted to B. delivers Money to C. to pay over ſine ulla mora to B. and C. in Conſideration thereof aſſumes, &c. this is a good Conſideration. Wheatly and Low, Cro. Jac. 667. adjudged. Palm. 281. adjudged. (z) Yelv. 164. like Point adjudged.

(a) Ante Pl. 24. vide.

53. (a) If a Man is bound in an Obligation of 40 l. for the Payment of 20 l. and the Obligee promiſes the Obligor, that in Conſideration that he will pay the Money without Suit, that after Payment he will deliver up the Obligation to him; This is a good Conſideration to maintain an Action * if the Obligee does not perform his Promiſe. Hill. 41 Eliz. B. R. 35. per Popham. Paſch. 14 Jac. B. R. per (b) Coke.

* Fol. 28.

(b) 1 Rol. Rep. 355. S. P. per Coke.

54. If A. recovers a Debt and Damages to 7 l. againſt B. and after A. in Conſideration of 4 l. paid him by B. aſſumes and promiſes that he will forbear further to proſecute his Suit, and that he will releaſe it, and alſo that he and his Attorney will acknowledge Satisfaction of the Sum recovered; tho' this 4 l. cannot be any Satisfaction of the 7 l. due by the Record, yet the (c) Acceptance of the 4 l. is a good Conſideration, to raiſe this Aſſumpſit, whereby to compel

(c) I think this ſhould rather be the Payment, &c.

compel him to diſcharge the 7 l. Mich. 37, 38 Eliz. B. R. between (d) Pinowe and Reynolds adjudged.

(d) Moor 412. Pl. 564. S. C. adjudged. Cro. Eliz. 429. S. C. adjudged.

55. In Debt by A. againſt M. upon an Obligation, if D. is Bail for M. and after A. recovers, and Proceſs is continued till A. has Execution awarded againſt D. the Bail, and after A. in Conſideration that D. will pay to him the Condemnation, aſſumes and promiſes to D. to diſcharge him of the ſaid Execution, and further, to aſſign over the ſaid Obligation of M. the Principal; upon which D. pays the Money to A. but A. will not aſſign over or deliver the Obligation to him, here is a good Conſideration for D. to have an Action upon the Caſe upon this Aſſumpſit againſt A. for tho' the Money paid by D. to A. was due, and D. compellable to pay it by Force of the Execution awarded againſt him, yet there might be Charge, Labour and Trouble to A. in the Service of the Execution for the getting of the Money; and then when D. gives this Money to A. without this Trouble or Charge, this is a good Conſideration for an Aſſumpſit. Trin. 39 Eliz. B. R. between (e) Dixon and Adams adjudged.

(e) Moor 710. Pl. 992. S. C. reverſed upon Error in Exchequer-Chamber. Cro. Eliz. 538. S. C. reverſed upon Error. Goulsb. 156. S. C. adjudged.

56. (f) If a Man makes a Contract with J. S. and dies Inteſtate, and his Adminiſtrator in Conſideration of Forbearance, &c promiſes to pay it, &c. this is a good Conſideration, tho' the Adminiſtrator was not chargeable upon this Contract at Common Law, for he was chargeable in Conſcience. Paſch. 5 Jac. B. R. between Walker and Wittel per Curiam. Mich. 4 Jac. B. R. between Richardſon and Sir Moyle Finch per Curiam, because he is bound in Conſcience to pay it.

(f) Moor 702. Pl. 977. S. P. adjudged. Fiſher and Richardſon, S. P. Cro. Jac. 47. adjudged. Yelv. 55. adjudged. But where the Plaintiff declared that he intended to ſue the Executrix for the Debt ſecundum debitum legis curſum, and that the Executrix in Conſideration the Plaintiff would forbear to ſue her, promiſed, &c. it was adjudged for the Defendant, for his Intention being to ſue ſecundum debitum, &c. it can't be intended in Chancery, nor by way of Aſſumpſit, but by Action of Debt; which does not lie againſt an Executor upon a ſimple Contract, and ſo the ſtaying ſuch Suit was no Conſideration. Cro. Eliz. 804.

57. (g) If a Man (h) binds himſelf and his (i) Heirs in an Obligation and dies, and after the Obligee ſues the Heir upon the Obligation, who had no Aſſets deſcended to him, and the Heir ſays to him, that if he will not ſue him, that then he will pay him the Money; This is no Conſideration ſo as to maintain an Action, becauſe he was not chargeable without Aſſets. Lord Gray's Caſe adjudged cited. Paſch. 42 Eliz. B. R. 11. in Monning and Knopp's Caſe.

(g) 4 Leon. 6. S. P. per Curiam. 3 Leon. 67, 68. S. P.
(h) This Word is wanting in the Original.
(i) In an Aſſumpſit againſt an Heir upon ſuch a Promiſe, it muſt be expreſly ſhewn that the Heir was bound, elſe it ſhall not be intended, tho' after a Verdict. Barber and For. 2 Sand. 136. adjudged 1 Vent. 159. adjudged. Hunt and Swain. Sid. 248. ——But in ſuch a Caſe where the Plaintiff declared, that the Defendant in Conſideration the Plaintiff would deliver the Bond to him and diſcharge the Debt, promiſed, &c. it was held a good Declaration, and that it ſhould be intended he was liable, or at leaſt that the Diſcharge ſhould be made to him that was ſo. 1 Sid. 31. adjudged. 1 Lev. 165.

58. If in an Action upon the Caſe the Plaintiff ſays that the Defendant was poſſeſſed of (k) divers Goods that were the Goods of her Husband in vita ſua, which ſhe converted to her Uſe; and that the Defendant did promiſe in Conſideration the Plaintiff would forbear her for a certain Debt due by the Husband to the Plaintiff, &c. that the Defendant would pay it; This is no good Conſideration, for perhaps ſhe had theſe Goods as Bona Paraphernalia, and ſo ſhe is not chargeable with the Debt, in as much as he has not ſhewn what Goods they were. Trin. 18 Jac. B. R. Rot. 1307. between Whittey and Brawne, adjudged in a Writ of Error.

(k) Ante Pl. 23.

(l) 2 Leon. 154. S. P. dubitatur. 1 Rol. Abr. 17. Pl. 7. vide. (m) Moor 549. Pl. 736. S. C. per Curiam præter Popham, upon Evidence to a Jury.

59. (l) If A. promiſes B. that in Conſideration if J. S. ſhall win a Game at Butts of 21 up, that he will pay to B. 20 l. and if not, then B. promiſes to pay to A. 50 l. this is a good Conſideration, for A. to have an Action againſt B. for the mutual Conſideration. Hill. 41 Eliz. B. R. between (m) Metcalfe and Aſcue per Curiam. Trin. 2 Jac. B. Daſſet's Caſe per Curiam.

Fol. 29.

(n) Mod. 12. like Point adjudged Con. 1 Ven. 153. 4. like Point adjudged. 1 Vent. 15. vide. ——In Conſideration that he would accept him for his Debtor, &c. is no good Conſideration, for it does not neceſſarily imply a Diſcharge to the other. Newcomin and Leigh. Stile 249. Hard. 73. cited. 1 Vent. 9. arguend' Con. Forth and Stanton. 1 Sand. 210. adjudged. 1 Lev. 262. adjudged. 1 Jones 87. adjudged. But vide 1 Vent. 9. —— A. being indebted to B. gives him a Note directed to C. requiring C. to pay him; upon which, C. in Conſideration B. would accept his Promiſe for the Money, and ſtay a Fortnight promiſed, &c. this is no good Conſideration, for B. might ſue A. in the mean Time. Clipſham and Morris, 1 Lev. adjudged. 1 Ven. 9. adjudged; but 1 Vent. 154. it is ſaid Clipſham's Caſe is Law, but that it did not there appear that C. was indebted to A. but yet vide the Caſe. 1 Lev. 248. adjudged. —— A. is indebted to B. and C. to A. and C. promiſes B. in Conſideration that B. will procure a Note from A. requiring C. to pay B. that then C. will pay, &c. this is a good Conſideration. 2 Vent. 71. adjudged.

60. (n) If B. is indebted to A. in 20 l. and C. is indebted to B. in the like Sum, and C. promiſes A. in Conſideration that he is content to accept the ſaid Sum by the Hands of C. and to ſtay for this for four Days, that he will pay him the ſaid Sum; this is a good Conſideration for A. to maintain an Action upon the Caſe againſt C. Paſch. 41 Eliz. B. R. between Wilmot and Prigget.

(o) Cro. Eliz. 703. S.C. and S. P. agreed. Moor 574. Pl. 791. S. C. adjudged. But in both theſe Books it appears the Action was brought by C. againſt A. ſetting forth the Promiſe of C. to pay B. Et in conſideratione inde, that A. aſſumed, &c. and tho' it was not alledged that C. had paid B. yet ſince the Promiſe was reciprocal, if C. had not paid B. A. might have an Action againſt him, and therefore adjudged for the Plaintiff.

61. If A. is indebted to B. in 20 l. and A. comes to C. and intreats him to pay the ſaid 20 l. to B. and if he will he promiſes to repay the ſaid Sum to him again, upon which C. aſſumes and promiſes to pay the ſaid 20 l. to B. and after does not pay it; A. ſhall have an Action upon the Caſe upon this Promiſe againſt C. for this is a good Conſideration, for tho' he ſhall not have Benefit by it, yet here was a mutual Aſſumpſit, and ſo he ſhall have no Prejudice. Mich. 41, 42 Eliz. B. R. between (o) Jones and Witchells. Dubitatur.

(a) 3 Leon. 129. like Point appears Con.

62. (a) If *A.* having ſeveral young Children lies ſick, and *B.* in Conſideration that *A.* after his Death will commit the Education of his Children, and the Diſpoſition of his Goods during their Minority to him, aſſumes and promiſes to *A.* to procure certain cuſtomary Lands to be aſſured to one of the Children; whereupon *A.* appoints *B.* Overſeer of his Will, and that his Goods ſhould be under the Diſpoſition of *B.* *A.* dies, and *B.* by Vertue thereof, takes Poſſeſſion of ſeveral of the Goods of *A.* if *B.* does not procure ſuch Lands to be aſſured accordingly; yet ſhall the Executor of *A.* have no Action againſt *B.* for here is no Conſideration, in as much as the Power which *B.* had given him, was only *pro educatione liberorum*, and (b) no Profit to himſelf; and tho' ſuch Overſeers do too often make their Advantage, yet that is contrary to their Truſt, and ſuch a Fraud as the Law will not preſume. *Mich.* 26 *Eliz.* between *Smith* and *Smith.* 3 *Leon.* 88. adjudged.

(b) But if one Executor in Conſideration the other would relinquiſh the Executorſhip aſſumes, &c. this is good. 1 Bulſ. 185. adjudged.

63. If there be certain Controverſies between *A.* and *B.* and they ſubmit to the Award of *J. S.* who among other Things is about to Award that *B.* ſhall deliver up to *A.* two ſeveral Obligations, wherein *A.* was bound to *B.* Whereupon *B.* in Conſideration that upon the Requeſt of *A.* the Clauſe in relation to the Delivery up of the Obligations ſhall be left out of the Award, aſſumes and promiſes to *A.* to deliver them up to *A.* *gratis*, &c. this is a good Conſideration, the Clauſe being omitted *ad ſpecialem inſtantiam ipſius* A. *Paſch.* 26 *Eliz.* between *Bret* and *Peagrim.* 3 *Leon.* 105. adjudged.

64. (c) If

64. (c) If *A.* in Conſideration that *B.* will deliver to him a Recognizance to read over, aſſumes and promiſes within 6 Days to re-deliver the ſame to *B.* or to pay him 1000 *l.* This is a good Promiſe upon which *B.* may have an Action againſt *A.* for the Conſideration is ſufficient. *Hill.* 28 and 29 *Eliz.* between *Fooly* and *Preſton.* 1 *Leon.* 297. adjudged; and it was there ſaid, *per Anderſon*, where a Bond is delivered to be rebailed, it is uſual for the Bailor to bring an Action without any expreſs *Aſſumpſit.*

(c) Cro. Eliz. 138. like Point cited.

65. If *A.* demiſes certain Lands to *B.* rendring Rent, and *B.* aſſigns to *D.* after which Rent becomes due, and *D.* in Conſideration that *A.* will ſhew him a (d) Deed by which it may appear that ſuch Rent is due, aſſumes and promiſes to *A.* forthwith to pay the ſame; if *A.* does ſhew *D.* the Indenture of Leaſe, by which it appears that ſuch Rent is due, *A.* ſhall have an Action upon this Promiſe againſt *D.* for when any Thing, tho' never ſo (e) ſmall, is to be done by the Plaintiff, it will be a Conſideration ſufficient to ground an Action. *Mich.* 29 and 30 *Eliz.* between (f) Sir *Anthony Sturlin* and *Albany.* *Cro. Eliz.* 67. adjudged.

(d) But yet Cro. Eliz. 67. it was ſaid to have been adjudged, that if one aſſumes to another, that if he can ſhew him an Obligation in which he is bound to him, he will pay him, &c. this is no good Promiſe, but Q. diverſitatem. (e) Cro. Car. 70. like Point adjudged. (f) Cro. Eliz. 150. S. C. adjudged; but the Promiſe there was in Conſideration, &c. to pay a Rent-charge.

66. (g) If *A.* is Lord of a Manor, and a Controverſy ariſes between *A.* and *B.* concerning a certain Copyhold, which *B.* claims to hold of the ſaid Manor, whereupon they ſubmit to the Judgment and Award of *J. S.* and in Conſideration that *A.* (h) had promiſed to abide thereby, *B.* aſſumes and promiſes, that if the ſaid *J. S.* ſhall adjudge the Copy inſufficient, that then he the ſaid *B.* will forthwith deliver up to *A.* the Poſſeſſion thereof; This is a good Conſideration, the Promiſe being (i) reciprocal, and to avoid Variances and Suits. *Paſch.* 30 *Eliz.* between *Cook* and *Songat.* 1 *Leon.* 103. adjudged. 4 *Leon.* 31. adjudged.

(g) 2 Rol. Rep. 194. S. P. adjudged.

(h) Note, Both Promiſes muſt be made at the ſame Inſtant, elſe they will be nuda pacta.

Hob. 88. Cro. Eliz. 137. T. Jones 168. (i) 4 Leon. 3. like Point, March. 75. like Point per Curiam. Cro. Eliz. 543. like Point adjudged. 889. like Point per Curiam. Hob. 88. like Point adjudged. 2 Mod. 33. like Point adjudged.

67. If the Father of *A.* and *B.* lying ſick, declares his Intention to deviſe a Rent of 4 *l. per Annum* to *B.* his younger Son, during his Life, and thereupon *A.* the eldeſt Son, in Conſideration that the Father will not charge his Lands therewith, aſſumes and promiſes to *B.* to pay the ſaid Rent; whereupon the Father forbears to charge the Land, and dies, and the Land deſcends to *A.* diſcharged of the ſaid Rent; this is a good Conſideration. *Mich.* 31 and 32 *Eliz.* between (k) *Rockwood* and *Rockwood.* 1 *Leon.* 192. adjudged.

(k) Cro. Eliz. 163. S. C. adjudged.

68. If the Plaintiff declares, whereas he had recovered againſt *J. S.* the Sum of 20 *l.* in the Court of *Southwark*, and had thereupon obtained a *Levari facias* directed to the Bailiff there, to make Execution of the Goods of *J. S.* and whereas he was ready to execute the Writ upon certain Goods of *J. S.* the Defendant did aſſume and promiſe, in Conſideration the Plaintiff would deliver to the Defendant the ſaid Goods, that he the ſaid Defendant within 14 Days after *Michaelmas*, would pay to the Plaintiff the Money, or otherways redeliver to the Plaintiff the ſaid Goods; unleſs ſome other in the mean Time makes and proves a Title thereto, and upon Iſſue *Non Aſſumpſit* a Special Verdict is found that ſuch a Recovery was had; that the Defendant did aſſume, *&c.* but the Jury further ſay, that before the Recovery *J. S.* was poſſeſſed of thoſe Goods as his own proper Goods, and in Conſideration of Money, by Indenture ſold them to his Brother, with a Proviſo, that *J. S.* notwithſtanding, ſhould have the Poſſeſſion for 4 Years, (which are not yet expired) and that if the ſaid *J. S.* at the End of the 4 Years, ſhould repay the ſaid Money, the Sale ſhould be void; This is a good Promiſe, notwithſtanding *J. S.* had only a ſpecial Property in theſe Goods, and they were not liable to the Execution, for the Plaintiff having the Poſſeſſion of the

the Goods, his Delivery of them to the Defendant is a good Conſideration. *Mich.* 32 and 33 *Eliz.* between (l) *Byne* and *Plain.* 1 *Leon.* 220. adjudged.

(l) Cro. Eliz. 218. S. C. adjudged.

69. If *A.* in Conſideration that *B.* will relinquiſh ſuch a Suit, aſſumes and promiſes, *&c.* this is no good Conſideration, for he may relinquiſh the Suit and begin again immediately. *Trin.* 39 *Eliz.* between (m) *Roſs* and *Moor.* *Moor* 539. Pl. 707. adjudged.

(m) Cro. Eliz. 561. S. C. adjudged. Cro. Eliz. 869. S. C. cited and denied, and like Point adjudged Con.

70. (n) If *A.* is indebted to *B.* in 20 Quarters of Corn, and *C.* in Conſideration that *A.* will deliver the ſaid 20 Quarters of Corn to him, aſſumes and promiſes to *A.* to deliver the ſame to *B.* at a Day to come; This is a good Conſideration, for the very Poſſeſſion of ſo much Corn may be for the Advantage of *B.* by giving him Countenance and ſupporting his Credit. *Paſch.* 44 *Eliz.* between (o) *Riches* and *Bridges.* *Cro. Eliz.* 883. adjudged; but this Judgment was after reverſed in the Exchequer Chamber for want of a Conſideration.

(n) Yelv. 128. like Point adjudged, that the Conſideration was not good.

(o) Yelv. 4. S. C. adjudged; but ſaid to have been after reverſed in the Exchequer Chamber. Yelv. 50. S. C. cited and ſaid per Curiam, it ought not to have been reverſed.

71. If *A.* makes *B.* his Wife, his Executrix, and bequeaths a Legacy to *C.* and *A.* dies, and *B.* marries *D.* who by Vertue thereof takes into his Cuſtody ſeveral of the Goods of *A.* *B.* dies, and *D.* having theſe Goods in his Poſſeſſion, in Conſideration that C. would forbear to ſue him for the ſaid Legacy, aſſumes and promiſes to pay it, *&c.* No Action lies againſt *D.* upon this Promiſe; for the Forbearance to ſue *D.* can be no good Conſideration; becauſe *D.* without a Converſion or Imployment of the Goods to his own Uſe, is not liable either in the Court Chriſtian or at Common Law to pay it. *Mich.* 8 *Jac.* between (p) *Smith* and *Jones.* *Yelv.* 184. adjudged.

(p) Cro. Jac. 257. S. C. adjudged. Owen 133. S. C. adjudged. 1 Bulſ. 44. S. C. adjudged.

72. If *A.* pawns Goods to *B.* upon Condition of Redemption at a Day, and after the Day the Goods not being redeemed, *B.* ſays he will ſell them; upon which *D.* ſays, if he will ſtay the Sale of them but for three Days, he will pay the Money and have the Goods; if *B.* does ſtay the Sale accordingly, *B.* may have an Action againſt *D.* upon this Agreement, for this was in Nature of a Sale, and if *D.* had paid the Money, he might have brought Detinue for the Goods. *Trin.* 13 *Jac.* between *Capper* and *Dickenſon.* 1 Rol. Rep. 215. adjudged.

73. If *A.* and *B.* are both Solicitors for the Office of Under-Sheriff, and *A.* in Conſideration that *B.* will deſiſt, aſſumes and promiſes to *B.* that if he the ſaid *A.* obtains the ſaid Office, that he the ſaid *A.* will pay unto *B.* 20 *l.* for a Horſe, *&c.* This Conſideration is good and valuable. *Hill.* 18 *Jac.* between *Parker* and *Brown.* *Cro. Jac.* 612. adjudged.

74. *A.* brought Debt againſt *B.* and *C.* an Attorney, in Behalf of *A.* his Maſter, delivered a Declaration thereupon, and in Conſideration that *B.* would order his Attorney to confeſs Judgment, *C.* aſſumed and promiſed to *B.* that the ſaid Judgment ſhould not be entered till *Cras. Aſcenſion*; and that Execution ſhould not be taken out till *Mich.* Term then next, *&c.* and tho' it was objected that it was impoſſible for *C.* to prevent the Entry of the Judgment, which was in the Diſcretion of the Court yet. *Mich.* 20 *Jac.* between *Bawtry* and *Scarlet.* *Hut.* 63. adjudged for the Plaintiff, upon a Motion in Arreſt of Judgment after a Verdict for him.

75. (q) If *A.* obtains an (r) erroneous Judgment againſt *B.* and *B.* in Conſideration that *A.* will forbear to take out Execution thereupon, promiſes to pay the Debt, the Conſideration is good notwithſtanding the Judgment is erroneous. *Hill.* 20 *Jac.* between *Kite* and *Smith, adjournatur.*

(q) 2 Rol. Rep. 495. S. P. and like Point per Dod'. (r) In Conſideration the Plaintiff would permit J. S. who was arreſted, at his Suit, to go at large, the Defendant promiſed, &c. the Conſideration is good, tho' it did not appear J. S. was legally arreſted. 2 Rol. Rep. 495. Yelv. 25, 26. Randal and Harvy. Godb. 358. Palm. 394. 2 Rol. Rep. 390. vide 2 Keb. 134.

76. *A.* has Lands in *D.* of which *B.* is Rector; and *B.* in Conſideration that *A.* will plant his Lands with Hops, and ſo better the Tithes, aſſumes and promiſes to allow him 40 *s.* for every Acre ſo planted, and

whether this is a good Conſideration, becauſe the Tithes cannot be bettered by the planting of Hops, but by the growing of them. *Paſch.* 22 *Jac.* between *Summers* and *Digs. Winch.* 80. *dubitatur.*

77. (s) If the Leſſee, in Conſideration the Leſſor will forbear to diſtrain Corn in the Shocks, aſſumes and promiſes to pay all ſuch Rent as is Arrear, the Conſideration is void, becauſe ſuch Corn is not diſtrainable. *Stile* 305. ſaid.

(s) Hard. 73. S. P. cited as to have been adjudged.

78. If the Plaintiff declares, that in Conſideration the Defendant was indebted to him in 20 *l.* the Defendant did aſſume and promiſe to deliver ſeveral Cattle to *J. S.* to the Uſe of the Plaintiff, and that the Defendant had not delivered the Cattle accordingly, *&c.* the Conſideration is void, becauſe it does not appear the Debt was to be diſcharged thereby, and if not, the Plaintiff notwithſtanding might bring his Action for the Money; ſo that the Promiſe is but *Nudum Pactum.* Trin. 1652. *Godwin* and *Butlin*, *Stile* 330. adjudged.

79. (t) If *A.* together with *B.* is bound to *C.* for the proper Debt of *B.* *&c.* and *A.* pays the Money, and *B.* dies, and makes *D.* his Executor, and *D.* in Conſideration that *A.* will forbear to ſue him till ſuch a Time, aſſumes and promiſes to repay him; this (u) Conſideration is good, tho' *D.* was liable in Equity (x) only. *Mich.* 14 *Car.* 2. between (y) *Scot* and *Stevens.* 1 *Sid.* 89. adjudged.

(t) 1 Rol. Rep. 21. like Point per Crook ſaid to have been adjudged.

(u) So if the Conſideration be, that the Plaintiff ſhall releaſe an equitable Intereſt only. Wells and Wells. 1 Vent. 40. 1 Lev. 272. (x) In Conſideration the Plaintiff would forbear to ſue for a Legacy. Davis and Reyner. 2 Lev. 3. 1 Vent. 120. (y) 1 Lev. 71. S. C. adjudged.

80. If the Plaintiff declares that he was poſſeſſed of ſeveral Seamens Tickets for Wages due to them, and had ſolicited the Treaſurer of the Navy to pay them, who had order'd the Defendant his Clerk to pay them, and the Defendant in Conſideration the Plaintiff would not give his ſaid Maſter any further Trouble about the Payment thereof, aſſumed to pay them, *&c.* This is a good Conſideration, for tho' it does not appear the Plaintiff had any Intereſt in the Money, or Authority to receive it; and it was objected, tho' he might not trouble the Maſter farther, yet the Owners might. *Mich.* 20 *Car.* 2. between (z) *Bolton* and *Fenner.* 1 *Lev.* 257. after a Verdict for the Plaintiff, it was adjudged for him; for it cannot be intended but that the Plaintiff had an Intereſt in the Tickets, or Authority to receive the Money, elſe the Treaſurer would not have order'd the Payment thereof.

(z) 1 Sid. 392, 393. S.C. adjudged.

81. (a) If *A.* in Conſideration that *B.* an Infant hath promiſed to permit *A.* to carry away ſo much of his Graſs, *&c.* aſſumes and promiſes to pay *B.* 6 *l.* the Conſideration is good, and *B.* may maintain an Action againſt *A.* upon this Promiſe, notwithſtanding (b) *B.* may avoid his Promiſe. *Mich.* 21 *Car.* 2. between (c) *Smith* and *Bowen.* 1 *Mod.* 25. adjudged.

(a) Foreſter's Caſe. S. P. 1 Sid. 41. adjudged. 1 Keb. 1. adjudged.

82. (d) If *A.* and *B.* are Churchwardens of *D.* and *C.* at the Proſecution of *A.* and *B.* is excommunicated for not paying a Tax for the Reparation of the Church of *D.* and *C.* in Conſideration that the Biſhop, at the Requeſt of *A.* and *B.* would abſolve him, aſſumes and promiſes to pay unto *A.* and *B.* ſo much, if *C.* is accordingly abſolved; *A.* and *B.* may have an Action upon this Promiſe againſt *C.* for it cannot be intended but the Abſolution was at the Inſtance of *A.* and *B.* and by reaſon of the Promiſe to pay them the Money. *Trin.* 28 *Car.* 2. between (e) *Curtis*, &c. and *Collingwood.* 1 *Ven.* 297. adjudged.

(b) Yelv. 134. like Point, per Curiam. (c) 1 Vent. 51. S. C. adjudged. (d) 2 Keb. 359. like Point appears. (e) 2 Lev. 119. S. C. adjudged. The Conſideration being that the Biſhop would Abſolve the Mother of the Defendant, at the Requeſt of the Defendant, which the Biſhop would not have done, if the Plaintiffs had not accepted the Promiſe of Payment.

(X) Upon an Assumpsit.

At what Time it lies.

1. If A. promises B. that if he will Marry his Daughter, he will give him 100 l. viz. 50 l. at such a Day, and 50 l. at another Day after; and because B. was indebted to C. 100 l. A. at the Request of B. for the Consideration aforesaid, promises to pay the Money accordingly at the said Days to C. and after the Marriage took Effect, and A. does not pay to C. the 50 l. at the first Day, B. shall have an Action against him upon this Promise before the 2d Day. Hill. 43 Eliz. B. R. between (a) Taylor and Poston adjudged.

(a) Cro. Eliz. 776, 807. S. C. adjudged.

2. If A. in Consideration that B. had bargained and sold to him certain Tuns of Strong Beer at the Request of A. promises to pay to him 4 l. for every Tun, Super deliberationem inde of 30 Tun of Strong Beer; An Action lies upon this Promise for so many Tuns as he delivers, before the Delivery of all the 30 Tuns. Mich. 12 Jac. in Camera Scaccarii, between Field and Dale, adjudged, quod Vid. Mich. 12. Jac.

(b) 2 Leon. 221. like Point adjudged. Dier 113. vide. Cro. Car. 350. like Point, per Jones and Berkly, 4 Rep. 94. b. like Point. Beckworth and Not, like Point.

3. (b) If A. in Consideration that B. will Marry his Daughter, promises to pay him 10 l. at Michaelmas, and 10 l. at Lady-Day after, and after B. takes the Daughter of A. to his Wife, and A. does not pay the 10 l. at Michaelmas; tho' this be in Nature of a Debt, for which B. may have an Action of Debt; yet B. may have an Action upon the Case upon this Promise, for the Non-payment of the first 10 l. before Lady-Day is come; for this is alledged in the Declaration as an express Promise, and in Law they are two several Promises. Hil. 7 Car. B. R. between (c) Milles and Milles adjudged, this being moved in Arrest of Judgment, and tho' Damages were given to 20 l. for it does not appear that it was given in respect of the second 10 l.

Cro. Jac. 504. adjudged. 2 Rol. Rep. 47. adjudged.——But where the Promise was to pay 400 l. in 7 Years, it appearing upon the Plaintiff's Declaration, that one of the Years was not expired, after a Verdict for the Plaintiff, the Writ was abated. Joslelyn and Chilton. Bend. 57. Pl. 93. adjudged. 3 Leon. 4. adjudged. Kelw. 208. b. adjudged. Moor 13. Pl. 15. adjudged; but Cro. Eliz. 118. Joslelyn's Case is cited, and Owen 42. like Case is cited, in both which it is said to have been adjudged, that if the Promise be to pay 300 l. viz. 50 l. per Annum. &c. during 6 Years, at the End of every Year an Action lies for 50 l. tho' not for the Whole; but Quære, Where the Promise is to pay an entire Sum, as 50 l. in 5 Years, viz. 10 l. &c. Hunt and Sone. Cro. Eliz. 118. Owen 42. 2 Leon. 108. 1 Leon. 319. —An Assumpsit to perform an Award, and Money awarded to be paid at several Days, an Action lies after the first Default; and so toties quoties. 2 Sand. 337. adjudged. (c) Cro. Car. 241. S. C. adjudged.

4. In an Action upon the Case, if the Plaintiff declares that the 26th of May, 1629. apud civitatem Exoniæ in Consideration that the Plaintiff had sold to the Defendant Sex pecias panni nigri, Anglice. Six Pieces of black Grogran, the Defendant promised to pay to him 47 s. for every Piece in toto attingentes ad 14 l. 2 s. ad ferias Pentecostes Anglice vocat' Whitsontide Fair tunc proximo sequent', and the Action is brought long Time after Whitsontide, and avers that the Defendant had not yet paid it; (d) but does not aver that Whitsontide Fair is yet come, and for this, after a Verdict upon Non Assumpsit Pleaded, and Judgment in the City Court, it was revers'd in B. R. Hill 7 Car. between Taylor and Lee. Intratur Pasch. 7 Car. B. R. Rot. 158.

(d) An Action upon a Promise to deliver Corn next Seed-time, &c.

and it is not shewn when that was, yet adjudged for the Plaintiff. Godb. 350. —So in Case of a Promise to deliver Corn at Harvest, &c. and the Action is brought at Michaelmas; for it is apparent to the Court that the Harvest is past. Godb. 350. per Dod.

5. (e) If A. promiſes B. for a certain Conſideration, &c. to pay (*) to B. 15 l. yearly, and every Year during the Term of 4 Years then next following, if J. S. a certain Meſſuage in D. tam diu haberet & Occuparet, if J. S. occupies the Meſſuage for one or two Years of the ſaid 4 Years, B. may have an Action upon the Caſe for the ſaid ſeveral 15 l. due before the End of the other 2 Years, and tho' he does not occupy it for the laſt 2 Years, yet an Action lies for the firſt 2 Years, for this is to be paid yearly, and every Year; and therefore the Limitation Si tam diu, he Occupies it, refers to every Year, and not intirely to the 4 Years. Trin. 23 Car. B. R. between (f) Freer and Prentice, adjudged in a Writ of Error upon ſuch a Judgment given in B. this being aſſigned for Error, and the firſt Judgment affirmed accordingly. Intratur Hill. 22 Car.

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(e) Hunt and Bone like Point. Owen 42. adjudged. Cro. Eliz. 118. adjudged. 2 Leon. 107. adjudged. 4 Leon. 13. adjudged.

(f) Allen 20. S. C. adjudged, but there the Promiſe is laid if J. S. live ſo long, &c. and it is not averr'd that J. S. is living, yet adjudged for the Plaintiff, Si being a Limitation Subſequent.

6. If *A.* obtains a Judgment againſt *B.* for 20 *l.* and *B.* in Conſideration that *A.* will forbear to take out Execution thereupon until *Octab. Mich.* aſſumes and promiſes to pay the ſame at *Mich.* if the Money is not paid at *Mich. A.* before *Octab. Mich.* may have his Action againſt *B.* for the Forbearance between *Mich.* and *Octab. Mich.* can be no Part of the Conſideration; becauſe if the Money had been paid at *Mich.* the Forbearance after would have been inſignificant. *Paſch.* 42 *Eliz. Tiſdale*'s Caſe, *Cro. Eliz.* 758. adjudged.

(Y) What ſhall be a good Aſſumpſit (a) where Part of the Conſideration is not good

(a) For this vide 1 Rol. Abr. 17. Pl. 11, 12.

1. If A. promiſes B. in Conſideration that ſhe will not ſue an Attachment out of Chancery, upon a Decree that is there made againſt him, and in Conſideration that ſhe will give to him all her Title and Right of Dower, that then he will pay to her 20 l. tho' the ſecond Conſideration is void, becauſe it cannot be given to a Stranger, but only releaſed to the Tenant of the Land by Way of Extinguiſhment; (b) yet the Action upon the Caſe lies upon the other Conſideration, which is good. Hill. 42 Eliz. B. R. between (c) Colſton and Carre, per Curiam.

(b) For inutilis conſideratio, viliates not a good one; But it ſeems otherways of a Conſideration againſt Law. 1 Sid. 38. quod nota by the Reporter. Quære & vide. Cro. Jac. 103. Fetherſon and Hutchinſon. 3 Leon. 208. Cro. Eliz. 199. 1 Rol. Abr. 17. Pl. 11, 12. (c) Cro. Eliz. 847. S. C. adjudged. Noy 38. S. C. but S. P. does not appear.

2. (d) If a Man in Conſideration of a Surrender, and of 10 l. paid, promiſes to do ſuch a Thing, tho' the Surrender cannot be made, ſo that this Conſideration is void; yet the Action is maintainable upon the other Conſideration. 36 Eliz. (e) between Cripps and Goulding adjudged, cited Hill. 42 Eliz. B. R.

(d) Cro. Eliz. 149. like Point per Curiam. Cro. Eliz. 759. like Point adjudged.

Yelv. 56, 57. like Point adjudged. 1 Mod. 284. like Point, per Curiam. —And that Part of a Conſideration which is impoſſible, void, or againſt Law, need not be alledged Poph. 32. per Popham, and if alledged, need not be proved, for the Allegation was idle. Cro. Jac. 127. adjudged. (e) 1 Leon. 296. S. C. adjudged. 2 Leon. 71. S. C. adjudged. Cro. Eliz. 50. S. C. but S. P. does not appear.

(Z) Who

(Z) Who ſhall have the Action.

1. (a) If A. in Conſideration that B. has truſted him for his Diet, promiſes to pay 10 l. at a Day, tho' he does not mention (b) to whom he promiſes to pay it; yet this ſhall be intended to B. who had truſted him. Trin. 12 Jac. B. R. between (c) Chappell and Woodham in Camerâ Scaccari adjudged, and that ſuch a Declaration is good. Contra Paſch. 3 Jac. B. R. between Goldſmith and Preſton, per Curiam.

(a) Sharp and Holt, l. Point, Noy 83. adjudged. Latch. 151. 272. adjudged. Poph. 181. adjudged. Cro. Car. 77. adjudged. Cro. Eliz. 703. S. P. adjudged. Littl. Rep. 85. like Point adjudged. Cro. Eliz. 149. adjudged. 1 Rol. 46. Pl. 4. vide. Colſton and Carr, S. P. Noy 38. adjudged. Cro. Eliz. 847. adjudged. (b) The Plaintiff declares, That in Conſideration the Plaintiff would Marry the Daughter of the Defendant ſuper ſe Aſſumpſit, Noy 50. after a Verdict for the Plaintiff, the Judgment was ſtaid, becauſe not ſaid who made the Aſſumpſit. Vide 1 Rol. Abr. 15. Pl. 4. and Poſtea in the Pleadings after this Title. (c) 1 Rol. Rep. 58. S. C. adjudged.

2. If a Communication be between the Father of A. and B. for a Marriage between A. and the Daughter of B. and B. affirms and publiſhes to the Father of A. that he daret cuicunq; maritaret his ſaid Daughter with his Aſſent, 100 l. and after A. marries the ſaid Daughter; yet ſhall he have no Action upon this Aſſumpſit, becauſe B. did not mention to whom he made the Promiſe. Trin. 3 Jac. B. R. between (d) Weeke and Tybold, per Curiam.

(d) 1 Rol. Abr. 6. Pl. 1. S. C. Noy 11. S. C. adjudged, the Declaration being aſſeruit & publicavit, &c. but it is not averr'd or ſhewn to whom.

3. (e) If a Man promiſes to J. S. to pay his Daughter 40 l. at her Marriage, ſhe marries, ſhe and her Husband ſhall not have an Action upon this Promiſe, but the Father. Paſch. 5 Jac. B. R. between Archdale and Barnard adjudged.

(e) Dutton and his Wife, and Pool, S. P. Con. Where the Conſideration was, that the Father would not Fell Timber to raiſe a Portion for his Daughter. 1 Vent. 318. 335. adjudged. 2 Jon. 102. adjudged. Raym. 302. adjudged. 2 Lev. 210. adjudged, per tot' Cur'. upon a Writ of Error in Cam' Scacc' Hetl. 30. S. P. adjudged Con.

4. (f) If C. is indebted to A. and D. is indebted to N. in 20 l. and C. at the Requeſt of D. pays the 20 l. for him to N. and appoints D. to pay ſo much over to A. for him and D. in Conſideratione premiſſorum, promiſes to pay the 20 l. to A. A. cannot have an Action upon the Caſe upon this Promiſe againſt D. for he is a Stranger thereto, and there is no Conſideration for any Aſſumpſit to him. Trin. 4 Jac. B. R. between Ritly and Dennet adjudged.

(f) 1 Vent. 6. like Point, adjudged, and there ſaid where the Promiſe is made to the Father, to pay ſo much to the Daughter, the Nearneſs of the Relation gives the Daughter the Benefit of the Conſideration performed by the Father. Vide 1 Vent. 333.

5. If A. and B. are bound in an Obligation to pay to C. 20 l. (*) when he comes to the Age of 21, and after A. makes B. his Executor and dies, and B. having Aſſets, aſſigns them to D. and in Conſideration of this Aſſignment, D. promiſes to C. to pay to him the 20 l. when he comes to the Age of 21; C. when he comes to the Age of 21. ſhall have an Action upon the Caſe upon this Promiſe againſt D. tho' no Conſideration comes from C. (g) for if a Man deliver Money to J. S. to pay over to B. in Satisfaction of a Debt due to him, this raiſes a Debt to B. and (h) cannot be revoked; and ſo here, Paſch. 1649. between Disborn and Denaby adjudged, this being moved in Arreſt of Judgment, after a Verdict upon Non Aſſumpſit for the Plaintiff. Intratur Hill. 24 Car. Rot. 1010.

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(g) 1 Rol. Abr. 7. Pl. 2. Poſt. Pl. 13. (h) There is a Diverſity where Goods, &c. are delivered to B. to be delivered over to C. upon a Conſideration as to ſatisfy a Debt, and where it's only as a voluntary Gift. 2 Rol. Rep. 39. per Dod'. 2 Leon. 31. per Egerton. Dier 22. a. 49 a. New Dier 272. a. Margine in the Caſe of Gilbert and Ruddiard.

6. Upon a Communication of Marriage between the Daughter of A. and the Son of B. A. promises B. in Consideration that B. will assure 40 l. per Annum to his Son, and also convey a Jointure to the Daughter of A. that then A. will give to the Son of B with his Daughter 100 l. in Marriage; in this Case the (a) Father to whom the Assumpsit was made, shall have the Action, and (b) not the Son. Mich. 22 Car. B. R. between (c) Bayfield and Collard adjudged, this being moved in Arrest of Judgment, where the Case was the same in Effect with this, Intratur Trin. 22 Car. Rot. 673. Norf. where the Promise was made after Marriage for a further Provision of Maintenance, that one Father should give 50 l. to the Husband, and the other should pay to the Wife 100 l. after the Death of her Husband, if he died in the Life of his Wife, and the Action was brought by the Administrator of the Father of the Wife, after the Death of the Husband living, the Wife Contra. Mich. 40, 41 Eliz. B. R. between (d) Hawes and Levett per Curiam. But there a Judgment is cited to the contrary.

(a) Hippon and Norton, like Point. Cro. Eliz. 849. adjudged Con. but I think that Case cannot be Law.

(b) Hippon and Norton, like Point. Cro. Eliz. 881. adjudged Con. Yelv. 1. adjudged Con. Allen 1. cited Con. 1 Brownl. 40. like Point Con. Hetl. 30. S. P. adjudged Con.

(c) Stile 6. S. C. adjudged. Allen 1. S. C. adjudged; yet there said it was agreed the Daughter might have brought the Action.

(d) Moor 550. Pl. 740. S. C. adjudged by 2 Judges against 1. Cro. Eliz. 619, 652. S. C. adjudged Con. and like Case cited Con.

7. If A. delivers 20 l. to B. and in Consideration thereof, B. assumes and promises to A. to cause and procure J. S. to pay the said Sum of 20 l. to J. D. a Stranger upon a certain Day; if J. S. does not pay the said Money to J. D. A. who delivered the Money, shall have an Action upon the Case against B. upon this Promise. Pasch. 11 Car. B. R. between Osmond and Crossing, adjudged upon a Demurrer, but this was not moved. Intratur Hill. 11 Car. Rot. 348.

8. (e) If A. who is the Uncle of B. an Infant, delivers 12 l. to J. S. to educate B. the Infant; and in Consideration thereof, J. S. promises to educate B. and also at his full Age, to pay to him, viz. B. the said 12 l. B. when he comes to his full Age may have an Action upon the Case against J. S. for the 12 l. if he does not pay it according to his Promise; for the Use of the Money in the mean Time was the Consideration of the Education, and the Money was to be paid to B. Pasch. 13 Car. B. R. between Oldham and Bateman adjudged per Curiam, this being moved in Arrest of Judgment.

(e) 1 Vent. 119. like Point adjudged.

9. If in an Action upon the Case by A. and B. against C. it be recited in the Declaration, That whereas certain particular Cattle belonging to A. and other particular Cattle belonging to B. were taken away by Persons unknown, and in Consideration of 10 l. given by A. and B. to C. C. did assume and promise to procure the said Cattle to be restored to A. and B. and for that the Cattle were not restored they brought this Action; this Action is well brought jointly by A. and B. tho' the Cattle which belonged to A. ought to be restored to him, and the other Cattle to B. and so the Thing to be performed severally and not jointly; yet because the Contract is joint and the Consideration joint, and it is not known how much the one or the other gave, the Action is well brought jointly. Hill. 1649. between (f) Ivans and Raans Plaintiffs, against Draper adjudged, this being moved in Arrest of Judgment. Intratur Trin. 1649. Rot. 1104.

(f) Maur and Draper. Stile 156, 157, 203. S. C. adjudged by three Judges against one.

10. If A. be in Execution at the Suit of B. and C. a Stranger, comes to the Wife of B. in the Absence of B. and promises the Wife, that if B. her Husband will Discharge A. out of Execution, that he will pay the Debt (*) at such a Day to B. if A. does not pay it before; and after B. comes home, his Wife acquaints him with the said Assumpsit, and he agrees thereto, and upon this discharges A. out of Execution. This is a good Assumpsit, upon which B. the

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Husband may have an Action, tho' the Husband gave no Command or Authority before to the Wife to make an Agreement, (a) for the Agreement to it after is sufficient, 27 Hen. 8. 24. adjudged (b) Tatam's Case.

(a) Cro. Eliz. 61. like Point adjudged.

(b) Godb. 361. S. C. cited, and like Point adjudged.

11. (c) If A. appoints B. an Attorney to sue out a Latitat against J. S. at his Suit for a Debt due to him by J. S. and to arrest him, and B. accordingly takes out a Latitat, and shews it to J. S. and his Intent to arrest him thereupon; upon which J. M. promises B. that if he will forbear to Arrest J. S. he will pay the Debt at a certain Time to A. upon which B. forbears to arrest him, (d) and after A. agrees thereto, and brings an Action upon the Case against J. (e) M. upon this Promise, and it seems it lies, tho' the (f) Attorney had no Authority to take this Promise before it was made, for the Agreement thereto after is sufficient, contra between Jurdan and Jurdan adjudged upon a Demurrer.

(c) Sav. 23. like Point adjudged. Cro. Eliz. 229. like Point, per Curiam.

(d) Godb. 361. like Point, per Dod'.

(e) In the Original 'tis J. D. and so appears plainly to be misprinted. (f) A Man may declare upon a Promise to himself, or to his Attorney, Latch. 206. 'tis good either way; But Cro. Eliz. 369. vide Con. But vide Raym. 303. 1 Rol. Rep. 367. 1 Lev. 98.

12. If A. Discourses with B. about his Sale of Land to B. and after B. assumes and promises to C. the Wife of A. in Consideration that she will not hinder the said A. her Husband, to levy a Fine to him of the said Land, to pay to C. 10 l. or to give her a Riding Suit; if the Wife does not hinder the Husband, but he levies the Fine accordingly, the Husband and Wife (g) may have an Action upon this Promise; for the Promise is laid in the Declaration to be made to the Wife, (h) for they may join at the Election of the Husband. Pasch. 11 Car. B. R. between Fawcett and Childers per Curiam adjudged; this being moved in Arrest of Judgment.

(g) Stil. 298. like Case cited per Rol. &c. seems to be intended the same, and said it was adjudged they could not join.

(h) For this vide the Divisions, Title Baron and Feme.

13. (i) If A. gives Goods to B. of the Value of 80 l. out of which he should pay to C. 20 l. if B. does not pay the 20 l. to C. C. may have an Action upon the Case against B. and declare that he was indebted to him in 20 l. for Goods of the Value of 80 l. given to him by A. out of which he should pay 20 l. to C. for when Goods of the Value of 80 l. are given to B. by Agreement between him and A. that he should pay 20 l. to C. (k) this becomes a Debt to C. as if A. deliver 20 l. to B. to pay over to C. C. may have an Action of Debt or Account, or an Action upon the Case upon a Promise for it against B. Mich. 1651. between (l) Starky and Mylne adjudged per Curiam; this being moved in Arrest of Judgment. Intratur Trin. 1651. Rot. 1701.

(i) Gilbert and Ruddiord, new Dier 272. a. Margine like Point adjudged. (k) Ante Pl. 5. vide.

(l) Stile 296. S.C. adjudg'd by 2 Judges, but Nicholas doubted.

(A) What ſhall be a good Bar or Diſcharge of an Aſſumpſit.

1. (*) If J. S. is in Execution for 10 l. at the Suit of J. D. and J. N. comes to J. D. and promiſes him that if he will ſuffer J. S. to go at large, that he himſelf will ſatisfy him, to which J. D. agrees, tho' J. N. afterwards, and before J. D. has done any Thing by Force of the Promiſe, comes to J. D. and diſcharges him from delivering him out of Cuſtody, and that he will not ſtand to his Promiſe, but revokes it; yet is this no Bar in an Action upon the Caſe upon the Promiſe. Paſch. 16 Jac. B. R. between (m) Harford and Pile per Curiam, upon a Demurrer.

(*) 2 Rol. Rep. 19. 39. S. P. adjudged.

(m) Cro. Jac. 483. S. C. adjudged.

2. (a) If *A.* being poſſeſſed of a Horſe, lends him to *B.* and *B.* aſſumes and promiſes to redeliver the Horſe to *A.* by a Day, before which Day, the true Owner of the Horſe, *Contra voluntatem B.* (b) takes him from *B.* this Matter by reaſon of the precedent Property, is *quaſi* an Eviction of the Horſe from the Poſſeſſion of *B.* and (c) ſhall diſcharge *B.* of his Promiſe. *Mich.* 44 and 45 *Eliz. Yelv.* 22. between *Shelbury* and *Scotford* adjudged.

(a) 2 Rol. Rep. 459. like Point, dubitatur.

(b) So if the Horſe dies. 1 Jones 179. adjudged.

(c) If one aſſumes to purchaſe Lands at the beſt Price he can, the Promiſe to Purchaſe is abſolute, but the Price muſt be as reaſonable as he can. 1 Lev. 3. per Twiſden. But per Foſter Ch. Juſtice, he is not bound to Purchaſe, unleſs the Owner will ſell.

3. If in an Aſſumpſit the Plaintiff declares, That in Conderation the Plaintiff would ſolicit a Buſineſs for the Defendant which he had with *J. S. & finem adinde poneret*, the Defendant did aſſume, *&c.* and that he had ſolicited and imployed much Care and Pains, *&c.* but before he could *finem inde ponere*, the Defendant countermanded him, the Action lies. *Paſch.* 1 *Jac.* 2. between *How* and *Beech.* 3 *Lev.* 244. adjudged upon a Writ of Error, in *Cam' Scac'* and the firſt Judgment affirmed accordingly; and tho' it was objected that ſuch Imployment is always countermandable, and if the Plaintiff had beſtowed Pains, and in Part done the Thing before the Countermand, he might have had a *quantum meruit* for what he had done, but not an *Aſſumpſit* for the Whole; yet it was reſolved by the Court, that if after Part done the Defendant countermands it, the Plaintiff ſhall have an Action for the Whole; and upon Trial the Jury ought to give as much in Damages as the Buſineſs done deſerves.

Aſſumpſit.

When to do an illegal Act.

1. If *A.* obtains a Judgment againſt *B.* in the Marſhal's Court, and afterwards in Conſideration of Money in Hand paid, aſſumes and promiſes to aſſign this Judgment to *C.* this is a good Promiſe, for it is lawful ſo to do, and the Intent that it ſhall be aſſigned according to common Uſage, *viz.* by Letter of Attorney; ſo that *C.* may take out Execution in the Name of *A.* which may be done without any Maintenance. *Trin.* 16 *Car.* 2. between (a) *Loder* and *Cheſlin.* 1 *Sid* 212. per Curiam.

(a) 1 Keb. 744. S. C. adjudged niſi.

2. If *A.* and *B.* Merchants, import ſeveral Quantities of Rye, and a Queſtion ariſes between *A.* and *C.* an Officer of the Cuſtoms, to what the Cuſtom amounts, and what *B.* had paid; and *C.* in Conſideration that *A.* will pay him 100 *l.* (which in Truth is leſs than the Cuſtom comes to) aſſumes that if *B.* paid no more, then *A.* ſhould pay no more, and *B.* did pay no more; but yet *C.* cauſes *A.* to be compelled by the Commiſſioners to pay more;

more; upon this *A.* may have an Aſſumpſit againſt *C.* for Payment without Trouble of leſs than is Due, is a good Conſideration between the Officer and Merchant, and the Officer muſt anſwer the reſt to the King out of his own Pocket. *Mich.* 18 *Car.* 2. between (b) *Johnſon* and *Aſtel.* 1 *Lev.* 198. adjudged, but by the Reporter *Quære* this Point; and in this Caſe it was objected by the Counſel of the Defendant, that a Promiſe to cozen the King as *B.* had done, and that by Agreement of the Officer was void.

(b) 2 Keb. 155, 156. S. C.

3. If *A.* obtains a Judgment againſt *B.* and thereupon takes out an *Elegit*, and delivers it to the Under-Sheriff, who by Vertue thereof ſeizes certain Goods of *B.* and afterwards the Under-Sheriff, in Conſideration that *A.* will take out a new *Elegit* and deliver it to him, he promiſes to cauſe and procure the ſaid Goods to be found by Inquiſition, and to deliver the ſame to ſuch Perſon as *A.* ſhall appoint, *&c.* this Promiſe is againſt Law, being to do a Thing againſt the Duty of his Place, by which he is bound to return an indifferent Jury; and tho' Part of the Promiſe was to do a lawful Act, yet ſince that depended upon the other Part, which was illegal, the Whole is naught. *Mich.* 23 *Car.* 2. between (c) *Morris* and *Chapman.* 2 *Jon.* 284. adjudged.

(c) Foreſt and Chapman. Cart. 223. S. C. adjudged.

What is within the Promiſe.

1. (a) If *A.* in Conſideration that *B.* will put her Daughter abroad to be inſtructed in Needle-work, aſſumes and promiſes to *B.* that he will pay for the Board of her Daughter for one Year, and *B.* puts her Daughter abroad for 3 Quarters of a Year only; if *A.* will not pay for this 3 Quarters, *B.* ſhall have an Action againſt him; for the Effect of the Promiſe is, that *A.* will pay for the Daughter's Board for any Time not exceeding one Year, and (b) if there be any Variance from the Agreement, it is for the Advantage of *A. Mich.* 16 *Car.* 2. between (c) *Came* and *Gunſton.* 1 *Sid.* 225. adjudged.

(a) Cro. Eliz. 756. like Point adjudged. 1 Rol. Rep. 382. like Point, per Coke and Dod. 3 Bulſ. 187. like Point, per Coke and Dod'. Winch 80. like Point. dubitatur.

2. But if an Agreement is laid to pay 2 *d.* for (d) every Tun of Iron that ſhould be delivered (e) or to pay to a Clerk ſo much for every Quire writing, and that the Plaintiff had delivered one Tun and an half, or had wrote one Quire and an half, *&c.* notwithſtanding a Verdict for the Plaintiff, the Declaration is not good. 1 *Sid.* 225, 226. ſaid to have been adjudged *quod conceſſum fuit per Curiam.*

(b) 1 Rol. Abr. 20. Pl. 14.

(c) Keime and Goulſton. 1 Lev. 140. S. C. adjudged. 1 Keb. 792, 802. S C. adjudged. (d) If A. aſſumes to pay for all the Iron made in ſuch a Furnace, Secundum ratam 40 s. per Tun, he muſt pay for odd Pounds proportionably. Yelv. 133, 134. adjudged. (e) All. 9. S. P. adjudged upon an Action of Covenant. And vide 2 Lev. 124.

Aſſumpſit.

(a) Where it muſt be in Writing per 29 Car. 2. Cap. 3.

Per 29 *Car.* 2. *Cap.* 3. It is enacted, *That from and* (b) *after the* 24*th of* June, &c. *No Action ſhall be brought to charge an Executor or Adminiſtrator upon any ſpecial Promiſe to anſwer Damages out of his own Eſtate, or to charge the Defendant upon any Promiſe, to anſwer for the Debt, Default or Miſcarriage of another Perſon; or to charge any Perſon upon* (c) *any Agreement made upon Conſideration of Marriage; or upon any Contract or Sale of Lands, Tenements or Hereditaments, or* (d) *any Intereſt concerning the ſame; or upon any Agreement, not to be performed within one Year from the making, unleſs the Agreement upon which ſuch Action ſhall be brought, or ſome Memorandum or* (e) *Note thereof* (f) *ſhall be in Writing, and Signed by the Party to be charged, or ſome other by him authorized.*

(a) But yet the Plaintiff in his Declaration need not ſhew there is any ſuch Note in Writing; but it is ſufficient to ſhew it upon the Trial. Caſe and Barber. 2 Jon. 158. per Curiam. Raym. 450. per Curiam. —But if ſuch Promiſe is pleaded in Bar of another Action, it muſt be ſhewn to be in Writing: So that it may appear to the Court to be ſuch a Promiſe upon which an Action will lie. 2 Jon. 158. adjudged. Raym. 451. adjudged. (b) This extends not to Promiſes made before, tho' to be performed after; and tho' the Words are, That after the 24th of June no Action ſhall be brought, &c. yet in Conſtruction they ſhall be tranſpoſed, viz. That no Action ſhall be brought upon

any Promiſe after 24 Jun. &c. for it is againſt Natural Juſtice, that a Promiſe made upon good Conſideration, ſhould be deſtroyed by the Retroſpect of a Law, which none could divine would be made. Gilmore and Shuter. 2 Jon. 108. adjudged. 1 Vent. 330. adjudged. 2 Mod. 310. adjudged. 2 Lev. 227. adjudged. (c) This extends to a Promiſe by A. to Marry B. Manor and Baſter. 3 Lev. 65. adjudged; Tho' objected the Statute intends Promiſes for Payment of Money upon Marriage and not Promiſes to Marry. (d) An Agreement to aſſign a Term is within the Act. 1 Vent. 361. adjudged; tho' objected the Statute extended only to Intereſts created de novo. (e) A Promiſe by Letter good. 2 Vent. 361. adjudged. (f) But where Part of the Agreement for Lands was, that it ſhould be put in Writing, and executed by a certain Day. 2 Chan. Rep. 35. decreed.

And by another Clauſe, *That no Contract for Sale of any Goods for* 10 l. *or upwards, ſhall be good, except the Buyer accept and actually receive Part of them, or give ſomething in Earneſt, or in Part of Payment, or that ſome Note or Memorandum thereof in Writing, be made and ſigned by the Parties to be charged, or their Agents, lawfully authorized.*

Pleading in an Aſſumpſit.

The Declaration.

The Manner of ſetting forth the Conſideration.

1. (a) IN an Action upon the Caſe, the Plaintiff (b) cannot declare *quod cum* the Defendant was indebted to the Plaintiff in ſuch a Sum, the Defendant in Conſideration thereof, *ſuper ſe aſſumpſit*, to pay, *&c.* without (d) ſhewing the Cauſe of the Debt. 10 Co. 77. a. *per Coke* Ch. Juſtice.

(a) For this Point, vide Hob. 5. Godb. 186. Cro. Jac. 207 213, 642. Hob. 18. Moor 854. Pl. 1167. Hetl. 106. 1 Rol. Rep. 391. 1 Bulſ. 67. 3 Bulſ. 207. Cro. Jac. 397. Hard. 132. But Palm. 171. per Croke and Chamberlain, there is a Diverſity where the Promiſe is to pay at a Day to come, and where not; for the Promiſe to pay at a Day to come, implies a Forbearance in the mean Time. And vide 1 Rol. Rep. 396. (b) And ſuch a Declaration is not made good by Verdict. Cro. Car. 6. 31. 1 Sid. 182. and ſeveral of the Books cited immediately before. And 1 Brownl. 14 Poph. 31. Jenk. Rep. 293. and other Books to the contrary, are not Law. (d) The Plaintiff declares, that the Defendant was indebted to the Teſtator of the Plaintiff in 20 l. quas illi ſolviſſe debuit ſecundum agreamentum inter eos habit' 2 Lev. 162. Judgment was ſtaid after Verdict, for the Agreement might be by Deed.

2. (e) If in an Aſſumpſit the Plaintiff declares, That whereas the Defendant was indebted to the Plaintiff in 30 *l.* the Defendant in Conſideration that the Plaintiff had given Day to the Defendant until, *&c.* did aſſume and promiſe to pay, *&c.* this is a good Declaration, without ſhewing for what the Defendant was indebted, for the Debt is not in Queſtion; and tho' it be true there muſt be a Debt to make this a good Conſideration, yet that is (f) allowed in the Promiſe, being Actual. *Mich.* 9 *Jac. Woolaſton* and *Webb*, *Hob.* 18. adjudged after a Verdict for the Plaintiff.

(e) For this Point vide Cro. Jac. 397. 548. 593. Linghil and Broughton. Moor 853. Pl. 1167. 3 Bulſ. 206, 207. 1 Rol. Rep. 379, 380. Godb. 13. (f) Vide Hob. 216. Moor 854. 1 Rol. Abr. 19. Pl. 6.

3. If in an *Indebitatus Aſſumpſit* the Plaintiff declares, that the Defendant was indebted unto the Plaintiff in 10 *l.* for the (g) Feeding and Agiſtment of Beaſts, and for Wheat, *& aliis* (h) *mercimoniis per præd'*, the Defendant (i) *habit' & recept'*, this is a good Declaration; for tho' it be not ſufficient

(g) Indebitatus for Tithes Wright and Beal. 1 Lev. 141. 1 Sid. 223. after Verdict adjudged good, and intended ſevered, and upon a ſpecial Contract. (h) So an Indebitatus lies pro opere perantea facto, Ruſſel and Collins, 1 Sid. 425. adjudged. 1 Vent. 44. adjudged. 2 Keb. 552. adjudged. 1 Mod. 8. adjudged. — So pro labore — pro ſervitio, 1 Vent. 44. 1 Sid. 425. 2 Keb. 552. 1 Mod. 8. (i) Indebitatus for Tithes is good, without ſaying vendit' & deliberat', for that is implied, elſe he could not be indebted for them. Wright and Beal, 1 Lev. 141. adjudged after a Verdict for the Plaintiff. 1 Sid. 223. adjudged, for pro implies a Sale. — So when the Plaintiff declares that he was bargaining for a Horſe, and the Defendant aſſumed to pay if they could agree of the Price, and avers an Agreement was made pro tanto, &c. 1 Lev. 103.

ficient to ſay, that he was indebted generally, (k) becauſe that may be for Rent upon Leaſes, or Debts upon Specialties, yet this is certain enough; for as well the Wares and Merchandizes, as the Paſturing and Wheat are perſonal Things, for which an Aſſumpſit may lie. *Trin.* 10 *Jac.* (l) between *Gardiner* and *Bellingham*. *Hob.* 5. adjudged and affirmed upon a Writ of Error in *Camera Scaccarii.*

(k) And Damages recovered in an Aſſumpſit, will be no Bar in Debt for theſe. Cro. Car. 6.

1 Leon. 155. Cro. Eliz. 242. (l) 1 Rol. Rep. 24. S. C. adjudged and affirmed upon a Writ of Error; and Tanfield there ſaid, it would have been otherways if it had been pro diverſis aliis rebus.

4. If in an Aſſumpſit the Plaintiff declares, That whereas the Defendant had receiv'd 24 *l.* of ſeveral Perſons, to the Uſe of the (m) Plaintiff, in Conſideration thereof, the Defendant did aſſume and promiſe to pay, *&c.* this is a good Declaration without (n) ſhewing of what Perſons in particular he receiv'd the Money, (o) becauſe the Conſideration is executed, and not traverſable. *Trin.* 14 *Jac.* between (p) *Babington* and *Lamb.* *Moor* 854. *Pl.* 1168. adjudged.

(m) So an Indebitatus for Money receiv'd by the Hands of J. S. to the Uſe of the Defendant.

Noſworthy and Wildman. Mod. 42. adjudged good after Verdict, and ſaid 'they would intend it Money lent. 2 Keb. 615. adjudged; and vide 1 Rol. Rep. 391. Cro. Jac. 690. (n) So an Indebitatus lies for 40 l. pro diverſis denar' ſummis ei præſtitis, ac pro diverſis Denariorum ſummis de eod' the Plaintiff recept' & habit', ac pro quadam pecuniæ ſumma by the Plaintiff, at the Requeſt of the Defendant to J. S. ſolut' without ſhewing in particular how much he was indebted for each Cauſe, for that is not material, he being indebted ſo much in toto. Rook and Rook. Cro. Jac. 245. adjudged. Yelv. 175. appears. And vide 1 Brown. Ent. 71. (o) Where the Conſideration is executed, 'tis only Inducement, and needs not be preciſely alledged as to Time or Place. Cro. Eliz. 715. (p) 1 Rol. Rep. 391. S. C. adjudged.

5. (q) If in an Aſſumpſit the Plaintiff declares *quod cum* there were ſeveral Reckonings and Accounts between the Plaintiff and Defendant, and at ſuch a Day, *&c. Inſimul Computaverunt*, for all Debts, Reckonings and Demands; and the Defendant upon the ſaid Account, was found to be in Arrear the Sum of 20 *l.* in Conſideration whereof the Defendant promiſed to pay, *&c.* This is a good Declaration without ſhewing it was *pro mercimoniis*, or otherways wherefore he ſhould have an Account, for an Account may be for divers Cauſes, and ſeveral Matters and Things may be included and compriſed therein, which in *pede Compoti* are reduced to a Sum certain, and thereupon being indebted to the Plaintiff, it is ſufficient to ground an Action. *Trin.* 4 *Car.* between (r) *Holms* and *Savil.* *Cro. Car.* 116. adjudged.

(q) Goodwin and Willoughby, S.P. Poph. 177. adjudged. Lat. 141, 142. adjudged. Palm. 442. adjudged. And vide Yelv. 70. 1 Rol. Rep. 396.

(r) Hetl. 106. 113. S. C. adjudged. Lit. Rep. 148. ſeems to be S. C. adjornatur.

6. A Man may declare upon an *Indebitatus* for 20 *l.* *pro præmio*, upon a Policy of Aſſurance upon ſuch a Ship. *Trin* 27 *Car.* 2. between *Fowke* and *Pinſack*, 2 *Lev.* 153. adjudged upon a Special Demurrer, becauſe the Conſideration is not ſhewn in certain, nor what Præmium is, or how it became due; and it was ſaid, it was as good as an *Indebitatus pro quodam Salario*, which hath been adjudged good.

7. If in a *Quantum meruit* for Meat, *&c.* the Plaintiff declares upon a Promiſe to pay ſo much *quantum rationabiliter valerent*; This is a good Declaration. *Hill.* 3. *Jac.* 2. between *Bowyer* and *Lenthal.* 3 *Mod.* 190. adjudged upon a Writ of Error upon a Judgment by Default, and the Judgment affirmed accordingly, notwithſtanding it was objected that it ought to have been *Valebant.*

(a) The (b) Averment of Performance of the Consideration.

(a) For this, vide the Subdivisions of Averment, Title Pleading.

(b) Upon an Assumpsit to the Attorney in Consideration that he would acknowledge Satisfaction, &c. he declares, &c. and avers that he did acknowledge Satisfaction tanquam attornatus, præd', &c. and held naught; for perhaps before the Conusance his Warrant was revoked. 1 Rol. Rep. 366. per Curiam.—In Consideration quod venderet & deliberaret to the Defendant, and he avers, quod vendidit & deliberavit to the Wife of the Defendant. All. 61, 62. whether good dubitatur.—The Plaintiff declares, whereas he and the Defendant were Joint-Executors, and the Defendant had received all the Estate of their Testator, and the Plaintiff threatned to sue the Defendant for one Moiety, the Defendant in Consideration the Plaintiff would forbear, &c. and would shew an Account concerning the Testator's Estate, did assume, &c. and the Plaintiff avers, That he did shew quoddam Compotum, and tho' not said Compotum præd', yet Raym. 203, 204. after a Verdict for the Plaintiff it was adjudged for him.

1. If in an Assumpsit the Plaintiff declares, That the Defendant in Consideration that the Plaintiff would forbear him one Week, assumed, *&c.* and avers that he did forbear him for one Week, but says not one Week following; yet this is a good Declaration, for it must necessarily be intended so. *Hill.* 34 *Eliz.* between *Tenacy* and *Brown. Cro. Eliz.* 272. adjudged.

2. If in an Assumpsit the Plaintiff declares, That whereas there was a certain Bargain between the Plaintiff and the Defendant, for certain Woods, for which the Defendant was to pay 20 *l.* at a Day after; and that the Defendant, in Consideration that the Plaintiff *Asportaret sufficientem hominem foret obligat'* to the Defendant for the Payment of the said 20 *l.* did assume and promise that the Plaintiff should enjoy the said Woods, *&c.* and the Plaintiff doth aver, *quod asportavit B. sufficientem hominem fore obligat'*, to the Defendant, *&c.* yet this is no good Declaration. First, Because it is not shewn (c) how he was Sufficient; So that it may appear to the Court to be according to the Agreement. Secondly, Because it is not in Fact shewn that *B.* (d) did become Bound, or that *obtulit se obligari*, and perhaps he came to be Bound, but being there refused. *Mich.* 2 *Jac.* between *Allen* and *Randall*, *Yelv.* 49. adjudged.

(c) Vide Hob. 69, 70. 77. 1 Mod. 77.

(d) In an Action upon a Promise to repay Money laid out, or to be laid out, for Goods for the Use of the Defendant, the Plaintiff need not aver that the Goods came to the Hands of the Defendant. 1 Bulst. 169. adjudged.

3. If in an Assumpsit the Plaintiff declares, That his Father was seised of the Manor of *D.* and of divers Lands, *&c.* in *D.* in Fee, and in Consideration that the Plaintiff, together with his Father *Sigillaret quandam Indenturam per quam*, his Father *Barganizaret*, &c. the said Manor and Lands the Defendant did assume, *&c.* and alledges, that the Plaintiff such a Day *Sigillavit indenturam præd'*, yet the Defendant, *&c.* this is no good Declaration, for *Diversa terras & tenementa* in *D.* are uncertain, and comprehend not all his Lands in *D.* and therefore the Plaintiff ought to have shewed in certain, and particularly, what Lands were comprised within the Indenture. *Mich.* 5 *Jac.* between my Lord *Mordant* and *Walden. Yelv.* 110, 111. adjudged.

4. And in the Case before the Allegation, that he had sealed *Indenturam Prædictam* was not good, for *præd'* ought to refer to some Certainty before; but (e) *quandam Indenturam* is altogether Uncertain, and the Plaintiff should have shewed in certain that he sealed such an Indenture *per quam*, the Plaintiff and his Father *Barganizaverunt, &c. De verbo in verbum*, as laid in the Premisses of the Declaration. *Mich.* 5 *Jac.* between my Lord *Mordant* and *Walden. Yelv.* 111. adjudged.

(e) The Plaintiff declared, that whereas quædam pars domus, &c. was out of Repair, the Defendant in Consideration that the Plaintiff would repair eandem partem of the said House, assumed and promised, &c. and avers that he did repair eandem partem; and tho' it was objected the Plaintiff should have shew'd which Part of the House was out of Repair, yet 2 Leon. 53. 3 Leon. 91. after a Verdict for the Plaintiff, it was adjudged for him.

But

5. But if a perfect Indenture in Date, in the Nomination of the Parties, and Limitation of the Land had been mentioned before, it had been ſufficient to ſay, that they Sealed *Indenturam præd'*, becauſe by the Premiſſes, it appears there was *in facto* a true and perfect Indenture. *Mich.* 5 *Jac. Yelv.* 111. *per Curiam.*

6. If in an Aſſumpſit the Plaintiff declares, That in Conſideration the Plaintiff had promiſed to deliver a Cow to the Uſe of the Defendant, the Defendant did aſſume and promiſe, *&c.* This is a good Declaration, without (a) any Averment of the Delivery of the Cow, (b) becauſe there is (c) Promiſe for Promiſe. *Hill.* 12 *Jac.* between *Nichols* and *Rainbred. Hob.* 88. adjudged.

(a) And if in ſuch Caſe the Plaintiff doth aver a Performance, the Defendant can take no Iſſue thereupon. Cro. Eliz. 543.—And an ill Averment will not hurt. 1 Lev. 88, 293. (b) Where there are mutual Promiſes, the Plaintiff need not aver a Performance of his Part. Yelv. 134. 1 Mod. 621. Rol. Rep. 336. 1 Vent. 41. Hard. 102, 103. A ſtrong Caſe, March 75. Cro. Eliz. 703. 1 Lev. 20. 293. Kirkby and Coles, Cro. Eliz. 137. 1 Leon. 186. (c) Both theſe Promiſes ought to be made at the ſame Time, elſe they will be nuda pacta. Hob. 88. Cro. Eliz. 137. 1 Leon. 186.

7. If in an Aſſumpſit the Plaintiff declares, That the Defendant in Conſideration that the Plaintiff would Leaſe certain Lands to the Defendant, rendring 10 *l. per Annum*, the Defendant did aſſume and promiſe to, *&c.* and avers, that he did make a Leaſe of the ſaid Lands; but does not ſay that it was rendring 10 *l. per Annum.* This is no good Declaration. *Piſch.* 13 *Jac.* between *Lee* and *Adams.* 3 *Bulſ.* 35. adjudged after a Verdict for the Plaintiff.

8. If in an Aſſumpſit the Plaintiff declares, That in Conſideration the Plaintiff would find and provide for a ſick Man, all ſuch Neceſſaries as he ſhould want, the Defendant aſſumed and promiſed to pay, *&c.* and avers that he had found him Neceſſaries amounting to ſuch a Sum, *&c.* This is a good Declaration, without ſhewing in particular what thoſe Neceſſaries were; for that would make the Record (d) too prolix. *P.* 13 *Jac.* between (e) *Crips* and *Bainton.* 3 *Bulſ.* 31. adjudged after Verdict for the Plaintiff.

(d) For this vide the Diviſions, Title Pleading, viz. What may be alledged generally for the Avoidance of Prolixity. (e) 1 Rol. Rep. 173, 174. S. C. adjudged; and the rather becauſe after Verdict.

9. If in an Aſſumpſit the Plaintiff declares, That whereas the Defendant had committed a Felony, and thereupon had requeſted the Plaintiff to do his Endeavour (f) to procure a Pardon for the Defendant, and thereupon the Plaintiff by all the Means he could, and many Days Labour, did his endeavour to obtain a Pardon for the ſaid Felony, *viz.* in Riding and Journying at his own Charge from *London* to *R.* where the King was, and ſo to and from *New-market*, to obtain a Pardon, *&c.* This is a good Declaration; (g) tho' nothing in particular is laid to be done, but only Riding up and down, and nothing done when he came there, for an Endeavour in general is expreſly laid, and Particulars ought to be ſet forth for Form-ſake only; for tho' upon the Trial he could have proved no Riding nor Journying; yet any other effectual Endeavour, according to the Promiſe, would have ſerved. *Mich.* 13 *Jac.* (h) *Lampleugh* and *Blaithwait.* Hob. 105, 106. adjudged, *per totam Curiam præter Warberton*, and the rather becauſe it was after Verdict.

(f) Stil. 465. like Point, where the Defendant did his Endeavour to reconcile Differences, &c. (g) But if the Plaintiff declares, that the Defendant in Conſideration the Plaintiff had done him multa beneficia, aſſumed and promiſed, &c. this is not good. More and Lewis. 1 Vent. 27. adjudged after a Verdict for the Plaintiff. 1 Sid. 413. adjudged after a Verdict for the Plaintiff. And vide 2 Keb. 552. (h) Moor 866. Pl. 1197. S. C. 1 Brownl. 7. S. C. and S. P. appears.

10. If in an Aſſumpſit the Plaintiff declares, that in Conſideration the Plaintiff would deliver all the Corn in a certain Barn, the Defendant did aſſume and promiſe, *&c.* and avers that he did deliver all the Corn in the Barn, but does not ſhew that there was any Corn there; this is no good Declaration. *Trin.* 14 *Jac.* between *White* and 1 *Rol. Rep.* 382. agreed *per Curiam*, if it had been upon a Demurrer; but being after Verdict upon Non-

Aſſumpſit pleaded, by which Iſſue it is admitted there was Corn there, it was adjudged for the Plaintiff, and afterwards affirmed upon a Writ of Error.

12. (a) If in an Aſſumpſit the Plaintiff declares, That the Defendant in Conſideration that the Plaintiff, at the Requeſt of the Defendant, would marry the Couſin of the Defendant, did aſſume, *&c.* and avers that he did marry the ſaid Couſin of the Defendant, *&c.* This is a good Declaration, tho' it is not expreſly aver'd that he did Marry at his Requeſt, for it ſhall be ſo intended. *Trin.* 14 *Jac.* between (b) *Briſford* and *Woodruff. Cro. Jac.* 404. adjudged after a Verdict for the Plaintiff.

(a) Cro. Car. 195. S. P. adjudged after Verdict. 2 Leon. 53. S. P. adjudged after Verdict. Con. 3 Leon. 91.

S. P. adjudged after Verdict. Con. Trips and Rands. S. P. 2 Lev. 198. adjudged, and ſaid that the Requeſt ſhould be intended to be made at the Time of the Promiſe. 3 Keb. 769, 800. adjornatur. (b) 1 Rol. Rep. 433. S. C. adjudged, but S. P. does not appear. 3 Bulſ. 235. S. C. but S. P. does not appear.

13. If in an Aſſumpſit the Plaintiff declares, That whereas *J. S.* had acknowledged himſelf to be indebted to the Plaintiff in 10 *l.* for divers Treſpaſſes, which 10 *l.* the Plaintiff at the Defendant's Requeſt had accepted, and that the Defendant in Conſideration the Plaintiff would acquit and diſcharge the ſaid *J. S.* of the ſaid Debt, and would permit the ſaid *J. S.* to carry out of the Plaintiff's Houſe certain Goods, did aſſume and promiſe to pay the ſaid 10 *l.* to the Plaintiff, and alledges *in facto*, that he did acquit and diſcharge the ſaid *J. S.* and did permit the ſaid *J. S.* to carry away the ſaid Goods; This is no good Declaration, becauſe he doth not ſhew how he did acquit the ſaid *J. S.* for it could not be without Deed, which ought to have been particularly ſhewed; and tho' the Performance of the other Part of the Conſideration is ſufficiently aver'd, yet that will not help it. *Trin.* 16 *Jac.* between *Leneret* and *Rivett. Cro. Jac.* 503. adjudged.

14. If in an Aſſumpſit the Plaintiff declares, That the Defendant in Conſideration that the Plaintiff would beſtow his Labour and Pains about the Daughter of the Defendant, and would Cure her, did aſſume and promiſe to pay, *&c.* but does not aver that he did Cure her, but further declares, That in Conſideration the Plaintiff had cured her, the Defendant did aſſume, *&c.* this is a good Declaration as to both Promiſes, for (c) in the laſt there is an Averment included that he had cured her; and if it appears upon the whole Record that ſhe is cured, that is ſufficient. *Mich.* 21 *Car.* 2. between (d) *Lea* and *Edwards.* 1 *Mod.* 14. adjudged, it being after a Verdict for the Plaintiff.

(c) But when a Cuſtom laid in the firſt Mar' ſhall not help the Want thereof in the ſecond Mar'. Vide 1 Lev. 298. (d) 1 Vent. 44. S. C. adjudged, where 'tis ſaid the ſecond Promiſe was concluded, with an Averment that ſhe was cured; but I take that to be only what was included in the Promiſe. 1 Sid. 428. S. C. darkly reported as to this Matter. 2 Keb. 559, 566. S. C. adjudged. 1 Lev. 280. adjudged and ſaid, that after Verdict it ſhall be intended to be the ſame Perſon, the ſame Malady, and the ſame Cure; for it is but the ſame Cauſe of Action laid ſeveral ways.

15. (e) If in an Aſſumpſit the Plaintiff declares, That whereas there was a certain Diſcourſe between the Plaintiff and Defendant, concerning a Marriage to be had between the Nephew of the Plaintiff, and the Niece of the Defendant; and thereupon the Defendant in Conſideration the Plaintiff would do his Endeavour, and labour to perſwade his Nephew to marry the Niece of the Defendant, did aſſume and promiſe to pay to the Plaintiff, *&c.* and avers that ſuch a Day, and divers other Days and Times *omnibus modis quibus poterat conatus fuit & elaboravit ſuadere*, his ſaid Nephew to marry the Defendant's ſaid Niece, *&c.* This is a good Declaration, without ſhewing in particular how he did his Endeavour; for if he ſhould ſet forth his ſeveral Speeches to his Nephew in the Praiſe of the young Lady, or the Advantages of a married Life, *&c.* the Record would be too long. *Trin.* 32 *Car.* 2. between *Aglionby* and *Towerſon. Raym.* 400. adjudged after a Verdict for the Plaintiff.

(e) Moor 595. Pl. 808. like Point adjudged.

The Promiſe.

The (*) Manner of Alledging the Promiſe it ſelf.

(*) 1 Rol. Abr. 6. vide.

1. (a) If in an Aſſumpſit the Plaintiff declares, That in Conſideration *quod procuravit* J. S. to Surrender a Meſſuage, *&c.* the Defendant *Solveret* to the Plaintiff 10 *l.* the Declaration is not good; for there is no Promiſe laid (b) *Super ſe Aſſumpſit* being omitted. 17 *Car.* 2. between (c) *Buckler* and *Angel*, 1 *Sid.* 246. adjudged, and after a Verdict for the Plaintiff upon ſuch a Declar' Judgment ſtaid accordingly.

(a) 2 Keb. 77. like Point, adjornatur, and vide 1 Rol. Abr. 15. Pl. 4.

(b) The Plaintiff declares, That the Defendant upon Account was found in Arrear ſo much to the Plaintiff, which he hath not paid; but ſays not quod ſuper ſe Aſſumpſit. 1 Sid. 306. after a Verdict for the Plaintiff adjornatur. (c) 1 Keb. 878. S. C. adjudged per Curiam præter Keeling who held the want of ſuper, &c. but Form, and that it was help'd by the Verdict. Raym. 123. S. C. adjudged niſi, but Keeling held as before. 1 Lev. 164. S. C. adjudged the Mar' being quod, the Defendant ſolvere vellet, &c. and ſaid, that no Promiſe being laid Non Aſſumpſit could make no Iſſue.

2. If in an Aſſumpſit the Plaintiff declares, That the Defendant in Conſideration of, *&c. inter alia* did aſſume to pay, *&c.* this is no good Declaration; becauſe he ought to ſet forth the whole Promiſe, which is (d) intire, *Hill.* 22 *Car.* 2. between *Powel* and *Waterhouſe. All.* 5. adjudged after a Verdict for the Plaintiff.

(d) March 100. vide.

(a) The (b) Breach thereof.

(a) Where the Promiſe is to do one Thing or another, the Plaintiff muſt ſhew he did neither. Wright and Johnſon. 1 Sid. 440. adjudged. 1 Vent. 64. adjudged, but ill reported, for Part of the Promiſe is omitted.

1. If in an Aſſumpſit the Plaintiff declares, That in Conſideration that the Plaintiff would ſurceaſe a certain Suit he then had depending againſt the Defendant, the Defendant did aſſume and promiſe to pay to the Plaintiff his Coſts of Suit; and does aver that he did ſurceaſe his ſaid Suit, but that the Defendant hath not paid his Coſts, without ſhewing what Coſts he had expended; this is no good Declaration. *Paſch.* 34 *Eliz.* between *Foxe* and *Goodſon. Cro. Eliz.* 276. agreed *per Curiam*, if it had been upon Demurrer; but being after a Verdict it was adjudged for the Plaintiff.

(b) Where the Promiſe is to warrant ſuch a Debt, or firmam facere, anglice, make good ſuch a Sum to the Plaintiff, he may aſſign for Breach that the Defendant hath not paid it. 2 Rol. Abr. 738. Pl. 1, 2.

2. If in an Aſſumpſit the Plaintiff declares, That the Defendant in Conſideration that the Plaintiff would marry the Niece of the Defendant, did aſſume and promiſe to give the Plaintiff as much in Marriage with his ſaid Niece, as before *agreaſſet dare in maritagio* with his ſaid Niece to *J. S.* and alledges *in facto*, that the Defendant had agreed to give the ſaid *J. S.* 1000 *l. ſi ipſe maritare vellet* the ſaid Niece, and that the Plaintiff had married the Defendant's ſaid Niece, and yet, *&c.* this is no good Declaration, becauſe not ſhewn with whom the Defendant did agree to give 1000 *l.* to *J. S. Mich.* 44 and 45 *Eliz.* between *Alſop* and *Sytwell*, *Yelv.* 17. *per Fenner & Yelverton, contra Gaudy &* who held the contrary clearly; becauſe as they ſaid, the Agreement was but Inducement, and Matter meerly collateral to the Promiſe; and if the Defendant had pleaded that he did not agree to give *J. S.* 1000 *l.* the Plaintiff in his Replication might have ſhewed with whom the Agreement was made.

3. If in an Aſſumpſit the Plaintiff declares, That whereas it was agreed between the Plaintiff and one *A.* that the ſaid *A.* ſhould Leaſe a certain Houſe to one *B.* for 7 Years; and it was alſo agreed, That *B.* during the ſaid Term, ſhould repair the Houſe with Tile and Slate only, and thereupon an Indenture was drawn, but becauſe there was a Covenant therein, that *B.* ſhould be bound to all manner of Reparations, *B.* refuſed to Seal the ſaid Indenture, and the

Plaintiff refuſed to Seal a Bond for Performance, *&c.* and further ſhews that in the ſaid Houſe there was a great Wall, Part whereof was ruinous and likely to fall during the ſaid Term, and that the Defendant in Conſideration that the ſaid *B.* would Seal the ſaid Indenture, and the Plaintiff would Seal the ſaid Bond, did aſſume and promiſe, That he the ſaid Defendant would maintain and uphold the ſaid Wall *durante præd. termino 7 Annorum,* and avers that the ſaid *B.* the ſaid Indenture, and the Plaintiff the ſaid Bond did thereupon Seal, and in Fact ſays, That the ſaid Wall during the ſaid Term did fall, *&c.* this is no good Declaration, becauſe not expreſly aver'd that *A.* did demiſe the ſaid Houſe, and if there was no Demiſe, it was not poſſible for the Defendant to repair it during the Term, and for any Thing that appears, the Indenture was ſealed only on the Part of the Leſſee, and not on the Part of the Leſſor. *Mich.* 44 and 45 *Eliz. Yelv.* 18. *Soprani* and *Skurro*, adjudged *per totam Curiam.*

4. (c) If in an Aſſumpſit the Plaintiff declares, That whereas the Plaintiff was bound in an Obligation to *J. S.* the Defendant in Conſideration, *&c.* aſſumed and promiſed to ſave the Plaintiff harmleſs from the ſaid Bond, and ſays, That altho' the Plaintiff upon the ſaid Bond was impleaded, and a Recovery *per debitam legis formam* thereupon had, yet the Defendant had not ſaved the Plaintiff harmleſs, *&c.* this is a good Declaration, tho' tis not alledged (d) how he impleaded him, but only *implacitaſſet & recuperaſſet, Paſch.* 1 *Jac.* between *Foſter* and *Clement. Cro. Jac.* 10, 11. adjudged.

(c) Yelv. 16. like Point adjudged.

(d) For this vide Aſt. Ent. 37.

5. If in an Aſſumpſit the Plaintiff declares, That whereas the Defendant had diſtrained 6 Oxen of the Plaintiff for a Quit-Rent due to the Bailiffs of *B.* and thereupon the Defendant in Conſideration that the Plaintiff would pay the Money for the Redemption of his ſaid Cattle, did aſſume and promiſe upon Requeſts, to ſhew to the Plaintiff, or to ſuch other Perſon or Perſons as he ſhould Name, a ſufficient Record to charge the ſaid Lands with the ſaid Quit-rent, and alledges, that he appointed *B.* to ſee the ſaid Record, and requeſted the Defendant to ſhew it to *B.* accordingly, but that the Defendant had not ſhew'd to the ſaid *B.* any ſufficient Record to charge the ſaid Lands, this is a good Declaration; for tho' the Sufficiency of the ſaid Record is not triable *per pais*, and the Plaintiff might have aver'd a Breach generally, *ſcilicet*, that he did not ſhew any Record, yet this is ſufficient and moſt proper for the Plaintiff to lay the Breach according to the Promiſe; and in this Caſe the Defendant may plead, that he did ſhew *tale recordum* reciting it, and conclude which was ſufficient, and thereupon the Plaintiff may demur, and put the Sufficiency thereof to the Judgment of the Court. *Mich.* 1 *Jac.* between *Heyford* and *Reeve. Yelv.* 38. adjudged.

6. If in an Aſſumpſit the Plaintiff declares, That whereas the Defendant was poſſeſſed of 17 Todd of Wooll, and whereas there was a *Colloquium* between them for 15 Todd of the ſaid 17 Todd of Woll, to be choſen by the Plaintiff, and that the Defendant in Conſideration of 6 *l.* to be paid at a Day to come, *&c.* did aſſume and promiſe to deliver to the Plaintiff *pred'* 15 Todd of Wooll, and avers, that altho' he was ready to pay, *&c.* yet the Defendant had not deliver'd the ſaid 15 Todd, *&c.* but doth not ſhew that the Plaintiff had made any Election; this Declaration is not good, becauſe the Election was *quaſi* a Condition precedent, and an Act firſt to be performed on the Part of the Plaintiff, before the Defendant by his Promiſe was obliged to do any Thing, and this is much inforced by the Word *pred'*, which cannot refer to any other 15 Todd than what were mentioned upon the Communication, by which the Plaintiff of his own ſhewing ought to make an Election, and ſo the Fault appears to reſt on his ſide. *Mich.* 3 *Jac.* between *Raynay* and *Alexander. Yelv.* 76. adjudged *per totam Curiam*, after a Verdict for the Plaintiff.

7. But if the Plaintiff lays ſuch a Communication as before, and then declares upon a Promiſe to deliver 15 Todd generally, without ſaying *pred'*, and the Promiſe is found, the Plaintiff ſhall have Judgment, for the *Colloquium* might be conditional, and the Promiſe abſolute. *Mich.* 3 *Jac. Yelv.* 76. *per Curiam.*

8. So if it appears the Defendant hath ſold one of the Todds, by which the Election of the Plaintiff is deſtroyed, or if it appears that the Defendant would

would not ſuffer the Plaintiff to ſee the Wooll, ſo that he might make his Election, for this will excuſe the Act on the Part of the Plaintiff to be performed. *Mich.* 3 *Jac. Yelv.* 76. *per Popham.*

9. If in an Aſſumpſit the Plaintiff declares upon a Promiſe made by the Defendant to pay 40 *l. ante inceptionem* of the Plaintiff's next Journey to *London*, alledges, that ſuch a Day *incepit iter* towards *London*, *&c.* this is no good Declaration, becauſe it is not ſaid that this was the Plaintiff's next Journey, and he ought to have preciſely alledged, that it was his next Journey, or elſe no Breach appears. *Trin.* 8 *Jac.* between (e) *Rock* and *Rock*. *Yelv.* 175, 176. adjudged after a Verdict for the Plaintiff.

(e) Cro. Jac. 245. S. C.

10. If in an Aſſumpſit the Plaintiff declares upon a Promiſe to ſave the Plaintiff harmleſs, and alſo to pay 2 *d.* for every Farthingworth of Damage, the Plaintiff ſhall ſuſtain, *&c.* the Plaintiff in his Declaration muſt ſhew how many Farthings Damage he ſuſtained. *Paſch.* 10 *Jac.* between (f) *Coveny* and *Wooden*. *Yelv.* 220. adjudged after a Verdict for the Plaintiff, for it cannot be intended but that the Jury have given Damages as well for the Farthingworths of Damage, as for the not ſaving harmleſs.

(f) 2 Bulſ. 37, 38. S. C. adjudged.

11. If in an Aſſumpſit the Plaintiff declares, that the Defendant in Conſideration of, *&c.* aſſumed and promiſed to take the Son of the Plaintiff to be his Apprentice for 7 Years, and to find him Meat, Drink and Apparel, *&c.* during the Term, and avers that he did not find him Meat, Drink and Apparel, *&c.* but does not aver that he did put him, or that the Defendant did accept him as his Apprentice; this is no good Declaration, for it ought to appear that he was his Apprentice, or elſe the Defendant was not bound to provide for him. *Mich.* 14 *Jac.* between (g) *Talkarn* and *Wrigg*, *Cro. Jac.* 406. adjudged after a Verdict for the Plaintiff.

(g) 1 Rol. Rep. 414. S. C. adjudged. 3 Bulſ. 221, 222. S. C. adjudged.

12. If in an Aſſumpſit againſt an Executor, the Plaintiff declares, that the Teſtator of the Defendant in Conſideration of, *&c.* did aſſume and promiſe, that he would leave to the Wife of the Plaintiff as good a Portion as he ſhould give to any of his Children, and avers, that the Teſtator to ſuch a Daughter *dedit* ſuch a Portion, but did not leave, *&c.* this is no good Declaration, becauſe it does not appear when he did give this Portion, and perhaps it might be before the Promiſe. *Hill.* 2 *Car.* between *Almot* and *Pickten*. *Latch.* 203, 204. *per* 2 Judges againſt one after a Verdict for the Plaintiff.

13. If in an Aſſumpſit the Plaintiff declares upon a Promiſe made by the Defendant, to pay 50 *s.* to the Plaintiff when the Defendant ſhould have received Money, and avers, that the Defendant hath received Money, but yet hath not paid, *&c.* this is no good Declaration, becauſe it doth not appear how much Money the Defendant has received, and perhaps he hath not received ſo much as 50 *s.* and tho' the Promiſe is general, yet the Breach ought to be laid ſo as to be adequate to the Conſideration. *Mich.* 25 *Car.* 2. *Anonymus* 1 *Mod.* 169. agreed *per Curiam*, if it had been upon Demurrer, but being after a Verdict, it was adjudged for the Plaintiff.

14. If the Plaintiff declares, that whereas the Defendant was poſſeſſed of the 6th Part of a Ship, and it was agreed, the Defendant ſhould by Writing ſell his Intereſt to the Plaintiff for 600 *l.* and that the Plaintiff ſhould pay 20 *l.* in Hand, and the Reſidue *ſuper executionem* of the ſaid Writing; and that in Conſideration the Plaintiff had paid the 20 *l.* and aſſumed to perform the Agreement on his Part, the Defendant did aſſume to perform it on his Part, *pred' tamen* the Defendant had not performed the Agreement on his Part: This being upon a mutual Promiſe, the Breach is well aſſigned in the Words of the Promiſe. *Trin.* 3 *Will.* and *Mary*, between *Keech* and *Knight*. 3 *Lev.* 319. adjudged the rather becauſe after Verdict.

The

(*) The Plea.

(*) Where the Defendant may plead generally, that the Plaintiff exonerabit eum of the said Promise. Vide Cro. Car. 383. 2 Rol. Abr. 408. Pl. 1.

1. If in a *quantum meruit* for Medicines, the Defendant pleads that he hath paid to the Plaintiff (a) *tot' & tantas denariorum summas*, as the said Medicines were worth, without shewing what Sum in certain he hath paid; This is no good Plea. *Trin.* 16 *Car. March* 77. adjuged.

2. If in an Assumpsit the Plaintiff declares, That the Defendant did assume and promise to pay to the Plaintiff so much Money, and also to carry away certain Wood before such a Day; the Defendant as to the Money cannot plead that he paid it, and as to the Carriage of the Wood *Non Assumpsit*, (b) for the Promise being (c) intire, cannot be apportioned. *Trin.* 17 *Car. March* 100. adjudged, and after a Verdict for the Plaintiff upon *Non Assumpsit*, a Repleader was awarded.

(a) In an Assumpsit for Fees and Money laid out, the Plaintiff avers, that he had laid out 27 s. and the Defendant pleads that he paid all Fees and Money laid out. Rob. Ent. 56. without shewing what he had paid. (b) 1 Brown. Ent. 58, 59. In an Assumpsit to pay 24 s. per Hogshead for Ale, &c. The Plaintiff shews, licet 48 s. was due to him, Secundum ratam præd', &c. and the Defendant quoad 24 s. de, &c. Pleads Non Assumpsit, and as to the Residue a Tender, and thereupon Issue is joined. And vide Thomp. Ent. 66. Rob. Ent. 40. (c) The Defendant pleads the Promise was Conditional, and Traverses that it was absolute as the Plaintiff had declared. Thomp. Ent. 74. Rob. Ent. 97.

3. (d) If the Plaintiff declares upon an *Indebitatus Assumpsit*, and upon a *Quantum meruit*, and the Defendant pleads, That after the said several Promises made, and before the Action brought, the Plaintiff and Defendant came to an Account concerning divers Sums of Money, and that the Defendant was found in Arrear to the Plaintiff in 30 *l.* and thereupon in Consideration that the Defendant promised to pay the said 30 *l.* the Plaintiff likewise promised to release and acquit the Defendant of all Demands; this is a good Plea; for by the Account, the first Contract is merged. *Trin.* 27 *Car.* 2. between (e) *Milward* and *Ingram.* 2 *Mod.* 43, 44. adjudged *per totam Curiam.*

(d) 1 Brown's Ent. 14, 15. a like Precedent. And vide Thomp. Ent. 69, 71.

(e) 1 Mod. 205, 206. S. C. adjudged; but North Chief Justice, there said That if there had been but one Debt between them, the Entry into an Account for that, would not determine the Contract.

4. If the Plaintiff declares upon an *Indebitatus Assumpsit* for 100 *l.* and upon an *insimul Computassent*, the same Day for another 100 *l.* and the Defendant pleads that the said several Sums of 100 *l.* are for one and the same Cause of Action, and for one Sum of 100 *l.* only, and not for several Sums, and that after the Time of the said several Promises made, the Defendant by the Order of the Plaintiff, paid to one *B* 30 *l.* in Part of Payment, and Satisfaction of the said Money in the Declaration mentioned, and in full Payment and Satisfaction of the Residue of the said Money, did become Bound to the Plaintiff in a Bond of 120 *l.* conditioned for the Payment of 65 *l.* to the Plaintiff at a certain Day in the Condition specified, which said 30 *l.* and Bond the Plaintiff accepted, *&c.* this is a good Plea; for tho' 'tis no Plea to say the several Nar' are for one Sum only, and so to go no further; yet when the Defendant pleads over, that the very Sum demanded is satisfied, this is a good Plea, and if the several 100 *l.* were distinct Sums, the Plaintiff might have replied so, and taken Issue thereupon; But when he admits there was but 100 *l.* due, and that satisfied, the Plea is good. *Pasch.* 35 *Car.* 2. between (f) *Case* and *Barber. Raym.* 449. *per Curiam*, upon Demurrer, tho' upon the Importunity of the Plaintiff's Counsel, the Court gave him Leave upon Payment of Costs, to wave his Demurrer, and take Issue upon the Payment.

(f) 2 Jon. 158. S. C. adjudged and said per Curiam, that the Averment was but Surplusage; and that the other Matter was a full Answer to all, because said the Obligation was given in full Satisfaction of the rest of the Money demanded, and so extends to all.

Fol. 33.

(B) In what Cases an Action lies for a Collateral Respect.

1. If J. S. libels against J. D. in the Spiritual Court for a Defamation, and produces W. N. as a Witness to prove the Defendant guilty, and the Defendant makes an Allegation in writing (as the Course there is) that the said W. N. ought not to be received as a Witness, because he is a perjured Man, and that he was Perjured in such a Cause at such an Assizes in certain, which Allegation is false; yet W. N. shall have no Action upon the Case for this against J. D. because the Spiritual Court had a Jurisdiction of the first Matter, and this Allegation is but according to the Common Course of Justice there, where the Sentence is given upon the Proofs; and therefore if the Action would lie, every Man would be deterr'd from taking lawful Exceptions to false Witnesses. Trin. 15 Jac. B. R. between (a) Westover and Daubinet adjudged upon Demurrer.

(a) Cro. Jac. 432. S. C. adjudged.

2. (b) In an Action between two, where the Question is upon Evidence to a Jury if one of the Parties be a Bankrupt, or not, if a Counsellor in giving Evidence for his Client, says expressly to a Juror, that he is a Bankrupt where it is false; yet no Action lies against him, (c) because it is in the Course of Justice. Trin. 15 Jac. B. R. in the said Case of (d) Westover agreed per Curiam. and it seems by Hought' and Mount' that such an Action was brought against the same Mount' now Chief Justice, and that it was not maintainable.

(b) 1 Rol. Abr. 87. Pl. 1, 2, &c. vide.

(c) In Trespass the Defendant pleads the Plaintiff was a Bankrupt, &c. tho' he never was so; yet shall the Plaintiff have no Action for this, because, &c. Cro. Jac. 432. said per Hought'. (d) Cro. Jac. 432. and like Point cited.

(C) (a) In (b) Courts of Justice.

1. If A. exhibits false Articles to a (c) Mr. in Chancery against B. upon which B. is bound to his good Behaviour, B. shall have an Action upon the Case against A. for this Deceit and Vexation. Pasch. 17 Jac. B. between Allen and his Wife Plaintiffs, and Gomersal Defendant, adjudged per totam Curiam. Mich. 11 Jac. B. between (d) Bradly and Jones adjudged.

(a) 1 Rol. Abr. 101. H.

(b) Such false Oath in a legal Course not punishable in the Ecclesiastical Court, or Star-Chamber, vide 1 Rol. Rep. 61. 2 Bulst. 269. Goulst. 51. Pl. 13, 14. But Q. of the Star-Chamber. (c) If a Man exhibits false Articles to a Justice of Peace, &c. no Action lies. Cutler and Dickson. 4 Co. 14 b. adjudged. 3 Leon. 123. adjudged. 4 Leon. 35. adjudged, per tot' Curiam. Cro. Eliz. 230. S. P cited. Rob. Ent. 73, 74. Godb. 240. S. C. cited and admitted. (d) Godb. 240. S. C. and S. P. resolved Con. but because the Articles were exhibited in Chancery, and he thereupon had Process out of the King's Bench, Judgment was there given for the Plaintiff. Rob. Ent. 75, 76. S. P. and upon the same Reason as Godb. vide.

2. (e) If a Supplicavit issues out of Chancery to the Sheriff, against J. S. and upon this the Sheriff makes a Warrant to a Bailiff to take him, &c. and after the Bailiff comes into Chancery, and there makes an Affidavit that he had took him, and that he had rescued himself; upon which J. S. is committed to the Fleet, by the Lord Chancellor, tho' the Affidavit be false by which he is committed to the Fleet, and so to his great Damage; yet because the Affidavit was made in a legal Course, tho' he was not compelled by Process to make it, No Action upon the Case lies, for then every Man would be

(e) 12 Co. 128. like Point per Cur' con. And vide 3 Mod. 108.

be deterr'd from making Affidavits in ſuch Kind. Mich. 18 Jac. B. R. between (f) Aier and Redgwit adjudged in Arreſt of Judgment. (f) Palm. 142. 143, &c. S.C. adjudged per tot' Curiam. 2 Rol. Rep. 195, 197, 198. S. C. but no Judgment. Cro. Jac. 601, 602, S. C. adjudged per tot' Curiam contra Houghton.

3. In an Action upon the Caſe by A. againſt B. if the Plaintiff declares that he took his Oath in the Court of B. R. againſt the Defendant, concerning certain Matters, to have him bound to his good Behaviour; and upon this the Defendant intending to ſcandalize the Plaintiff, did falſly and maliciouſly ſay, in the Hearing of the Juſtices and Officers of the Court, and others there being, There is not a Word true in that Affidavit, and I will prove it by 40 Witneſſes, this Action is not maintainable; for the Defendant by his Anſwer made a Defence of himſelf in the Court, againſt the Charge and Accuſation againſt him, and therefore it is juſtifiable, being in a judicial way. Paſch. 15 Car. B. R. between (g) Moulton and Clapham per Curiam, adjudged in Arreſt of Judgment. Intratur Hill. 14 Car. Rot. 459. (g) 1 Rol. Abr. 87. Pl. 4.

Fol. 34.

4. (h) If A. recovers againſt B. Damages and Coſts in (i) C. or B. R. and ſues out a Fieri facias to the Sheriff, who by Force thereof takes Goods of B. to the Value, and ſo returns it, and the Goods remain in his Hands pro defectu emptorum; and after A. (k) well knowing thereof, yet to the Intent to vex and double charge B. ſues out another Fieri facias, and delivers it to the ſame Sheriff to be executed, who thereupon levies the Money of other Goods of B. and pays it over to A. in this Caſe for this Wrong and Veration, tho' it was in a legal Way, an Action upon the Caſe lies. Hob. Rep. 257. and 350. between (l) Waterer and Freeman adjudged. (h) Cro. Eliz. 574. like Point adjornatur. Cro. Jac. 667. like Point adjudged and affirmed upon Error. (i) This is A. in the Original, and ſo plainly appears there to be miſprinted. (k) If A. upon a Plaint entered againſt B. in London, Scienter, Attaches the Goods of J. S. an Action lies. Sanders and Powel, 1 Sid. 183. adjudged. 1 Keb. 693. adjudged niſi. 1 Lev. 129. adjudged tho' not ſaid Scienter; or that A. knew them to be the Goods of J. S. as if a Sheriff upon the Goods of C. levies a Debt due from D. for he ought to take Notice at his Peril. (l) Hob. fol. 205, 266. S. C. adjudged. 1 Brownl. 12. S. C. adjudged. Noy 23. S. C. better Opinion for the Plaintiff, but no Judgment. But vide the Roll, and Q. whether this Judgment was not reverſed upon Error, for I have heard it was, and yet Q. if this Point is not Law.

5. If A. ſues B. in the Spiritual Court for Tithes contrary to a Compoſition by him made; an Action upon the Caſe lies for it. Hob. Rep. in Caſe 257. cited. Mich. 43 and 44 Eliz. B. R. between (m) Bray and Partridge, for this Suit is coram non judice. (m) Hob. fol. 206. Cro. Eliz. 836. S.C. and like Point adjudged Con. 1 Rol. Abr. 101. Pl. 2. S. C. vide. ——A Man ſues in the Spiritual Court for Tithes in Kind, whereas he ought to ſue for a Modus, &c. Q. 1 Rol. Rep. 64. 3 Keb. 383.

6. So if A. ſues B in the Spiritual Court, for Tithe of Trees not Titheable, no Action upon the Caſe lies, 4 Jac. between Dame (n) Waterhouſe and Moodie. (n) Cro. Jac. 133. S. C. adjudged. Hob. 206. S. C. cited Con. vide

7. So if a Man charge another with Felony or Piracy, in a Bill in the Star-chamber, of which the Court has no Juriſdiction, an Action lies. Hob. Rep. c. 350. cited the Caſe of (o) Bulkly and Wood. Margin, where 'tis ſaid no Judgment was given. Hard. 196. S. P. per Hales, Ch. Bar'. Noy 23. S. C. cited. (o) Hob. fol. 206. S. C. cited 267. cited Cro. Eliz. 230. 247. S. C. adjudged. 4 Co. 14. b. S. C. adjudged, but after reverſed in Cam' Scac' for a Fault in the Pleading, it being there allowed, that an Action would lie for this Matter. Moor 705. Pl. 986. S. C. reverſed upon Error, and the Reaſon, tho' not ſo clearly ſtated, ſeems to be the ſame, as in Coke 2 An. 28, 29. S. C. reverſed upon the Matter in Law; but this Caſe is not there ſo clearly reported; for it does not appear that the Bill was exhibited for Matters not examinable in the Star-Chamber, vide 2 Keb. 832. S. C. cited and denied.

8. If

8. If a Man brings an Action upon a falſe Surmiſe (p) in a Proper Court, no Action lies for (q) it, for the Suit was legal, tho' the Cauſe thereof was untrue; for which he ſhall pay Coſts (r) Hob. Rep. c. 350.

(p) No Action lies for Suing an Attorney in an inferior Court, for who knows whether he will inſiſt on his Privilege, and if he does, he may plead it. 1 Mod. 209, 210. per Curiam.

9. If a Man brings a Writ of Forgery againſt a Peer, &c. and the Defendant by the Jury is found Not Guilty, yet ſhall not he have a Scandalum Magnatum, and lay the Charge contained (s) in the Action to be a Scandal. Hob. Rep. c. 350. (t) cited 11 Eliz.

10. If A. cauſes B. to be impriſoned upon a Statute acknowledged by him, tho' the Statute was defeaſanced, and the Money paid according thereto; yet no Action of falſe Impriſonment lies againſt A. Hob. Rep. c. 350. cited (u) 43 Ed. 3. 33.

11. If one ſues me contrary to his Releaſe, an Action lies, Hob. Rep. 350. (x) per Hob.

12. If the Obligee ſues the Obligor after the Money paid, tho' it be upon a ſingle Obligation an Action lies. Hob. Rep. c. 350. (y) per Hob.

(q) Damages given the Defendants upon ſuch a Bill, becauſe no Action lies. Noy 102.

(r) Hob. fol. 266. S. P. per Hob. 3 Leon. 138. 163. like Point per Curiam. Cro. Jac. 432. like Point per Curiam. (s) Moor 38. Pl. 123. Hetl. 55. (t) Hob. fol. 266. S. C. cited 267. S. C. cited. Dier 285. Pl. 37. S. C. adjudged. Kelw. 26, 27. S. C. adjudged. (u) Hob. fol. 266. S. C. cited. (x) Hob. fol. 267. per Hob. ſupra Pl. 4. Margin. vide 1 Rol. Abr. 102. Pl. 5. like Point Con. (y) Hob. fol. 267. S. P. per Hob. ſupra Pl. 4. Margin. vide 1 Rol. Abr. 102. Pl. 4. like Point Con. Cro. Eliz. 836. S. P. per Gawdy and Fenner Con.

(D) For Words.

(a) For what Words it lies, for Matters of which the Spiritual Court hath Conuſance.

(a) For what Words during the Act againſt Adultery, &c. vide Stile 299, 323. 328. 352. 387. 394. 455. 460. 1 Sid. 61.

1. If one Man ſays to another, (b) Thou art (c) a Whoremaſter; or to a Woman, (d) Thou art a (e) Whore, no Action lies for this, becauſe this is meerly Spiritual, (f) without any Temporal Loſs. Trin. 11 Jac. B. R. between Matthew and Croze, per Curiam.

where it was adjudged, tho' the Words were ſpoke during the Act, yet after that was repealed, no Action lay. 2 Sid. 5. 34. Hard. 107. (b) Cro. Jac. 323. S. C. and S. P. appears. Moor 10. Pl. 38. S. P. per Hales and Mountag' Con. (c) So if Adulterer. Moor 29. Pl. 92. adjudged. (d) 2 Bulſ. 89. S. C. and S. P. ſaid. 2 Rol. Rep. 433. S. P. per Chamberl' and Dod'. (e) Thou art a Whore, for J. S. hath the Uſe of thy Body; the Cart is too good for thee, not Actionable. Pollard and Armſhaw, Cro. Eliz. 582. adjudged. Gouldsb. 172. adjudged per tot' Curiam.—Thou plaidſt the Whore for a white Smock, not Actionable, Cart. 55. cited. But where by the Cuſtom of London, an Action lies for thoſe Words, if ſpoke there. Vide 1 Rol. Abr. 550. Pl. 1. (f) Where the Action lies, becauſe poſſibly a Temporal Damage may enſue. Vid. 1 Rol. Abr. 58. Pl. 2.

2. If one Man ſays of another that is married, He hath had two Baſtards Thirty-ſix Years agon, and he ſhould pay for keeping them; no Action lies for theſe Words, tho' he aver'd that by Force of theſe Words a Contention aroſe between him and his Wife, and he was in Danger to have been divorced, (g) for here is no Temporal Loſs, and the Offence was Pardoned by many General Pardons, this being 36 Years before. Paſch. 16 Jac. B. R. between (h) Randal and Beal adjudged in Arreſt of Judgment.

(g) No Action lies for ſaying the Plaintiff was with Child by J. S. and miſcarried, per quod ſhe got her Father's Diſpleaſure, and was turned out of Doors. Barns and Bruddel. 1 Vent. 4. adjudged. 1 Sid. 396. adjudged. 2 Keb. 451. adjudged. 1 Lev. 261. (h) 2 Rol. Rep. 24. S. C. adjudged. Poph. 140. S. C. adjudged, and one Reaſon thereof given, becauſe it was not ſaid that he was de facto Divorced. Cro. Jac. 473. S. C. adjudged, and there ſaid, this ſuppoſed Danger was a vain Fear. Godb. 273. S. C. adjudged.

3. (i) If a Man ſays of a Woman, That J. S. did beget her with Child, and ſhe had a Child by him, by Force of the ſpeaking of which Words ſhe loſt her Marriage with J. D. tho' thoſe Words are a Spiritual (*) Slander, yet the Loſs of the Marriage is Temporal, and therefore the Action lies for them. Co. 4. 16. b. (k) Anne Davis againſt Gardner adjudged.

* Fol. 35.

(i) 3 Bulſ. 48. like Point cited per Coke, Ch. Juſtice. Cro. Eliz. 639. like Point adjudged.——Diverſity where the Words are ſpoke to the Suitor himſelf, and where to a Stranger. Cro. Eliz. 787. adjudged; yet Q. for I think there is no Difference. (k) Poph. 36. S. C. adjudged. Hetl. 161. S. C. cited 2 Rol. Rep. 433. S. C. cited and agreed per Chambert' and Dod' Palm. 298. S. C. cited and there ſaid, that one Reaſon of the Judgment was, becauſe ſhe was puniſhable by the Statute; but 1 Sid. 397. it is ſaid to have been ſaid by Popham; and 1 Vent. 4. it is ſaid by Twiſden, to have been ſaid by Jones, that the Reaſon of the Statute was of Coke's own putting in. Vide 1 Rol. Abr. 37. Pl. 18, 19.

4. So if a Man ſays of a Woman, That J. S. had the Uſe of her Body, by which ſhe loſes her Marriage, an Action lies. Paſch. 5 Jac. B. R. between Dame Morriſon and Cade adjudged.

5. If a Man ſays to J. S. another Man, Thou art a Whoremaſter, for thou haſt lain with Brown's Wife, and hadſt to do with her againſt a Cheſt; by which he loſes his Marriage with A. D. &c. J. S. ſhall have an Action for theſe Words; (l) for there is no Difference between a Man and a Woman as to this Matter, for a Man may have a Temporal Damage by the Loſs of his Marriage as well as a Woman. Trin. 11 Jac. B. R. between (m) Mathew and Craze adjudged. Mich. 12 Jac. B. R. between (n) Sell and Fairee, per Curiam.

(l) Taylor and Colwin, S. P. Lat. 218. adjudged. 2 Rol. Rep. 373. appears. Palm. 385. appears. (m) Cro. Jac. 323. S. C. adjudged. 2 Bulſ. 89, 90. S. C. adjudged. (n) 3 Bulſ. 48. S. C. adjudged.

6. If a Man (o) ſays to a Woman, Thou art a Whore, I will marr thy Marriage, (p) by which ſhe loſes her Marriage; an Action lies. Trin. 22 Jac. B. R. between Tonſon and Spring adjudged. This being moved in Arreſt of Judgment.

7. (q) In an Action upon the Caſe, if the Plaintiff declares, that ſhe had many Suitors to marry her, and that the Defendant ſaid of her, She is with Child and hath taken Phyſick for it; by which ſhe became in Diſgrace, Et perdidit conſortium vicinorum ſuorum, &c. tho' it be (r) not alledged that ſhe loſt any Marriage thereby, yet the Action lies. Mich. 21 Jac. B. R. between (s) Medhurſt and Balam adjudged, This being moved in Arreſt of Judgment.

8. If one Man ſays to another, Thou waſt found in Bed with J. S.'s Wife, by the Reaſon of the ſpeaking of which Words he loſes his Marriage with A. S. &c. tho' he might be in Bed with her without any Ill done, yet becauſe this ſounds in Scandal, (t) and he has loſt his Marriage thereby, the Action lies. Mich. 8 Car. B. R. between (u) Southall and Dawſon adjudged; this being moved in Arreſt of Judgment. Intratur Trin. 8 Car. Rot. 868.

(o) So for Words wrote in a Letter per quod J. S. refuſed to marry her, &c. Shepherd and Wakeman. 1 Sid. 79. adjudged. 1 Keb. 255. adjudged. (p) She is a Man and not a Woman, actionable; Special Damage being laid, Cart. 55. cited.—She is a Burſtenbellied Quean, and her Guts hang down to her Garters, per quod, She loſt her Marriage with, &c. Actionable. Litl. Rep. 193. cited.——She is a Whore, and her Children (innuendo which ſhe had by her firſt Husband) are F's Baſtards, per quod ſhe loſt, &c. being ſpoke of a Widow, actionable. Cro. Car. 322. adjudged. (q) Hetl. 18. like Caſe adjudged for the Plaintiff, but (by the Reporter) without any Reaſon given. (r) Special Damage muſt not only be alledged, but proved in Evidence. 2 Mod. 296. (s) 1 Sid. 397. and 1 Vent. 4. 1 Lev. 261. S. C. cited and denied per Curiam. (t) What do you mean to entertain him, for he was a very harſh Man to his former Wife, and would not allow her Neceſſaries, and is of ſmall Eſtate, &c. per quod he loſt, &c. Actionable. Litl. Rep. 193. cited March 2. like Point agreed per Curiam. (u) Cro. Car. 269. S. C. adjudged.

9. (x) In an Action upon the Caſe for Words, if the Plaintiff declares that the Defendant ſaid of him, he had the Uſe of my Wife's Body by Force, by reaſon of which Words he was brought before certain Juſtices, &c. and by them examined for a Rape by him committed upon the ſaid Woman, by reaſon of which, for the Purgation of himſelf therefrom, he expended ſeveral Sums of Money;

(x) Litl. Rep. 337. like Point perhaps S. C. per Curiam, præter Hutton qui dubitabit.

An Action lies upon this Declaration for the temporal Damage he had thereby. Mich. 9 Car. B. R. between Harris and Smith adjudged per Curiam, in a Writ of Error upon a Judgment in Southampton; and the first Judgment affirmed accordingly. Intratur Hill. 9 Car. Rot. 73.

10. In an Action upon the Case, if the Plaintiff declares, That there was a Communication of a Marriage between him and A. S. and the Defendant said of him, he had a Bastard Child by Jenning's Wife of Northampton; and by the speaking of which Words, he himself refused to Marry with A. S. where it ought to have been, that A. S. refused to marry with him; after Not guilty pleaded, and this found for the Plaintiff, it was moved in Arrest. Mich. 11 Car. B. R. between Carter and Smith, & per Curiam, and the Words would have maintained the Action, if the Loss of the Marriage had been well alledged; because it might be intended that he might have a Bastard by her before her Marriage with Jennings, and if she had Issue by him after her Marriage, tho' this be no Bastard in Law, (y) yet such a Scandal might occasion the Loss of his Marriage; but per Curiam the Action does not lie, because it is not well alledged that A. S. refused to Marry him, but that he himself refused to marry A. S. and so no Damage, and therefore the Postea was staid.

(y) 1 Rol. Abr. 74. Pl. 1. and Margine several like Cases.

Fol. 36.

11. If a Man says to a Feme-covert, Thou bold Cullobine Bastard-bearing Whore, thou didst throw thy Bastard into the Dock at White-Chappel; No Action lies for these Words, tho' it might be intended she had a Bastard by the said Cullobine (who in Truth was her Husband) before Marriage, in as much as there does not appear to have been any Temporal Damage thereby by the Loss of any Marriage; but only a Punishment by the Statute for having a Bastard, which is not a sufficient Cause to maintain the Action. Hill. 10 Car. B. R. between (z) Cullobine and his Wife Plaintiffs, and Vinor Defendant, adjudged in Arrest of Judgment.

(z) Jones 356. S. C. adjudged. 1 Rol. Abr. 79. Pl. 1. S. C.

12. In an Action upon the Case, if the Plaintiff declares, that whereas divers Persons Conabantur & desiderabant to marry their Relations and Friends to the Plaintiff, the Defendant (being a Woman) of purpose to scandalize the Plaintiff, and to hinder him in his Marriage of any Woman, preferr'd a scandalous Libel in the Spiritual Court against the Plaintiff, and thereby charged him, that he under colour to be a Suitor to her in the Way of Marriage, often resorted to her in the Night, and lay with her, and got her with Child, and after published and affirmed the same Matter before several Persons, falsly and maliciously, by which the Plaintiff was so much Scandalized, that all honest Persons having the Fear of God before them, Aliquam mulierem de filiabus aut consanguineis suis in legitimo Matrimonio cum querente Copulari & Jungi semper postea, & hucusq; omnino recusaverunt & adhuc recusant, and upon Not guilty pleaded, the Jury find a Special Verdict, scilicet that the Defendant preferr'd the said famosum & Scandalosum libellum, &c. and that she after at the Sessions of the Peace being examined, who was the Father of the Child begotten of her Body, said and affirmed that the Plaintiff was; and that she affirmed this falso & injurioso of the Plaintiff; and that by Reason thereof, the Plaintiff was much Scandalized in his Fame and Name, and that all honest Men having the Fear of God before them, Aliquam mulierem de filiabus aut consanguineis suis in legitimo Matrimonio cum querente copulari & jungi semper postea hucusq; recusaverunt & adhuc recusant; the Action in this Case does not lie upon this Special Verdict, because here does not appear to have been any malicious Prosecution, and any Loss of any particular Marriage is not here alledged or found, or that there was any Treaty of any particular Marriage, and this general Matter that all honest Persons refused, by Reason thereof, to marry their Daughters or Relations to him, is too general. Mich. 11 Car. B. R.

between (a) Norman and Symons per Curiam adjudged, in Camera Scaccarii, and the Judgment given econtra in B. R. reversed accordingly.

(a) 1 Rol. Abr. 112. p. 8. S. C.

13. (b) In an Action upon the Case, if the Plaintiff declares, that (c) in London by the Custom, a Common Whore ought to be Carted, and a Bason tinged before her; and that the Defendant spoke these Words of the Plaintiff, Thou art a Whore and a Common Whore, and art a Baud to thy Mistress, and I will have a Bason tinged before thee; the Action will lie upon this Declaration for these Words. Trin. 15 Car. B. R. between Hassel and Capcot, adjudged good, this being moved in Arrest of Judgment that the Action does not lie.

(b) 1 Rol. Abr. 550. Pl. 1. 2. Rol. Abr. 69. Pl. 1. vide.

(c) The like Custom appears to be in Southwark. 1 Sid. 97.

14. In an Action upon the Case, if the Plaintiff declares, that in London there is a Custom, that a Baud ought to be Carted; and the Defendant said these Words of the Plaintiff; She is a Baud, and I will have her Carted. Hill. 15 Car. B. R. between Rily and Lewis, per Jo. and Bark', adjudged that the Action lies; this being moved in Arrest of Judgment, no other Judge being then present.

Fol. 37.

15. (d) In an Action upon the Case, if the Plaintiff declares, that whereas he was a Parishioner of S. the Defendant being Vicar there, to the Intent to scandalize the Plaintiff, and to create an ill Opinion of the Plaintiff among his Neighbours, so that they abstraherent themselves a consortio of the Plaintiff, tanquam ab homine excommunicato, & nulla fide aut credentia digno, and injustly to exclude the Plaintiff out of the Church, and for a great Time to deprive him of all the Benefit of hearing Divine Service in the said Church, the Defendant in the Time of Divine Service in the Church, in the Hearing of the Parishioners, maliciously pronounced the Plaintiff excommunicated, prætextu cujusdam instrumenti by him received from the Ordinary; whereas he had no such Instrument of Excommunication, nor was he Excommunicated; and also at another Time to the same Purpose aforesaid, in the Time of Divine Service, in the Hearing of the Parishioners, maliciously pronounced the Plaintiff excommunicated; and further, refused to celebrate Divine Service till the Plaintiff departed out of the Church, upon which the Plaintiff was compelled to go out of the Church, whereas the Plaintiff was not Excommunicated, by which Means the Plaintiff was Scandalized, and hindred of hearing Divine Service for a long Time; and for the clearing of this Scandal, and his Innocency therein, diversos corporis sui grandes labores Capere, & diversas ingentes denariorum summas erogare & exponere coactus fuit in extremam depauperationem & ignominiam maximam of the Plaintiff; this Action lies, tho' he does not shew that any Man avoided his Company, or forbore to Trade or Deal with him, or that he had any Temporal or Special Loss; for this is a great and malicious Scandal, tho' Spiritual, and to his Soul. Mich. 16 Car. B. R. between Barnabas and Traunter, adjudged per Curiam; this being moved in Arrest of Judgment.

(d) 1 Rol. Abr. 100. Pl. 4. like Case.

16. (e) If one Man says of another that has Land by Descent, that he is a Bastard; An Action upon the Case lies, for this tends to his Disinheritance and Disturbance by Suit. Mich. 3 Jac. B. R. per Curiam.

(e) Herns Pleder 111. S. P. Co. Ent. 28. Pl. 25. S. P. adjudged

17. But if one Man says of another that has Lands by Descent, that he is Base born, no Action lies; for these Words taken in mitiori sensu are not actionable. Mich. 3 Jac. B. R. per Curiam.

(f) 2 Vent. 26, 27, 28. S. P. by 3 Judges against 1. arguend' Con. 4 Co. 17. S. P. cited to have been adjudged Con.

18. (f) If a Man says of the Son and Heir apparent of J. S. that he is a Bastard; no Action lies, because he yet has no Prejudice thereby. Mich. 3 Jac. B. R. per Curiam.

19. (g) If a Man says to a Woman thou hadst a Bastard, no Action lies; because it does not hereby appear that he intends that the Bastard was chargeable to the Parish; in which Case by the Statute, a corporal Punishment is to be inflicted. Hill. 5 Car. B. R. between

(g) Palm. 298. S. P. adjudged Con. tho' it did not appear the Child was living, for she was punishable however.

Lightfoote

Lightfoote and Piggot. Rot. 423. per Curiam; this being moved in Arrest of Judgment, and the Plaintiff never had Judgment therein. Mich. 1650. between (h) Winter and Barnard adjudged, Intratur Hill. 1649. Rot. 666.

(h) Stile 2. 21. S. C. adjudged.

20. In an Action upon the Case for Words, the Plaintiff Thomas Brown declares, That one A. G. had a Bastard Son begotten of her Body, then living, of which the Defendant knowing, of his Malice to defame him, and to draw him in Danger of the Statute of 18 Eliz. having a Discourse of the Bastard, and of the Plaintiff, said of the Plaintiff, that Brown is the reputed Father of that Child, by reason of which he was very much prejudiced in his Buying and Selling, and put to great Expences in the Clearing of himself in hac parte; the Action does not lie for these Words upon this Declaration; because it is not said by the Defendant that he was to be punished by the (i) Statute; for he was not to have any Corporal Punishment, or to be imprisoned, unless the Bastard was some Charge to the Parish, Hill. 11 Jac. B. R. between (k) Salter and Brown, adjudged in a Writ of Error upon a Judgment for the Plaintiff in (*) B. where it was adjudged as I have heard per totam Curiam econtra for the Plaintiff there; but the said Judgment was now reversed per Curiam. Intratur Hill. 10 Car. Rot. 270. B. R.

(i) 18 El. Cap. 3.

* Fol. 38.

(k) Cro. Car. 436. S. C. adjudged, and the first Judgment reversed accordingly.

21. In an Action upon the Case, if the Plaintiff declares, that he was (l) Heir apparent to his Father, and B. his Brother, and that each of them had Lands in Fee of the Value of 40 l. per Annum, and that they intended to suffer their Lands to descend to him, or to convey them to him; yet the Defendant intending to disinherit the Plaintiff, said to the Plaintiff, Thou art a Bastard; by reason of which, his Father and Brother (m) (n) intended to disinherit him, and to convey their Lands to another; the Action lies upon this Declaration, for the Temporal Damage, that may accrue to him thereby. Pasch. 13 Car. B. R. between (o) Humfrys and Stutfield adjudged per Curiam; this being moved in Arrest of Judgment.

(l) For calling Bastard, tho' not shewn he was Heir apparent, or claimed any Inheritance by Descent from any one. Godb. 327. cited per Chamberl. Justice, to have been adjudged. 2 Rol. Rep. 249, 250. S. C. cited by Chamberl. but here it was said by another, that in that Case, special Damage was laid. vide 1 Rol. Rep. 244. 3 Bul. 75. Cro. El. 346. (m) In the Report of this Case by Jones, it is laid, per quod il perd le terres, &c. by Godb. that they did intend, and after did give their Lands from the Plaintiff, &c.—— for calling the Plaintiff's Father Bastard. Dal. 63. adjudged, nor quer', alien Godb. 328. per Chamberl. Justice, Quære Ow. 32. vide.——Action per Fitz. puisne for calling the Bastard Eigne lawful, Dal. 63. per Dier. (n) He hath cheated his Mother-in-Law of an Estate in N. per quod, he lost her good Will, which intended to have given him 100 l. not Actionable. Cart. 1, 2. Adjornatur, the Mother being living. (o) 1 Jon. 388. S. C. adjudged. Cro. Car. 469. S. C. adjudged. Godb. 451. S. C. adjudged.

22. In the said Case of (p) Humfrys, it was said by Justice Jones, that it was adjudged in Scaccario, and affirmed afterwards in a Writ of Error in Camera Scaccarii, that where there was Grandfather, Father and Son, and the Son brought an Action upon the Case, and declared that the Grandfather (whose Heir he is) intailed certain Lands upon himself, and the Heirs males of his Body; and the Defendant intending to scandalize the (q) Possibility that he had to inherit this Land, as Heir of the Body of his Grandfather, said he was a Bastard; tho' the Grandfather and Father were then living, yet the Action brought ut supra by the Son, lay. But Justice Jones did not say (r) in what Term or Year it was so adjudged.

(p) Cro. Car. 469. S.C. and S.P. cited accordingly.

(q) 2 Bulst. 90. S. P. per Fleming Chief Justice, Cro. Jac. 324. S. P. arguendo per Curiam.

(r) Vaughan and Ellis, Cro. Jac. 213. S. C. affirmed upon Error in Camera Scaccarii, by the Opinion of the two Chief Justices, it appearing that he was offered a Sum of Money to join in an Assurance.

23. In an Action upon the Case for scandalous Words, if the Plaintiff declares that the Defendant said these Words of the Plaintiff, being a Feme Sole, the of 1650. This is that

Whore that my Man A. got a Baſtard by, and withal ſpent all my Money; and being ask'd by another Perſon ſtanding by, Whether he were not miſtaken, for the Maid hath been but a little above a Year in Town; the Defendant replied, The Quean hath been too long to my Coſts; no Action lies for theſe Words, for to ſay that a Woman had a Baſtard, is no Cauſe of Action. Trin. 1651. between (s) Owen and Jevan adjudged; this being moved in Arreſt of Judgment after a Verdict for the Plaintiff.

(s) Stile 274. 277. S. C. adjudged Con. but the Words were ſpoke during the Statute againſt Adultery, &c.

24. If one Man ſays of another, He was the true Patron of the Advowſon of S. but he hath loſt that Patronage and Preſentation by being a Simoniſt and Recuſant, both which I will prove him to be; yet no Action lies, for by the Simony only, the Loſs of the Preſentation pro hac vice only comes by the Temporal Law, and the Recuſancy touches him only in his Religion, for it does not appear that he intended him to be a Recuſant according to the Statute. Trin. 16 Jac. B. R. between (t) Sir John Tasburrough & adjudged in Arreſt.

(t) Cro. Jac. 484. S. C. adjudged, 2 Rol. Rep. 43. S. C. adjudged, 1 Rol. Abr. 56. Pl. 27. S. C.

25. If *A.* having a Diſcourſe with *B.* concerning *I. S.* ſays of him, (a) You take Part with *I. S.* againſt me, who is an (b) arrant Papiſt, and hath a Pardon from the Pope, and can help you to ſuch an one if you will; No Action will lie (c): For the ſaying he is a Papiſt, is no more than to ſay he errs in his Religion, and no Action lies for calling a Man (d) Heretick, and this ſhall not be intended ſuch a Pardon as is made Treaſon, *&c.* by 13 *Eliz. per Hill.* 9 *Jac.* between *Ireland* and *Smith.* 1 *Brownl.* 12. 2 *Brownl.* 166. adjudged upon a Motion in Arreſt of Judgment.

(a) My Maſter put me away, becauſe I would not be a Papiſt, for he will keep no Servants but Papiſts; not actionable, tho' ſpoke of a Juſtice of Peace, Perepoint's Caſe, Cro. Eliz. 308. adjudged, 1 Rol. Rep. 427. cited. 3 Bulſ. 260. cited. (b) Thou art an arrant Papiſt, and it were no matter if ſuch were hanged, and thou, and ſuch as thou would pull the King out of his Seat if they durſt; not actionable, per Kingſton and Hill. Godb. 147. adjudged. 2 Brownl. 166. cited. (c) 1 Leon. 336. S. P. per Wray Chief Juſtice. (d) 4 Co. 17. a. at the Top. S. P. ſaid, 3 Mod. 27. S. P. cited.

26. (e) But if one ſays of a Biſhop or other Perſon that is intruſted with Eccleſiaſtical Government, he is a Papiſt, an Action lies. 2 *Brownl.* 166. *per Winch* Juſtice.

(e) 1 Leon. 336. S. P. per Wray, Chief Juſtice, 1 Brownl. 16. ſaid.

27. (f) If one ſays of a Woman Copyholder, *dum Sola & Caſta vixerit,* Thou art a Whore, and I will throw thee out of thy Living; an Action lies by reaſon of the ſpecial Damage which may accrue to her thereby. *Trin.* 16 *Car.* 2. between *Boys* and *Boys.* 1 *Sid.* 214. adjudged, but Judgment was there ſtaid for another Reaſon.

(f) 4 Co. 17. a. S. P. and like Point ſaid.

28. If *A.* declares whereas he is a Juſtice of Peace, and Deputy Lieutenant of the Country of, *&c.* The Defendant to cauſe him to be removed from the ſaid Offices, and to loſe his Election for one of the Knights of the Shire for which he then ſtood, falſly and maliciouſly ſaid of him, I have heard that a Maid Servant of *A.* ſhould report, that *A.* being ſick, the Maid Servant looking thro' an Hole of the Door where *A.* then lay, ſaw a Prieſt, *innuendo,* a Popiſh Prieſt, give the Euchariſt and extream Unction to *A.* and at another Time, I have heard that a Maid Servant who then lived with *A.* peeped thro' a Cranny of the Door where *A.* lay ſick, and ſaw a Popiſh Prieſt anoint him (extream Unction, *innuendo*) and give him the Sacrament of the Euchariſt, and avers that he never heard it; theſe Words are Actionable, for tho' it was objected, that by the firſt Words it does not appear that the Prieſt was a Popiſh Prieſt, nor by the laſt, that he gave him extream Unction otherways than by the *Innuendo*; yet it was reſolved, that all the Words being taken together they explain one another, and a Prieſt that gives extream Unction muſt be intended a Popiſh Prieſt, and an Anointing of one that is ſick by a Popiſh Prieſt, cannot be intended of any Thing elſe but extream Unction. *Trin.* 34 *Car.* 2. between Sir *John Knightly,* and *Marrow.* 3 *Lev.* 68. adjudged.

29. (g) If

(g) 2 Vent. 265. like Case cited. 3 Lev. 30. like Case adjudged, where the Words were ſpoke of a Juſtice of Peace.

29. (g) If the Plaintiff declares, whereas he was Deputy Lieutenant for the County of *Middleſex*, and one of the Privy Council of *Ireland*, and ſtood for Parliament Man of, *&c.* that the Defendant ſaid of him, he (h) is a Papiſt; The Action will lie, for theſe Words abſtractively taken will bear an Action, becauſe a Papiſt is expoſed to ſeveral Penalties within the Statutes of 23 *Eliz.* 3 *Jac.* and 25 *Car.* 2. and then a *fortiori* in this Caſe, in reſpect of the Quality of the Perſon of whom the Words were ſpoken. *Hill.* 34. and 35 *Car.* 2. between (i) *Row*, and Sir *Thomas Clergis*, *Raym.* 482. adjudged in *C. B.* and upon a Writ of Error in *B. R.* affirmed, *per totam Curiam.*

(h) He is a Rogue and a Papiſt Dog, and a pitiful Fellow, and never a Rogue in Town has a Bonfire before his Door but he; Actionable, Peake and Meker. 3 Mod. 103. adjudged. 2 Vent. 263. cited and ſaid, the Time perhaps might influence the Opinion of the Court, The Words being ſpoke the Day King James came to the Crown. (i) 3 Lev. 30, 31. S. C. adjudged. 3 Mod. 27, 28. S. C. adjudged and affirmed upon a Writ of Error.

(l) He hath ſaid many a Maſs to I. S. &c. Godb. 106. dubitatur.

30. If *A.* ſays of *B.* who was a Member of the Long Parliament *Tempore*, *Car.* 2. He is a Papiſt, when he is at Home, he goes to Church, but when he is at *London* he goes to Maſs: Sir *J. C.* and he were both Penſioners in the Long Parliament, an Action lies for theſe Words. *Hill.* 2 and 3 *Will.* and *Mar.* between Sir *Lionel Walden* and *Mitchel.* 2 *Vent.* 265. adjudged, but principally by reaſon of the Words (l) that he went to Maſs, for by the 23 *Eliz. Cap.* 4. ſuch Offender is to forfeit 100 *l.* and be impriſoned for a Year, ſo that the Words expoſed him to a corporal Puniſhment.

(E) Action upon the Caſe for Words.

1. IN an Action upon the Caſe, if the Plaintiff declares that he exhibited Articles in B. R. againſt the Defendant for his good Behaviour, and ſwore the ſaid Articles to be true before Juſtice Whitlock, one of the Juſtices of the ſame Court; and the Defendant to the Intent to ſlander the Plaintiff, ſaid of him, That he had taken a falſe Oath againſt him before Juſtice Whitlock (innuendo the ſaid Oath taken upon the ſaid Articles) tho' it is not aver'd that the Oath was taken of Record, yet the Action lies, for this ſhall be intended the Articles being exhibited in Court, and ſworn before a (*) Juſtice of the Court. Mich. 10 Car. B. R. between (a) Yolden and Wannel adjudged; this being moved in Arreſt of Judgment.

* Fol. 39.

(a) 1 Jones 352. S. C. adjudged. Cro. Car. 378. S. C. adjudged.

2. If one Man ſays of another that he hath written a forged Will, wherein I will prove him falſe, forſworn, and perjur'd in a Will that he made of John Hunt, an Action lies for theſe Words; for it ſhall be preſumed that he intended he was perjured in his Oath taken touching the ſaid Will. Hill. 12 Car. B. R. between Cowly and Clough, per Curiam adjudged, this being moved in Arreſt of Judgment.

3. In an Action upon the Caſe, if the Plaintiff declares, that there was a Writ of Inquiry of Damages between A. and B. in a Court of Canterbury, at the Seſſions-Houſe there, where he was ſworn to give Evidence, and what he knew; and after the Defendant ſaid of him, He is a forſworn Rogue in taking an Oath in the Seſſions Houſe; an Action lies for theſe Words, tho' it was objected in Arreſt of Judgment, that if a Man ſwear falſly before an Inqueſt of Office, this is not within the Statute of 5 Eliz. of Perjury. Mich. 13 Car. between (b) Pruer and Moadman adjudged. Intra Trin. 13 Car. Rot. 546. for tho' it be admitted that this is not within 5 Eliz. yet they all agreed, that for ſuch a Forſwearing at the Common Law he may be indicted, and therefore if it be out of the Statute, yet an Action lies for this Slander.

(b) 1 Rol. Abr. 42. Pl. 27. S. C.

(F) For Words.

For what Words the Action lies.

1. If one Man ſays of another, He is a Perjurer, he Swore once for me, and the ſecond Time hath perjured himſelf with J. S. (a Stranger); an Action lies for theſe Words. Mich. 9 Car. in Camera Scaccarii in a Writ of Error adjudged, and the Judgment given in B. R. affirmed; where the Words were ſpoke in Welſh, and interpreted to be ſo in Engliſh.

2. If a Man ſays of J. S. I will prove J. S. forſworn, and that ten Men can juſtify, and (a) I could prove him perjured if I would; the Action does not lie for the firſt Words, but it lies for the laſt Words; for this is a great Scandal, to have it reputed to be in the Power of any Man to prove him perjur'd. Paſch. 5 Jac. B. R. between Whitacre and Lovergden, per Curiam.

(a) If I liſt, I can prove him perjured; not Actionable, per Hut. 127, 128. adjudged, becauſe no Affirmative that he was perjured.

3. If one Man ſays to another, I did not know that Maſter Woodroofe was your Brother, he hath forſworn himſelf; and I will prove him perjured, or elſe I will bear his Charges; an Action lies for theſe Words, tho' they are ſpoke conditionally to bear his Charges, if he did not prove him perjured. Mich. 37 & 38 Eliz. B. R. (b) Woodroofe's Caſe adjudged.

(b) Moor 365. pl. 498. S. C. adjudged Cro. El. 429. S. C. adjudged.

4. If one Man ſays of another, that he was (c) perjured, and he would prove him ſo by 2 Witneſſes; an Action lies for theſe Words, tho' he does not ſay in what Court he was perjured, or how. Trin. 39 Eliz. B. R. 30. between (d) Rayner and Grimſton adjudged.

(c) Moor 365. S. P. ſaid 4 Co. 15. b. S. P. ſaid Herns Pleder 111. like Point, dubitatur 137. like Point dubitatur.— I will prove H. a perjur'd Knave, actionable. Farm and Worrington, 3 Leon. 151. adjudged. Cro. Eliz. 222. adjudged.— I have indicted Mr. B. of Perjury, and I doubt not to prove him perjured to all Intents and Purpoſes, not actionable; for otherways there could be no Proſecution or Inquiry after Evidence, without Danger of an Action. 1 Sid. 220. adjudged. Kelw. 29. b. (d) Owen 62. S. C. affirm'd upon Error in Cam' Scac'. Noy 61. S. C. affirm'd upon Error in Cam' Scac'.

5. (e) If one Man ſays of another, he hath (f) forſworn himſelf, no Action lies for theſe Words. Paſch. 40 Eliz. B. R. the laſt Caſe adjudged.

(e) Cro. Eliz. 429. S. P. agreed per Curiam. 4 Co. 15 b. Moor 365. S. P. ſaid, 1 Bulſ. 40. S. P. adjudged Con. but cannot be Law. (f) Thou art a forſworn Bailiff, and wert forſworn this Day, not actionable. Cro. Eliz. 788. adjudged.——Thou wert forſworn in Carpenter's-Hall, not actionable, tho' ſpoke of the Maſter, and in relation to his Oath there taken. Cro. Eliz. 788.—Thou art a forſworn Fellow; for by thy falſe Oath thou haſt hang'd as true a Man as thy ſelf, actionable; for it can't otherways be intended than of an Oath judicially taken. Cro. Eliz. 572. adjudged. 1 Rol. Abr. 70. Pl. 46. Margine——He is a diſſembling Fellow, a main-ſworn and forſworn Fellow, not actionable. Morton and Lydal. 1 Brownl. 4. 9. adjudged.

6. If one Man ſays to another, Thou waſt perjured in a Court of Tottenham, an Action lies; for this ſhall be intended a ſufficient Court to hold Plea. Paſch. 40 Eliz. B. R. the which intratur. Mich. 39, 40 Eliz. Rot. 2173.

7. (g) If one Man ſays to another, Thou haſt forſworn thy ſelf in Leake-Court; no Action lies without ſhewing what manner of Court this is, for that it cannot be intended or known whether this is ſuch a Court that may compel one to Swear or not. Mich. 8 Jac. B. between Law and Bennet, per Curiam.

(g) Cro. Jac. 190. like Caſe adjudged Con. Poſt. Pl. 9. Hern's Pleder 111. vide. Hern and Hert. like Caſe. Cro. Eliz. 135. cited 609. cited Cro. Car. 378. cited 1 Leon. 127. cited Cro. Eliz. 720. cited Con. and a Manuſcript ſhewed accordingly.——He is a forſworn Man, and hath taken a falſe Oath in his Depoſition at T. where he waged his Law againſt me. Cro. Jac. 204. adjudged pro quer'.

8. If

Fol. 40.

8. If one Man ſays to another, Thou art a forſworn Knave, and waſt indicted by 12 Men, and haſt Compounded for it; an Action lies, for all being laid together, it appears that he intended a Perjury in a Court of Record. Mich. 1 Car. between (h) Gilbertin and Rowe adjudged; this being moved in Arreſt of Judgment, the which intratur Trin. 1 Car.

(h) 3 Bulſt. 304. S. C. adjudged.

9. If one Man ſays to another, Thou art a forſworn Knave, and I will prove thee forſworn in the (i) Eccleſiaſtical Court; an Action lies for theſe Words, for the Eccleſiaſtical Court is a Court known. Paſch. 40 Eliz. B. R. between (k) Shawe and Thompſon adjudged.

(i) P. hath taken a falſe Oath in the Conſiſtory Court of E. actionable; Pierce and How, 1 Leon. 131. adjudged. Cro. Eliz. 185. adjudged.——He was falſly forſworn in the Court of the Biſhop of E. at E. actionable; becauſe it is well known every Biſhop has his Court. Cro. Eliz. 297. adjudged; but Cro. Jac. 436. like Caſe adjudged Con. but vide Rol. Abr. 69. Pl. 41. (k) Cro. Eliz. 609. S. C. adjudged. 2 Rol. Rep. 410. S. C. cited.

10 (l) An Action lies for theſe Words, He hath forſworn himſelf before the Counſel of the Marches of Wales, in the Suit I had againſt him there for Perjury. Hob. Rep. Caſe 360. between (m) Adams and Fleming adjudged; tho' it was objected this Court could not take Notice of this Counſel, &c.

(l) 2 Rol. Rep. 471. S. P. appears. (m) Hob. fol. 283. S. C. adjudged. 1 Brownl. 13. S. C. no Judgment. Hut. 34. S. C. adjudged, in all which Books the Words are, He hath forſworn, &c. and I will ſue him for Perjury.

11. (n) If one Man ſays to another, Thou art a forſworn Man, I will teach thee the Price of an Oath, and will ſet thee on the Pillory; an Action upon the Caſe lies, for this ſhall be intended ſuch a Forſwearing, for which he ought to ſtand upon the Pillory. Hill. 41 Eliz. B. R. per Fenner.

(n) 1 Rol. Abr. 70. Pl. 46. S. P. with Notes thereupon.

12. If one Man ſays of another, he did forſwear me (innuendo the Plaintiff) 40 s. worth of Tithes in Canterbury Court; no Action lies for theſe Words, for there are ſeveral Courts in Canterbury, and it is not ſhewn in what Court, nor before what Judge, nor that the Judge had Authority to hold Plea of Tithes. Paſch. 43 Eliz. B. R. between (o) Bray and Partridge adjudged.

(o) Hut. 34. S. C. cited.

13. If a Man ſays of J. S. I had not been caſt in that Action but for the Oath of J. S. and he was forſworn; and I marvel that B. would marry his Daughter to ſuch a forſworn Man; in an Action upon the Caſe for theſe Words, if the Plaintiff avers that there was an Iſſue between him and A. and that ad Curiam Baronis de Geton Soca, Domini Regis tent' apud S. in Comitatu prædict' he was produced as a Witneſs, and ſworn about the Matter of the Iſſue, and after the Defendant having a Diſcourſe about this Iſſue, ſpoke the ſaid Words; no Aaion lies upon this Declaration, becauſe it is not alledged that S. is within the Soke of Geton, and ſo perhaps the Court was held out of their Juriſdiaion; and alſo becauſe it is not alledged that he was ſworn about a Matter pertinent to the Iſſue. Mich. 11 Jac. B. R. between Crawford and Briſe adjudged.

14. If one Man ſays of another, He is a forſworn Knave, for he Swore that the Wood was worth 40 s. where it was dear of 13 s. and 4 d. no Aaion lies for theſe Words, tho' he does aver that there was a Diſcourſe between them of a Matter at the Aſſizes, in which the Plaintiff was ſworn as a Witneſs; becauſe he does not directly ſay, it was not worth 40 s. but that it was dear of 13 s. and 4 d. Alſo it does not appear that the Defendant intended this at the Aſſizes. Hill. 13 Jac. B. R. between Stephen (p) Apthorpe and Cockerell adjudged.

(p) 1 Rol. Rep. 287. S. C. adjudged, but a Quære is there made of it by the Reporter. 3 Bulſ. 150. S. C. adjudged.

15. **If one Man ſays to another,** That he was Perjured in his Anſwer in the (q) Star-Chamber; **an** Action upon the Caſe **lies.** Paſch. 40 Eliz. B. R. **between** (r) Corbet **and** Hill **adjudged.**

(q) Thou waſt falſly forſworn in the Star-Chamber, actionable, and it ſhall be intended in a Suit there. Foſter and Thorn. 1 Leon. 127. cited. Cro. Eliz. 135. cited. (r) Cro. Eliz. 609. S. C. adjudged. 1 Rol. Abr. 83. Pl. 9. S. C.

16. **If one Man ſays to another,** Thou waſt forſworn in (s) thine Anſwer in Chancery; **no Action lies.** Hill. 41 Eliz. B. R. cited per Clerk, **to be adjudged, within a Year then before paſſed** (it ſeems this is not Law.)

(s) Thou art thrice perjured in thy Anſwer in Chancery to my Bill, actionable. Cro. Eliz. 907. adjudged.

17. (t) **If one Man ſays to another,** Thou waſt forſworn in the Court of Requeſts; **an** Action upon the Caſe **lies, between** (u) Brooke **and** Doughty **adjudged, cited** Hill. 41 Eliz. B. R.

(t) Hut. 34. S. P. per Curiam arguend'. (u) 1 Leon. 127. S. C. adjudged, with the Addition of theſe Words, I will make thee ſtand upon a Stage for it; but Cro. Eliz. 135. S. C. adjudged, and ſaid, thoſe Words were not found by the Jury. 1 Rol. Abr. 69. Pl. 42. S. C.

18. **If one Man ſays to another,** Thou wert forſworn (x) in the Chancery; **an** Action upon the Caſe **lies, for** (y) **this is a Court of Record,** Paſch. (*) 8 Jac. **between** Perie **and** Rock, **agreed** per Curiam. Hill. 8 Car. B. R. **between** Shonke **and** Batten **adjudged; that an Action lies for theſe Words,** thou wert forſworn upon Record in Chancery, innuendo **a Suit by Bill there, which the Plaintiff recited in his Declaration, it being moved in Arreſt that it was not a Court of Record.**

(x) So, if in the Common * Fol. 41. Pleas. Hut. 34. per Hobert 44. ſaid, (y) No Action lies for ſaying he had proved the Plaintiff forſworn in the King's Bench, per Cro. Eliz. 135. cited.—He is forſworn and perjured in Swearing at the Common Pleas Bar upon the Deeds which he then had in his Hands, actionable. Owen 13. adjudged.—— Thou waſt forſworn at the Bar, innuendo the Bar of the Common Pleas, not actionable. Hut. 44. ſaid.

19. **If one Man ſays to another,** Thou wert forſworn in ſuch a Court, which is but a (z) Court-Baron; **no Action lies, becauſe it is not a Court of Record.** Paſch. 8 Jac. in Scaccario, **between** Pery **and** Rock, **agreed** per Curiam.

(z) Winch 3. S. P. Con. per Hutton and Hobert.

Hut. 34. S. P. ſaid Con.—Thou art falſly forſworn in Bell-Court innuend', a Court-Baron, with this innuendo the Action lies, elſe not. Cro. Eliz. 297. per Curiam. Herns Pleader 111. vide 137. vide.——Thou art a forſworn Jack in the Court-Baron of D. thou haſt Sworn me out of 20 s. Rent, and haſt me on thy ſide, actionable. Cro. Eliz. 342. adjudged, and 348. like Caſe adjudged.

20. **If a Man ſays** of J. S. **and another,** They are proper Witneſſes, they will ſwear any Thing, they have forſworn themſelves in Chancery, and the Lord Keeper committed them for it; **an Action lies by** J. S. **tho' he does not ſay that he was forſworn in the** Court of Chancery, **and tho' it may be that this was in an Office belonging to the Court; but this ſhall not be intended.** Mich. 8 Car. B. R. **between** (a) Jones **and** Ball **adjudged; this Matter being moved in** Arreſt of Judgment.

(a) Godb. 444. S. C. adjudged.

21. (b) **If a Man ſays** of J. S. **he gave** 10 l. **to** B. **for forſwearing himſelf in** Chancery, **an** Action upon the Caſe **lies for theſe Words, for it ſhall be intended** (c) **a Subornation.** Mich. 9 Car. B. R. **between** Ewer **and** adjudged, **this being moved in** Arreſt of Judgment; **but there were other Words alſo, which were not held material.**

(b) 1 Rol. Abr. 51. Pl. 5. like Caſe, and vide my Notes thereupon. (c) Thou art a perjured Fellow, thou hadſt 10 l. to take a falſe Oath, and therefore thou art a forſworn Fellow, actionable. 1 Bulſt. 69. by 2 againſt 1, who ſaid he might take the Money and not the Oath.

22. **Upon an Iſſue between two, if A. holds** of B. **by Fealty and Suit of Court** tantum, **and at the Aſſizes** C. **being produced as a Witneſs, takes his Oath, that it is held** of B. **by Fealty and** 5 s. **Rent and Suit of Court; and after** E. **having a Diſcourſe of this**

Iſſue, and of the Evidence ſo given, ſays to C. thou wert forſworn in that Action at the Aſſizes innuendo, &c. and I will prove it; C. ſhall have an Action for theſe Words, all this Matter being alledged in the Declaration, tho' E. does not alledge the particular Thing in which C. was forſworn; for it is alledged that he ſaid the Words, having a Diſcourſe of this Iſſue, and of the Evidence ſo given. Paſch. 11 Jac. B. R. between Lane and Gibbons adjudged.

23. If one ſays to a Jury-man, Thou art a Common Jury-man, and haſt ſeen the Overthrow of 100 Men by thy falſe and ſubtle Means; an Action lies for theſe Words, ſubtle and falſe Means ſhall be intended of a Common Juror, and this touches him in the Point of his Oath. Paſch. 7 Jac. B. R. (d) Peter's Caſe adjudged.

(d) Moor 876. Pl. 1226. S. C. adjudged. Godb. 242. S. C. cited. Hetl. 173. S. C. cited.

24. If A. be charged at a Seſſions of the Peace for ſeveral Treſpaſſes done to J. S. and J. N. a Conſtable is produced to teſtify his knowledge in the Matter, and he is Sworn, and upon this gives his Teſtimony; and thereupon A. ſays, having Reference to the ſaid Oath, that he is forſworn; tho' this Evidence was not given upon any Iſſue, ſo that it may be Perjury within the Statute, yet if he was forſworn in ſuch a Court of Record, this was an Offence at the Common Law, and therefore the Action lies. Mich. 8 Car. B. R. between (e) Duke and Corderoy, adjudged in a Writ of Error upon a Judgment in B. R. and the Judgment affirmed accordingly. Intratur Mich. 7 Car. Rot. 284.

(e) Cro. Car. 288. S. C. affirm'd upon Error, 1 Jones 307. S. C. affirm'd upon Error, and S. P. appears.

25. In an Action upon the Caſe by A. againſt B. for Words, if the Plaintiff declares, that one Chriſtmas preferr'd a Bill in Chancery againſt him, &c. ſhewing the Effect of the Bill, and that he made a true Anſwer thereto upon his Oath, according to the Courſe of the Court, and that after there being a Diſcourſe between one D. and the Plaintiff at Da. touching certain Matters between them, the ſaid B. and one F. came to the ſame Place, upon which A. ſaid to D. I will talk no longer with you now your two Affidavit Men are come; upon which B. the Defendant, ſaid of the Plaintiff, he need not to ſay ſo, for (*) he was abſolutely forſworn in his Anſwer to Chriſtmas his Bill, (innuendo, the ſaid Bill and Anſwer) tho' he does not ſay he was forſworn in a Point (f) material, yet is it a Slander; and tho' there was no Diſcourſe of this Suit, yet ſhall there not be intended any other Suit, nor any Suit in any Court, by Reaſon of which the Action ſhould not lie, without the Defendant's ſhewing of it. Mich. 9 Car. B. R. between Sir (g) Richard Strode and Strode Allen adjudged; this being moved in Arreſt.

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(f) He hath delivered untruths upon his Oath in his Anſwer to the Bill of J. S. in Chancery: Not actionable, becauſe it might be in ſome Matter of Form only, and not in Matter of Subſtance. Brown and Birchel. Cro. Eliz. 500. adjudged. Noy 36. adjudged, and the firſt Judgment reverſed accordingly. 2 Rol. Rep. 145. cited; and there the Words are, He hath delivered Untruths in a material Thing in his Anſwer in Chancery, for which it is there ſaid it was adjudged the Action lies. So in Palm. 65. cited as in Rol. Rep. before. (g) Cro. Car. 321. S. C. adjudged. 1 Rol. Abr. 78. F. 3. S. C.

26. If a Man ſays of J. S. He hath forſworn himſelf in a Court of Record, an Action lies for J. S. tho' he does not expreſs what Court he means. Mich. 14 Car. B. R. between (h) Hoskins and Chele, adjudged per Curiam, in a Writ of Error upon a Judgment in B. where it was adjudged econtra, and this Judgment now reverſed per Curiam. Intratur Hill. 13 Car. Rot. 696.

(h) Cro. Car. 509. S. C. adjudged upon a Writ of Error.

27. If one Man ſays to another, that he was forſworn in a Court of Record (in ſuch Matter and Manner as is not within the Statute of 5 Eliz. of Perjury) yet becauſe he may be indicted for this at Common Law, an Action upon the Caſe lies, tho' (i) it was urged that it was not Perjury within the Statute of 5 Eliz. the Oath being made upon a Writ of Inquiry of Damages, of which the Court gave no Opinion, but that the Action lay, admitting that it is not within the Statute. Mich. 13 Car. B. R. between (k) Pruer and Meadman adjudged, this being moved in Arreſt of Judgment. Intratur Trin. 13 Car. Rot. 546.

(i) Vide 1 Leon. 131, 132. Cro. Eliz. 185.

(k) 1 Rol. Abr. 39. Pl. 3. S. C.

28. If

28. **If one Man says to another,** Thou art forsworn (l) and didst take a false Oath at the Assizes at **Hereford** against J. S. **no Action lies for these Words, without an Averment that this was at a Trial, or before the Court or Jury; for it might be at the Assizes in a private House or other Place.** Pasch. 15 Car. B. R. **between** (m) Prichard **and** Smith **adjudged** per Curiam **in** a Writ of Error **upon a Judgment in** Ludlow; **and the first Judgment reversed for this Cause.** Intratur Pasch. 14 Car. Rot. 179.

(l) Your Father and your Brother is a forging extorting Knave, and did suborn to forswear himself before my Lord Chief Justice; and whether this shall be intended of an Oath taken judicially. 2 Rol. Rep. 410 dubitatur.——Thou art a false forsworn Knave, thou didst take a false Oath before a Judge of Assize to hang a Man, adjudged for the Plaintiff. 1 Brownl. 13.——He is falsly forsworn before the Justices of Assize between A. and B. actionable. Hetl. 119. adjudged.—Thou wast forsworn before my Lord Chief Justice in an Evidence, actionable. 1 Leon. 127 per Daniel.—He is a forsworn Knave, and took a false Oath against me at a Commission at W. not actionable, because it did not appear what Authority the Commissioners had, nor in what he was forsworn. Winch 2, 3. adjudged. Hut. 44. adjudged. (m) 1 Vent. 195. S. C. cited and said there was no **Colloquium,** &c. ergo agreed.

29. (n) **If a Man says of** J. S. (o) He is forsworn and his Oath is upon Record, **an Action lies;** for **this is as much as if he had said** that his Oath is upon Record, and he is forsworn; **for the Perjury is not of Record, but his Oath only, and so it must be intended that he was forsworn in the Matter which he swore of Record.** Mich. 22 Car. B. R. **between** (p) Osborn & Brookes per Curiam. Intratur Trin. 22 Car. Rot. 767.

(n) 1 Rol. Abr. 65. Pl. 1. Margin.
(o) Thou hast forsworn thy self at London, and there it appears upon Record upon Demurrer, adjudged for the Plaintiff. Cro. Eliz. 583.——Thou art a perjured Knave, and standest perjured upon Record for denying of thy own Hand, and I will prove it; This must be intended a Court of Record, else it would be oppositum in objecto, and therefore actionable. 3 Bulst. 283. adjudged (p) All. 7. S. C. adjudged.

30. **Upon a Discourse between** A. **and** B. **of a** (q) **Suit in a Hundred Court, in which** A. **was produced as a Witness and Sworn,** if B. says to A. Thou art a perjured Rogue, **an Action lies, for a Perjury in a Hundred-Court is within the express Words of the Statute of** 5 Eliz. P. 1653. **between** Saintsbury **and** Alborne **adjudged,** per Curiam; **this being moved in Arrest of Judgment.** Intratur, Trin. 1653.

(q) Thou art a false and forsworn Knave, and that I will prove, for thou wast forsworn in the Hundred-Court, (innuend' S. Court) not actionable, it not being shewn in the Declaration that any Suit was depending, &c. **Goz** and **Mozton.** Yelv. 27. adjudged. Cro. Eliz. 905. adjudged.

31. If one Man says of another (a) he is a suborner of Perjury; an Action lies, tho' it is not alledged that he suborned any Person in certain. *Mich.* 25 and 26 *Eliz.* between *Guerdon* and *Winterflud. Cro. Eliz.* 308. adjudged.

(a) Thou art a lewd Fellow, for thou hast drawn such a Man to Perjury; actionable, because it is much as if he had said, he had suborned him. Cro. Eliz. 809. adjudged. 906. adjudged.—Thou have caused this Boy to Perjure himself, adjudged for the Plaintiff. 1 Brownl. 2.—Thou have procured a perjur'd Man to seek my Blood; not actionable. Cro. Eliz. 342. cited to be adjudged; but Fenner said it was ended by Composition.

32. (b) If one Man says to another, Thou wast forsworn in the Leet at D. an Action lies. *Mich.* 38 and 39 *Eliz.* between (c) *Wyld* and *Cookeman, Cro. Eliz.* 492. adjudged.

(b) Winch 3. S. P. per Hutton.
(c) Noy 34. S. C. adjudged Moor 537. Pl. 701. S. C. adjudged, and there said, he spoke these farther Words, viz. and didst procure others to be Sworn.—Thou art a perjured Knave, for thou swearest this Day at the Leet, that I baked Bread in my House, when I did not; actionable, tho' not Perjury within 5 Eliz. Cro. Eliz. 709. adjudged.

33. If the Plaintiff declares that he was Sworn, and did give Evidence at the Sessions upon an Indictment against the Defendant, and that after the Defendant *habens colloquium* of the said Oath did say, the Plaintiff did (d) take a false Oath against me at the Sessions, *innuendo,* the said Oath, *&c.* The Action does well lie, for the *Colloquium* shews to what the Words did relate. *Pasch* 24 *Car.* 2. between *Wood* and *Coat.* 1 *Vent.* 195. adjudged.

(d) So if the Plaintiff declares that he did give Evidence upon a Trial between the Defendant and J. S. and that after habens colloquium of the said Trial, the Defendant did say, Thou art forsworn, &c. Hard. 152. adjudged.

(G) (a) General Words.

(a) Where an Action of Scandalum Magn' will lie for such Words. vide Poſt under that Title.

1. (b) **If a Man ſays to another** that he is a Thief, an Action upon the Caſe **lies.** Mich. 4 Jac. B. R. **between** (c) Minors and Liford, **admit** Mich. 14 Car. B. R. **between** Coke **and** Brampton, **adjudged in** a Writ of Error **out of** Ludlow. Intratur Paſch. 14 Car. Rot. 424. **the Words were,** Thou art a forſworn Whore-thief.

(b) Dal. 17. S. P. agreed **per Curiam.** but there ſaid the old Law was otherways. Owen 47. S. P. agreed per Wray, but Gaudy Con. Cro. Eliz. 857. S. P. adjudged. 2 Bulſ. 134. S. P. adjudged. (c) Cro. Jac. 114. S. C. adjudged, and S. P. admit.

2. **If there be a Diſcourſe of the Wife** of J. S. **and then one ſays,** Who would ſay this of me but J. S.'s Wife, who is a Whore and a Thief, an Action upon the Caſe **lies, without ſhewing what Words were ſaid; for this is not material.** Trin. 15 Jac. B. R. **between** Griffith **and** Johnſon **adjudged.**

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3. (c) **If one Man ſays to another,** I charge you with Felony; an Action upon the Caſe **lies.** Mich. 5 Jac. B. R. **between** (d) Baſy **and** Child, **adjudged.** Mich. 8 Car. B. R. **between** (e) Smith **and** Hodgskins, **adjudged,** per Curiam **upon a Demurrer.** Intratur, Paſch. 8 Car. Rot. 104. **and then a Caſe was cited to have been.** Mich. 2 Car. **between** (f) King and Merrick, B. R. **an Action brought for theſe Words,** I charge you with Felony, and I charge you Conſtable to (g) apprehend and lay hold of him, **and it was adjudged, that the Action did not lie, but the Court now denied it.**

(c) 1 Rol. Abr. 72. Pl. 10. 49. Pl. 6. like Caſe 72. Pl. 11. 73. Pl. 21. 113. Pl. 5.
(d) Noy 124. S. C. and S. P. appears.
(e) 1 Jones 302. S. C. adjudged Cro. Car. 276, 277. S. C. adjudged. (f) Latch. 175. S. C. adjudged. Cro. Car. 277. S. C. cited, and ſaid Judgment was given in that Caſe for the Defendant; becauſe the Words were not laid to be ſpoke of the Plaintiff. (g) Diverſity where ſuch Words are ſpoke before an Officer, or he is thereupon apprehended, and where not; per 2 Rol. Rep. 343. per 3 Judges. Godb. 340. per Ley, Chief Juſtice.

4. **If one Man ſays to another,** Thou deſerveſt to be Hanged, **no Action lies for theſe Words.** Trin. 4 Jac. B. R. **between** (h) Hake **and** Molton **adjudged, for this only expreſſes his Opinion and Judgment of him.**

(h) Yelv. 90. S. C. adjudged. 2 Mod. 163. S. C. cited.

5. (i) **If a Man ſays to** J. S. Thou art a Scurvy bad Fellow, and haſt done that thou deſerveſt to be Hanged, **no Action lies.** Mich 11 Car. B. R. **between** Fiſher **and** Atkinſon, **adjudged,** per Curiam, **in Arreſt of Judgment after a Verdict for the Plaintiff.**

(i) The Plaintiff declares, that whereas J. S. was attainted of Felony, the Defendant ſaid to the Plaintiff, You have done as ill and worſe, and it will coſt you as much to be quit as it coſt him; not actionable. Cro. Eliz. 31. per Gawdy, the reſt doubted, & adjornatur; but Cro. Eliz. 62. there is a like Caſe, and the Words held Actionable per Curiam, but Cro. Eliz. 470. like Caſe adjudged not Actionable.

6. (k) **If one Man ſays to another,** (l) You are (m) no true Subject to the King, **no Action lies for theſe Words, becauſe they are too general, for perhaps it may be becauſe he had not paid his Taxes.** Mich. 5 Jac. B. R. **between** (n) Smith **and** Turner **adjudged.**

(k) Cro. Eliz. 268. S. P. adjudged. 621. S. P. adjudged. 1 Rol. Abr. 69. Pl. 37, 38. (l) But if ſuch Words are ſpoke of one that is a Juſtice of the Peace, and Capt. of the Guards, they are Actionable. Sir **William Waldgrave** againſt **Agar.** Cro. Eliz. 191. adjudged. Cro. Jac. 202. cited, and ſaid the Reaſon of that Judgment was, becauſe the Plaintiff was ſo near in Service about the Queen. 1 Leon. 335. 6. Wray agreed, but **Fenner** Con. **Gaudy** held the Words in all Caſes Actionable. 1 Rol. Abr. 75. Pl. 1. (m) But yet in the Caſe of **Duval** and **Dyce,** Caſe in Parl. 12. where an Action was brought by a Juſtice of Peace, for ſaying he was diſaffected to the Government, per quod he was turn'd out of Commiſſion, tho' it was adjudged for the Plaintiff in the Court of Exchequer, and after in the Exchequer-Chamber, that Judgment affirmed upon a Writ of Error, yet it was after reverſed in the Houſe of Lords. (n) Cro. Jac. 202. S. C. adjudged Yelv. 104. S. C. adjudged. and in Yelv. ſaid it would have been otherways, if the Words had been ſpoke upon any Diſcourſe of the Plaintiff's Loyalty.

7. (o) If

7. If one Man ſays to another, (p) Thou art a (q) Rogue and an arrant Rogue, and I will prove thee to be a Rogue, no Action lies. Mich. 41 & 42 Eliz. B. R. adjudged.

(o) 1 Brownl. 9. like Caſe, no Judgment.
(p) 4 Rep. 15. b. S. P. Cro. Eliz. 857. S. P. appears. (q) If one Man ſays another is a Villain, Rogue, or Varlet vel ſimilia, theſe are but Words of Paſſion, for which no Action lies. 4 Co. 15 b. Moor 29. ſaid,—Thou art a Murderer, actionable. Moor 29. ſaid. Owen 33. per 2 Judges.

8. But if a Man ſays to another, You Rogue, you are a traitorly Rogue, you cheated your Father of all that ever he had; you are a branded Rogue, and have held up your Hand at the Bar; you have deſerved Hanging, and you ſhall be hanged, an Action lies; for it appears that he intended that he was branded according to the (r) Statute. Mich. 23 Car. B. R. between (s) Meake & Cubit adjudged, this being moved in Arreſt of Judgment.

(r) 1 Jac. cap. 7.
(s) Stile 49. S. C. adjudged. All. 35. S. C. adjudged, and there ſaid if a branded Rogue wander again, 'tis Felony, and ſo the Words put him in a nearer Degree of Felony than otherways he ſhould be.

9. If one Man ſays to another, Thou art a Rogue, a runaway Rogue, and thou didſt run away from Oxford, and thou art a Rogue of Record at Oxford, an Action lies for theſe Words; for he cannot be a Rogue of Record, if he be not convicted thereof upon Record according to the Statute. Trin. 1650. between (t) Alleſly & Mawdit, per Curiam, this being moved in Arreſt of Judgment, Intratur Paſch. 1650. Rot. 409.

(t) Stile 220. S. C. adjudged.

10. If one ſays of *I. S.* who is a Juſtice of Peace, Surveyor of the Dutchy of *L. &c.* he hath but one Manor, and that he hath gotten by ſwearing and forſwearing, no Action will lie; for the Words are too general, and perhaps he might obtain a Manor by ſwearing and forſwearing, and yet not procure or aſſent thereto himſelf. *Paſch.* 27 *Eliz.* between (u) *Stanhop* and *Blith.* 4 *Co.* 15. adjudged.

(u) Co. Ent. 21. n. 18. S. C.

11. If one Man ſays of another, (x) Thou ſhouldſt have ſat on the Pillory if thou hadſt had thy Deſerts; no Action will lie, becauſe the Words are too general. *Mich.* 29 *Eliz.* *Moor.* 243. *Pl.* 383. adjudged, but *Anderſon* Chief Juſtice there, ſaid it was otherways where general Words were ſpoke of a Magiſtrate.

(x) Thou art a Pillory Knave, remember thou ſhouldſt have been ſet on the Pillory; actionable, per Cro. Eliz. 11. adjudged; but 1 Leon. 127. like Point cited con. He is a falſe Knave, and worthy to ſtand on the Pillory; actionable per Lucas and Wheatly. N. Bond 155. Pl. 216. appears. 1 And. 12. appears. Moor 79. Pl. 210. appears. Thou art the falſeſt Knave in all England; not actionable. Dol. 89. cited.

12. If one Man ſays of another, (y) Thou art a malitious and ſeditious Man, and moveſt the Queen's Subjects to Sedition; no Action will lie, for the Words are too general; for perhaps he ſtirr'd up the Tenants of a Manor to Tumults and Sedition, which is no great Scandal, and ſuch Sedition as is made Felony by the Statute of 23 *Eliz.* muſt be Sedition againſt the Queen. *Trin.* 32 *Eliz.* between (z) *Peak* and *Pollart.* 4 *Leon.* 121. adjudged, *per totam Curiam.*

(y) You do openly maintain and countenance the worſt People againſt God's Laws and the Queen's; (being ſpoke of a Juſtice of Peace) not actionable; becauſe too general, Butler and Painter. Cro. Eliz. 297. adjudged per tot' Curiam. 1 Palm. 69. cited con. Yelv. 21. cited to be adjudged againſt the Plaintiff, becauſe not laid expreſly, that he was a Juſtice of Peace at the Time of the Speaking the Words. (z) Cro. Eliz. 214. S. C. and S. P. per Gaudy; to which the reſt inclined.

13. If one Man ſays of another, Thy Credit has been called in Queſtion, and a Jury being to paſs upon it, thou foiſtedſt in a Jury early in the Morning, and the Lands thou haſt are gotten by lewd Practices; no Action will lie, becauſe the Words are too general. *Mich.* 36 and 37 *Eliz.* between *Nichols* and *Badger.* *Cro. Eliz.* 348. adjudged.

14. If one Man ſays of another, Thou art a Murderer and a bloody Fellow and I am afraid of thee; an Action will lie. *Paſch.* 41 *Eliz.* between *Slade* and *Allen.* *Cro. Eliz.* 672. adjudged upon a Demurrer.

(a) Cro. Jac. 275. S. P. per Curiam. 1 Bulſ. 148. S. P. per Williams urguendo con. Cro. Jac. 674. S. P. cited. Dal. 17. S. P. per Curiam, but there Brook ſaid the old Books were otherways. 1 Jon. 194. & Cro. Car. 135. S. P. appears, being ſpoke of a Peer of the Realm.

15. (a) If one Man ſays of another, Thou art a Traitor; an Action will lie. *Mich.* 41 *Eliz.* between *Procter* and *Fitz-William*. *Cro. Eliz.* 906. adjudged.

(b) He hath ſpoke Treaſon, and that I will prove it; actionable. Berisford & Preſs. Yelv. 197. adjudged; but Cro. Jac. 276. the Court were divided whether this were a direct Affirmative that he had ſpoke, &c. and Judgment given for the Plaintiff, it being agreed that he ſhould accept 20 l. Coſts and Damage, and releaſe the reſt. 1 Bulſ. 147. S. adjudged the Plaintiff in leaſing, &c. — I doubt not to prove he hath ſpoken Treaſon; actionable. Hitcham & Brook. Winch. 123. 4. adjudged. Hut. 75. adjudged. 1 Rol. Abr. Margin. (c) Godb. 153. S. C. adjudged, per tot' Curiam. Cro. Jac. 276, S. C. cited. Winch. 124. S. C. cited. (d) 1 Bulſ. 148. S. C. and this Matter cited to have been ſaid per Curiam.

16. If one Man ſays of another, I will hang him, for he hath (b) ſpoken Words which be high Treaſon; an Action will lie; for Words may amount to Treaſon, and the laſt Words are enforced by the firſt. *Mich.* 5 *Jac.* between (c) *Blanchflower* and *Atwood*. *Yelv.* 107. adjudged, (d) it was there ſaid by *Flemming* Chief Juſtice, that it was not ſafe for the Plaintiff to have alledged the Words in certain that made the Treaſon, for that they were *Arcana Imperii*.

17. In the Time of *Cromwell*'s Rebellion, one Man ſaid of another, he put in two Horſes to Colonel *W.* and as ſoon as any Warrants came for the preſſing of Men for the Service he acquainted the Cavaliers, by Reaſon whereof none could be preſſed that were fit, and he doth hold conſtant Correſpondency with the Cavaliers; and the Words being taken together were held certain enough and actionable; for if true, he was thereby a Delinquent, and his Eſtate ſubject to Sequeſtration. *Hill.* 1654. between *Trevillian* and *Welchman*. *Stile* 400. adjudged.

(H) Where they touch not Life nor Member.

(a) Winch. 6. S. P. adjudged All. 11. S. P. per Roll. (b) Hut. 14. S. C. adjudged, but S. P. does not appear. (c) Wale and Ket, S. C. Hob. fol. 184. adjudged. Moor 883. Pl. 1240. S. C. adjudged. Poph. 129. S. C. adjudged. Hetl. 172. S. C. adjudged.

1. (a) If one Man ſays of another, That he has ſtole a certain Thing that is but Petit Larceny, that an Action upon the Caſe lies, for this is a kind of Felony, and a great Slander, and he ought to be whipt for this by the Law. Contra, Mich. 37 & 38 Eliz. B. R. between (b) Carter & Hunt, per Curiam.

2. If A. ſays of B. he ſtole Corn out of my Barn, tho' perhaps the Corn might not be worth a Farthing, yet the Action lies, for this is Felony, tho' not capital. (c) Hob. Rep. 249.

(d) Cro. Jac. 430. S. C. adjudged. 1 Rol. Abr. 66. Pl. 16. * Fol. 44. (e) 1 Brownl. 11. S. C. adjudged, Hob. fol. 219. S. C. adjudged.

3. If one Man ſays to another, That he has the Great Pox; an Action upon the Caſe lies, becauſe this is a great Slander and Diſgrace, in as much as this comes by Fornication, and no Man will converſe with him. Paſch. 15 Jac. between (d) Milner and his Wife againſt Reeves. Hob. Rep. Caſe 290. between (e) Crittal & Horner adjudged, the Words being, He hath caught the French Pox, and carried them home to his Wife, for the Slander is not * by Reaſon of the ill Means of getting it, but for the Odiouſneſs of the Infection.

4. (f) If one Man ſays to another, Thou art a leprous Knave and a Leper, an Action upon the Caſe lies; for he ought not to come into the Company of Men if it be ſo, notwithſtanding this is a natural Infirmity. Hill. 4 Jac. B. R. between (g) Taylor & Perr adjudged.

(f) Hob. 219. S. P. admit' arguend' (g) Noy 117. S. C. adjudged. Cro. Jac. 144. S. G. adjudged. Cro. Jac. 430. S. C. cited.

5. If one Man ſays of another, That he has the (h) falling Sickneſs, no Action lies. Hill. 4 Jac. B. R. between Taylor and Perr.

(h) 1 Roll. Abr. 55. Pl. 21. vide.

6. (i) If one ſays to another, Thou art a Bankrupt, no Action lies; if he be of no Trade, nor uſed to buy and ſell. Trin. 2 Jac. B.

(i) Goulſ. 84. S. P. adjudged. 1 Roll. Ab. 61. Pl. 18.

7. (k) If one Man ſays of (l) another, Thou art a Common Barreter, and I will indite thee for it at the next Aſſiſes; no Action lies for theſe Words. Trin. 4 Jac. B. R. between (m) Hake & Molton adjudged.

(k) Cro. Eliz. 171. S. P. adjudged. 1 Rol. Abr. 59. Pl. 3. 4. vide. (l) Otherways if an Attorney, 1 Roll. Abr. 54. Pl. 15. (m) Yelv. 90. S. C. per Curiam, the Words there being, Thou art a Common Barreter, and deſerveſt to be hanged. Hetl. 140. S. C. cited and ſaid there was Demurrer to the Declaration, but no Judgment ever given therein.

8. (n) If one ſays of another, Thou art a Bawd and doſt keep a Bawdy-Houſe; an Action upon the Caſe lies, for this is inquirable in a Leet and puniſhable, and is a great Defamation. Hill. 4 Jac. B. R. between (o) Turnam & Thorne per Curiam 38, 39 Eliz. B. R. Dame Bartlet's Caſe adjudged. Mich. 10 Car. and B. R. between Arnetta Nicholls adjudged, this being moved in Arreſt of Judgment. Intratur Mich. 10 Car. 27 H. 8. 14. B. per Fitz.

(n) Cro. Eliz. 643. S. P. adjudged Con. March. 212. S. P. adjudg'd. Stile 32, 326. S. P. adjudged niſi. Cro. Car. 261. S. P. arguend' per Germyn. 1 Bulſ. 138. S. P. adjudged. Noy. 73. S. P. adjudged; but in Noy the Words were ſpoke in London, where a corporal Puniſhment is ſaid to be for this Offence, vide. (o) Noy. 117. S. C. adjudged the rather becauſe the Plaintiff kept a Publick Houſe. Vide poſt. 61. Pl. 14. S. C.

9. But no Action lies for ſaying thou art a (p) Bawd. Mich. 38, 39 Eliz. B. R. per Curiam. Trin. 8 Car. B. R. between (q) Hicks & Hollingſhead per Curiam, in a Writ of Error, but the Judgment affirmed for other Words. Hill 15 Jac. B. R. between (r) Sir William Read and his Wife Plaintiffs.

(p) Thou haſt taken 5 s. of two Whores, and two Rogues to help them to a clean Pair of Sheets, and I will have thee carted for it; not actionable, becauſe no more than Bawd by Circumlocution, Ward and March, 1 Syd. 241. urged upon a Motion in Arreſt of Judgment. Raym. 115. ſtaid niſi. ——You are a Pimp and a Bawd, and fetch young Gentlewomen to young Gentlemen; not actionable, becauſe not puniſhable by our Law, unleſs he kept a Bawdy-Houſe, Gabel and his Wife againſt Burket. 1 Vent. 53. adjourned. 1 Syd. 438. the better Opinion, per Curiam; and Twiſden ſaid he remember'd a like Caſe, but 1 Mod. 31, 32. Judgment for the Plaintiff niſi. (q) Cro. Car. 261. S. C. dubitatur. 1 Roll. Abr. 43. Pl. 20. S. C. (r) Cro. Jac. 462. S. C. adjudged.

10. If a Man ſays of I. S. who is a Soldier, He is a Pimp, in an Action brought for theſe Words, if the Plaintiff avers, that in London where the Words were ſpoken, and in Places adjoining thereto a Pimp ſignifies as much as if he had ſaid he was a common Bawd that ſolicited Women to Incontinency with Men, the Action lies for theſe Words upon this Declaration, becauſe ſuch common Bawd may be indicted for this Offence. Hill. 10 Car. B. R. between (s) Dimmock & Fawſet, per Cro. & Bark, contra Jones, that the Action lies, but it was adjourned. Intratur Mich. 10 Car. Roll. 148. But Paſch. 11 Car. this was moved again, and then the Court was divided, and no Precedents could be found of any Indictment for ſuch an Offence, but only for keeping a Bawdy-houſe.

(s) Cro. C. 393. 4. S. C. where it is ſaid Brampſton agreeing with Jones Judgment was ſtaid, 1 Mod. 32. S. C. cited as the Opinion of two Judges, but not much relied upon. Stile 326. S. C. cited to be adjudged, that the Words were not actionable. 1 Ven. 53. ſaid it was agreed, no Action would lie for calling Pimp or Bawd, and this Caſe cited as an Authority to prove it.

11. If a Man ſays, that I. S. is a Witch, And I will prove him ſo, and I have ſeen him and his Imps and evil Spirits in the Night appear to me, and he did bewitch my Child. An Action upon the Caſe lies for theſe Words, tho' he does not charge him to have done any Damage to any Perſon, by which he ſhould be puniſhable within the Statute of Witches: For it is a great Scandal to be a Witch.

My

(t) 1 Roll. Rep. 255. S. C. adjudged, Cro. Jac. 392. S. C. adjudged, but after reverſed in Camera Scaccarii, in both which Books the the laſt Words were, and he did unwitch my Child. 3 Bulſ. 74. S. C. adjudged, but after reverſed in Camera Scaccarii. 1 Roll. Abr. 45. Pl. 18. S. C. Hern's Pleader 112. S. C. as adjudged in B. R. the Words being, he is a Witch, and did unwitch my Child.

My Reports. Mich. 13 Jac. B. R. **between** (t) Loars & Cook **adjudged.**

(u) Hern's Pleader 112. S. P. per two Judges Con. but by them ſaid if the Words had been thou, &c. and haſt bewitched me that I am lame, &c. an Action would have lain. (x) 1 Brownl. 14. S. C. adjudged.

12. (u) **If one Man ſays to another,** Thou art a Witch, and didſt bewitch me, **an Action lies,** Contra, Mich. 17 Jac. B. **between** (x) Hinch & Heale **adjudged.**

(y) 1 Roll. Abr. 50. Pl. 1. S. C. Poph. 128. S. C. adjudged.

13. **If a Man ſays to another,** That ſhe ſacrificed one of her Children to the Devil, to the Intent to bewitch his Mother; an Action upon the Caſe **lies, for an Invocation of Spirits is puniſhable by the Statute of Witches.** Paſch. 15 Jac. B. R. **between** (y) Lock & Lock **adjudged.**

14. **If one Man ſays to another,** That he is a Witch, or the Son of a Witch, **no Action lies for theſe Words (becauſe it lies not for the laſt as it ſeems.) My Reports.** 14 Jac.

(z) Morris and Smith, 2 Roll. Rep. 343. S. P. Palm. 297.

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15. (*) (z) **If one Man ſays to another,** That he is a Witch; **no Action lies, becauſe it is a common Word of Paſſion.** Hill. 15 Jac. B. S. P. Moor 906. Pl. 1263. reſolved Godb. 341. cited 2 Leon. 30. cited, infra Pl. 18. S. P. by 2 Judges againſt, Cro. Eliz. 571. S. P. adjudged, Con. Agnes Knight's Caſe, adjudged per tot' Cur. Poph. 187. cited.

(a) Noy. 22. S. P. agreed per Curiam, 1 Brownl. 2. S. P. ſaid Hut. 13. S. P. adjudged, but vide infra 17. Hern's Pleader 112. vide many Precedents.

16. (a) **But if one Man ſays to another,** Thou art a Witch an Inchanter, and thou didſt bewitch the Children of I. S. **an Action** upon the Caſe **lies;** for he ſhews **his Intention to be that he is a true Witch, and that the Words were not ſpoke in Paſſion, and that he has done an Injury to a Man.** Hill. 15 Jac. B.

(b) Stone Roberts, S. P. Noy. 22. adjudged. 1 Brownl. 2. adjudged, Godb. 341. cited, Hut. 13. adjudged for the Plaintiff, and according to the Report of Hutton, the Words were; he is a Witch and an Inchanter, and has bewitched the Children of one S. and ſo being coupled with a Fact done were actionable, but in Noy. the the Words were only as here, tho' it was there admitted, that if ſuch Words as in Hutton had followed, the Action would have lain. (c) Thou liveſt by Charming, Sorcery, and Witchcraft; not actionable. 2 Leon. 30. adjudged. (d) Payn and Mutton. 2 Brownl. 276. S. C. adjudged. (e) All. 37. S. C. adjudged.

17. (b) **If one Man ſays to another,** (c) Thou art a Sorcerer and Inchanter; **no Action lies; for Sorcery or Inchantment is but Couſinage as Fortune-tellers,** &c. Mich. 7 Jac. **between** (d) Bevies & Mutton **adjudged.** Trin. 24 Car. B. R. **between** (e) Yates & Linden, **adjudged in Arreſt of Judgment that no Action lies for theſe Words,** She is a Sorcerer and a Witch, and can witch and unwitch; ſhe is a White Witch, and can witch and unwitch, Intratur Trin. 23. Rot. 302.

(f) 1 Syd. 53. S. P. ſaid by Twiſden, to have been agreed in Adamſon's Caſe Godb. 181, S. P. cited, Cro. Jac. 531. S. P. adjornatur. Noy. 22. S. P. adjudged, Supra Pl. 15 Cro. Jac. 639. S. P. per cur' arguendo, Godb. 341. S. P. per 2 Judges, Hern's Pleader 221, 222. vide (g) She is a Witch, and I will take my Oath of it; not actionable. Stiles 47. adjudged. nisi. (h) 3 Bulſ. 74. S. C. adjudged, and after reverſed accordingly. 1 Roll. Rep. 255. S. C. adjudged in B. R. Cro. Jac. 399. S. C. reverſed accordingly, ante Pl. 11. S. C. (i) Cro. Jac. 150. S. C. adjudged, the Words being, thou art a Witch, and I will prove it. Noy. 22. S. C. cited accordingly.

18. (f) **If one Man ſays of another,** (g) Thou art a Witch without more Words; **no Action lies.** Mich. B. R. **between** (h) Lewis & Cock **adjudged, that the Action lies, but this was after reverſed** in Camera Scaccarii **in a Writ of Error,** Contra, Mich. 3 Jac. **between** (i) Edwards & Uſely **adjudged.**

19. If one Man ſays of another, He hath bewitched my Ware, and I can take no Fiſh, no Action lies. (k) Mich. 7 Jac. B. ſaid to be adjudged.

20. If a Man ſays of a Woman, Thou art a Baud, and haſt bewitched me; an Action lies not for the Word Baud, but for the other Words it lies. Trin. 8 Car. B. R. between (l) Hicks and Hollingſhead adjudged in a Writ of Error. Intratur Hill. 7 Car. Rot. 765.

Words being, And hath bewitched him by Witchcraft and Sorcery. 1 Rol. Abr. 44. Pl. 9. S. C. as to the Word Baud.

(k) 2 Brownl. 276. S. C. ſaid to be adjudged.

(l) Cro. Car. 261. S. C. adjudged; the

21. (m) If one ſays of another, She is a Witch and a (n) very Strong Witch; no Action lies. Mich. 8 Car. B. R. between (o) George and Harvy, the Poſtea ſtaid in Arreſt of Judgment, and after, ſcilicet Mich. 9 Car. this was adjudged againſt the Plaintiff, per totam Curiam, and ſome of the Judges thought there was no Puniſhment of Witchcraft at the Common Law, and if he is not charged with any Act, it is not within the Statute of 1 Jac. and the Word Strong enforces not the other Words.

(m) Cro. Car. 475. S. P. per tot' Curiam.

(n) She is a great Witch, not Actionable. Stile 11. adjudged.

22. If A. ſays to B. Thou art a Witch, for thou didſt bewitch my Wife's Milk; an Action lies, tho' he did not accuſe him to have done any Harm to the Milk. Mich. 18 Jac. B. R. (p) between Martin and Stodding adjudged, this being moved in Arreſt of Judgment.

(o) Cro. Car. 282, 324. S. C. adjudged. 1 Jones 325. S. C. adjudged.

23. If A. ſays to B. Thou art a Witch, and didſt bewitch my Mother's Drink, and what wilt thou have more? and we will prove her one before we have done with her; an Action lies. (q) Mich. 4 Car. B. R. Intratur. Trin. 4. Rot. 1063. adjudged, this being moved in Arreſt of Judgment.

(p) Cro. Jac. 600. S. C. adjornatur.

(q) Hughs and Farrer. S. C. Cro. Car. 141. adjudged by all, preter Whitlock. 1 Jones 197. adjudged by all præter Whitlock qui dubitavit. 1 Jones 325. cited. Stile 59. cited per Roll.

24. If A. ſays to B. Thou art a Witch, I will make thee ſay God ſave my Mare, I was forced to have my Mare charmed for thee; no Action lies for theſe Words, becauſe for the Word Witch, without more Words, no Action lies, and the other Words are not actionable, for it is not well known what is intended by the Words (I will make thee ſay God ſave my Mare) for in the Country where the Words were ſpoken, it is uſual for Men when they paſs by Cattle, to ſay, God ſave them, otherways they are taken for Witches; and for the other Words, I was forced to have my Mare Charmed, this implies, that he procured another to charm her to prevent the Witchcraft. Mich. 9 Car. B. R. between (r) Boxham and his Wife againſt Dangers and his Wife per Curiam, in Arreſt of Judgment. Intratur Trin. 9 Car. Rot. 1155.

(r) Cro. Car. 320. S. C. Judgment ſtaid, niſi. 1 Jones 325. S. C. cited.

25. (s) If a Man ſays of A. S. She is a Witch, and is convicted at this Aſſizes (innuendo Lincolnſhire, &c.) and J. S. was bound for her Appearance; an Action lies for theſe Words, for it ſhall be intended a Conviction for ſuch Witchcraft for which ſhe might be indicted; for elſe (*) ſhe could not be convicted thereof at the Aſſizes, and therefore a great Slander. Mich. 9 Car. B. R. between Hill and Johnſon adjudged; this being moved in Arreſt of Judgment. Intratur Hill. 8 Car. Rot. 1233.

(s) 1 Jon. 325. S. C. cited.

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26. If one ſays to another, Thou art a Witch, and a ſtrong Witch, and haſt bewitched me and my Aunt, and therefore I will not marry him; an Action lies; for this implies (t) a Witchcraft to his Perſon, which is within the Statute as well as if to his Goods, and (u) it ſhall not be intended that he intends a Bewitching by Love, as it was objected. Trin. 13 Car. B. R. between (x) Ceely and Hopkins by 3 Judges contra Croke, who thought the Action did not lie; this being moved in Arreſt of Judgment. Intratur Paſch. 13 Car. Rot. 171. and after Mich. 13 Car. Judgment was given accordingly for the Plaintiff per totam Curiam, Juſtice Croke, mutata opinione, and they ſaid, that the Procuration of unlawful Love is within the Statute alſo.

(t) Where charged with bewitching Man or Beaſt; actionable. All 3 agreed.

(u) 1 Sid. 53. like Point per Twiſden, and Quære by ſome, if there be not a Diverſity, where one is ſaid to have bewitched a Thing that has Senſe, and where that which has none.

(x) Cro. Car. 474. 5. S. C. adjornatur. 480. adjudged. 1 Jon. 397. S. C. adjudged.

27. If A. ſays, That B. made a Libel, which was made of A. in Writing, an Action upon the Caſe lies for B. againſt A. tho' the making of a Libel is not ſuch an Offence that concerns Life or Member, but only a Fine and Impriſonment in the Star-Chamber, or upon an Indictment at the Common Law. Mich. 13 Car. B. R. between Sir William Ruſſel and Ligon admitted and agreed, and the Queſtion was only upon the Declaration, Whether that was good; becauſe it was not ſhewn what was the Effect of the Libel; but Nota, it was there put in the Declaration, that the Plaintiff Sir W. B. was a Juſtice of Peace, finitur per Compoſitionem.

(y) Godb. 341. like Point cited. Stile 59. like Caſe adjudged niſi.

28. (y) If one Man ſays of another, Thou art a Witch, (z) and didſt bewitch my Cattle, or my Mare, an Action lies. Mich. 14 Car. B. R. between (a) Smith and Coker adjudged per Curiam, Without queſtion in 2 Actions. Intratur Trin. 14 Car. Rot. 1498, and 1499.

(a) She is a Witch, and by her Means I have loſt a Mare, Colt and other Cattle; actionable. 2 Rol. Rep. 86. adjudged.—You inchanted my Bull, and made him run mad about the Common, not actionable, becauſe no bodily Hurt within the Stat' is implied, and it is uſual for Bulls ſo to do. Seamor and Wyle. 1 Sid. 424. adjudged. 1 Lev. 276. adjudged, where the Words were, Thou art an Inchanter, &c. (z) 1 Jon. 409. S. C. adjudged. Cro. Car. 512. S. C. adjudged, and S. P. appears. 1 Rol. Abr. 84. Pl. 10.

29. If one Man ſays to another, The Devil appears to thee every Night in the Likeneſs of a Black Horſe, and (b) thou conferreſt with him, and whatſoever thou doſt ask (c) he gives it thee, and that is the Reaſon thou haſt ſo much Money, an Action lies for theſe Words. Hob. Rep. 159, & 172. between (d) Marſhall and Steward adjudged.

(b) 3 Bulſ. 74. like Point per Coke, Chief Juſtice.

(c) Thou doſt work by Necromancy, and doſt work by the Devil; actionable; for this implies a Familiarity, or immediate Uſage of the Devil as an Inſtrument, which tho' not Felony unleſs Damage to Man or Beaſt enſue; yet 'tis a great Slander. Yelv. 150. adjudged, to conſult, &c. Felony, tho' no other Act done. 3 Inſt. 45. (d) Moor 868. Pl. 1204. S. C. adjudged by Reaſon of theſe Words, Thou conferreſt with him. Hob. fol. 129. S. C. adjudged 1 Brownl. 8. S. C. adjudged.

30. In an Action upon the Caſe, if the Plaintiff declares that the Defendant did ſay to the Plaintiff in the Preſence of ſeveral Perſons; I do count thee to be a Witch, and at another Day after, that the Defendant requeſted and much deſired to have the Plaintiff ſearched, and thereupon the Plaintiff demanded of the Defendant why he would have him ſearched, to which the Defendant anſwered, Becauſe I do accuſe you to be a Witch; the Action does not lie upon this Declaration, becauſe partly it is not alledged that the laſt Words which were ſpoken at another Day, were ſpoken in the Hearing of others, and then it ſhall be intended they were ſpoke at a private Conference between themſelves, and ſo theſe Words are of no Force to maintain the Action, and if they were of Force and well alledged, yet it cannot appear that he intended that he was ſuch a Witch, or had Tetes, or had any Familiarity with the Devil, or had done any other Thing to draw him within the Compaſs of the Statute of 1 Jac. of Witches, but that he deſired to have him ſearched for his Satisfaction. Mich. 22 Car. B. R. between (e) Marchant and Adamſon adjudged, upon a great Debate after a Verdict for the Plaintiff. Intratur. Paſch. 22 Car. Stile 5. S. P. adjudged. Q. if not the S. C.

(e) All. 2. S. C. adjudged. Nulls and Cheyney.

31. If A. the Wife of B. ſays of C. a Feme ſole, C. did bewitch my good Man, and ſhe is a Witch, and I will prove it, and upon this C. brings an Action againſt A. and B. her Husband, for theſe Words, and there was an innuendo after the Words my good Man, viz. innuendo, the ſaid B. the Husband of A. now one of the Defendants, and tho' it was objected, that it is not certain who was intended by the Words my good Man, yet this is a common Phraſe, (*) in the Country for a Husband, of which the Court is to take Notice. But it was adjudged upon this Reaſon, by all the Court, that this implied that ſhe bewitched a Man; and if one Man ſays of another, that he has bewitched a Man, without naming any Man, an Action lies, and here ſhe ſays, that he had bewitched a good Man, and if ſhe bewitch'd any

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Man 'tis Felony within the Statute 1 Jac. and therefore the Action lies in this Case. Trin. 1650. between Adston Plaintiff, and Hunter and Isabel his Wife Defendants, adjudged, this being moved in Arrest of Judgment.

32. If one Man says to another, Thou art a Witch, an Inchanter, a Necromancer, and a Sorcerer, and thereby wast the Cause of the (a) Death of my Husband, an Action will lie. *Hill.* 35 *Eliz.* between *Forteſcue* and *Hext. Cro. Eliz.* 312. adjudged.

(a) Thou art a Witch, and wast the Death of a Child at the Birth of which thou wast guilty. Godb. 341. dubitatur.

32. If one Man says of another, He is a Witch, and bewitched my Husband to Death, for he made his Picture in Wax, and rosted it every Day by the Fire, until he had rosted my Husband to Death; an Action will lie for these Words, notwithstanding it may be objected, this is a fond Conceit, and so apparent he had no Cause to call him Witch. *Hill.* 31 *Eliz.* between *Forteſcue* and *Hext. Cro. Eliz.* 312. adjudged.

34. If one Man says of another, He is a Witch, and deserves better to be hanged then old *Arthur*, who was hanged for a Witch; an Action lies, for he intends such a Witch as (b) deserves to be hanged. *Mich.* 13 *Car.* 2. between (c) *Dacy* and *Lynch. Raym.* 35. adjudged.

(b) S. is a Witch, and I know it,

and if she cross me, I'll hang her for it; actionable. Slayter and Davis. 1 Sid. 386. adjudged. 1 Lev. 255. adjudged.—Thou old Witch, thou old Whore, leave off thy Witching or thou shalt be Hang'd or Burn'd if I can do it; not actionable, because no Act of Witchcraft shewn to be done. Hut. 132. adjudged. (c) 1 Sid. 52. S. C. adjudged; the Words there were, Thou deservest, &c. as well as, &c.

35. If one says to another, Thou art a Witch, and I will make thee suffer for a Witch: These Words are Actionable, for they shall be taken as usually understood among the Neighbours, and to suffer shall be intended to suffer Death, and not by Citation in the Spiritual Court, (which was said to be the usual Way before the Statute) nor by ducking in the Water, as common People try those who are suspected of Witchcraft. *Pasch. 6 Will.* and *Mar.* between *Stephens* and *Corben. 3 Lev.* 394, 395. adjudged by *Rookby*, and *Nevill Treby* inclining accordingly, *contra Powel*, who held the Words should be taken in *Mitiori sensu*, and that it was altogether uncertain what manner of Suffering was intended.

(I) For adjective Words.

1. If a Man says of I. S. He is a base beggarly Bankrupt Knave, an Action lies; for this is all one, as if he had said he is a base beggarly Knave and a Bankrupt. Mich. 10 Car. B. R. between Stile and Finch adjudged, per Curiam, this being moved in Arrest, upon a Variance between the Writ, and held per Curiam all one.

2. (a) If one Man says to another who is a Trader, Thou art a (b) Bankrupt Knave, an Action upon the Case lies against him. Pasch. 1 Jac. B. adjudged, dubitatur, &c. Pasch. 44 Eliz. B. R. between Grey and Weston, Pasch. 12 Jac. B. R. between (c) Selby and Carrier adjudged. Mich. 7 Jac. B. Trin. 8 Car. in Camera Scaccarii, between Beare and Row adjudged, per totam Curiam, in a Writ of Error; for here Bankrupt is not an Adjective but one Substantive, and Knave another Substantive.

(a) Woolverston and Meers, S. P. Cro. Eliz. 911. adjudged. 1 Rol. Rep. 22. cited, and there said to have

been affirm'd in Cam' Scac' Cro. Jac. 578. S. P. adjudged; but 1 Brownl. 16. S. P. adjudged Con. But Quære Cro. Eliz. 843. S. P. adjudged. (b) So if Bankrupt Rogue, Godb. 151. adjudged. Cro. Car. 31. adjudged. Herns Pleder 158. like Point, with several like Cases in the Margin, 2 Rol. Rep. 92. Vide (c) 2 Bulst. 210. S. C. adjudged. Cro. Jac. 345. S. C. adjudged. 1 Rol. Rep. 22. S. C. adjudged.

3. (d) If a Man says to a Merchant, Thou art a Bankruptly Knave, no Action lies, for this is but as much as to say, Thou art a Bankrupt like

(d) Godb. 151. S. P. adjudged; but vide; for there per Curiam

were these further Words, and canst not be trusted in L. for a Groat. Cro. Jac. 345. S. P. 1 Sid. 103. S. P. per Cur' arguend' Con.

like Knave, and is not actionable. Paſch. 5 Jac. B. between and Perkins, per Curiam Contra. Co. 4. 19.

4. If one ſays to another, Thou art a murderous Quean, no Action lies for theſe Words, becauſe the Words are adjectively ſpoken. Hill. 11 Jac. B R. Pett's Caſe adjudged.

(e) So if a Sheep-ſtealer, 3 Bulſ. 303. adjudged, and a Caſe cited where the Words were, actionable.

5. If one Man ſays to another, Thou art (e) a Steal-Sheep and a Steal-Calf, and Partner with a Coyner, an Action lies for the Words Steal-ſheep and Steal-calf, tho' they are adjectively ſpoken, for in Senſe it is as much as to ſay, thou art a Stealer of Sheep, and a Stealer of Calves. Mich. 5 Jac. B. between Aſton and Goffe, per Curiam.

Thou art a Horſe-ſtealer, ſaid to be adjudged actionable.——Thou art a Sheep Thief, 2 Bulſ. 145. actionable.

(f) Cro. Car. 318. S. C. adjudged. 1 Jones 326. S. C. adjudged per tot' Cur' All. 61. S. C. cited. 1 Rol. 81. Pl. 11.

6. If a Man ſays of I. S. Where is that Long-lockt, Shag-haired murdering Rogue? and being ask'd what Perſon he meant thereby, he anſwers the ſaid I. S. an Action lies for theſe Words, tho' they are adjective Words. Trin. 9 Car. B. R. between (f) Green and Lincoln, this being moved in Arreſt of Judgment upon ſuch a Declaration, and ſtaid; but Mich. 9 Car. Judgment was given for the Plaintiff, per totam Curiam preter Bark', who thought contra. Intratur Hill. 8 Car. Rot. 1252. (g) But it was ſaid by Serjeant Henden, that it was adjudged in B. this Term, that an Action lies for theſe Words, Thou art a murdering Knave, between Wilſon and Minſhawe, which Intratur Paſch. 8 Car. B. Rot. 724. but where the Words were further, and if it had not been for me thou hadſt been hanged.

(g) Cro. Car. 318. 1 Jones 326. ſaid by Henden accordingly.

(h) Thou art a Rogue, a Coney-catching Rogue, a Cozening Rogue, a Cut-purſe Rogue; not actionable, becauſe all but Rogue are Adjectives. Bets and Trevanian. Cro. Jac. 536. adjudged, Palm. 10. adjudged; there being theſe further Words, I will prove it. 2 Rol. Rep. 91. adjudged.

7. If one Man ſays to another, (h) Thou art a Coney-catching, cheating Thief, an Action lies for theſe Words, for this is as much as if he had ſaid thou art a Thief, and a Coney-catcher and Cheater. Hill. 9 Car. B. R. between Bedhead and Smith adjudged, this being moved in Arreſt of Judgment. Intratur Trin. 9 Car. B. R. Rot. 1248.

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(i) Thou art a Thief and a Main-worn Thief. 1 Brownl. 6. moved that theſe Words were not actionable; but Judgment arreſted for another Reaſon.

8. If one Man ſays to another (i) Thou art a falſe forſworn Whore-Thief, an Action lies for theſe Words. Mich. 14 Car. B. R. between Coke and (*) Brampton adjudged, in a Writ of Error upon a Judgment in Ludlow, and the firſt Judgment affirmed accordingly. Intratur Trin. 14 Car. Rot. 1494.

9. If adjective Words preſume an Act done, or ſcandalize a Man in his Office, Profeſſion or Trade, an Action will lie for them. *Co.* 4. 19. *a. per Curiam.*

(a) Thou art a perjured Prieſt, actionable. Stile 6. adjudged.

10. As if one Man ſays of another, (a) Thou art a perjured Knave; an Action will lie for theſe Words import, that he had committed Perjury, or elſe he could not be perjured. 4 *Co.* 19. *a. per Curiam.*

(b) Cro. Jac. 66. S. P. arguend'. 2 Bulſ. 138. S. P. arguend'. Latch. 47. S. P. per Jones Juſtice. 1 Sid. 373. S. P. held. (c) Thou art a Thieving Rogue; actionable, becauſe it implies an Act done, per 1 Sid. 173. held Cro. Jac. 514. vide.—Thou art a thieviſh Pirate; actionable. Latch. 47. per Jones Juſtice.

11. (b) If one Man ſays of another, Thou art a (c) thieviſh Knave; no Action lies, for theſe Words do not import any Act done, but an Intent or Inclination only. 4 *Co.* 19. *b. per Curiam.*

12. If *A.* being Churchwarden of *B.* preſents *D.* a Pariſhioner, at the Viſitation for an Offence, and thereupon *D.* ſays to *A.* Thou haſt perjuredly preſented me at the Viſitation before *I. S.* Official; no Action lies, becauſe the Words are adjectively ſpoken, and ſo no poſitive and direct Charge. *Mich.* 3 *Jac.*

Jac. between (c) *Stile* and *Heape*. *Cro. Jac.* 80. adjudged, and 120. adjudged for the Defendant, becauſe it did not appear the Plaintiff was ſworn, nor what he ſwore, ſo that he might commit Perjury.

(c) Yelv. 72. S. C. adjudg'd by 3 Judges. Poph. abſent.

13. If one Man ſays of another, Thou art a conjuring Knave, no Action lies for theſe Words. *Mich.* 11 *Jac.* between *Killick* and *Barnes*, 2 *Bulſ.* 138. adjudged.

14. If one Man ſays of another, (d) Thou art a traitorly Knave; an Action will lie notwithſtanding the Words are Adjectively ſpoken. *per Hill.* 14 and 15 *Car.* 2. between (e) *Booth* and *Seele*. 1 *Sid.* 103. adjudged, and that Judgment affirmed upon a Writ of Error.

(d) Thou art a rebellious and traiterous Knave, actionable; and tho' no Action lies for calling him rebellious, for he may be ſaid to be ſo upon a Commiſſion of, &c. *in* Chancery, yet being joined with the Word traiterous, an Action lies, per Cro. Eliz. 171. adjudged.—Thou haſt dealt traiterouſly with J. S. not actionable. Yelv. 72. arguend'.—Thou haſt dealt treacherouſly; not actionable. Cro. Jac. 81. arguend'.—Thou haſt dealt traiterouſly with the King. Yelv. 72. a Quære arguend'. (e) 1 Keb. 439. 469. S. C. adjudged niſi. 1 Lev. 90. S. C. adjudged.

15. If one Man ſays of another, Thou art a (f) buggering Rogue, and I could hang thee; an Action lies, for the Words ſuppoſe an Act done. *Trin.* 20 *Car.* 2. between *Collier* and *Burrel*. 1 *Sid.* 373. adjudged.

(f) You are a buggering Rogue, go home and bugger another Mare, actionable; for the Words ſuppoſe an Act done. All. 61. adjornatur.

(K) Interrogative Words.

1. (a) If one Man ſays to another, (b) When wilt thou bring home the nine ſtolen Sheep, which thou ſtoleſt from I. S? an Action lies for theſe Words. Mich. 37 & 38 Eliz. B. R. between (c) Hunt and Thimblethorp adjudged.

(a) All. 61. like Point cited.
(b) Have you brought home the 40 l. you ſtole; actionable, May and Gibbons. Cro. Jac. 568. adjudged. Palm. 66. adjudged. 2 Rol. Rep. 165. adjudged, and there ſaid it was not by Inference only, but a direct Affirmative; but if the Words had been, Did you not Steal 40 l.? no Action would have laid. 166. per Dod'.—Hath that Baſtard, &c. is that all the Spight that Baſtard can do you; actionable. Cro. Jac. 422. adjudged and affirm'd upon Error; Special Damage being laid.—Haſt thou been at L. to change the Money thou ſtoleſt from me; actionable, for the laſt Words are a poſitive Affirmation. March 58. per Jones and Berkly.—What art thou? a Bankrupt, and waſt a Bankrupt; actionable, for the Anſwer is a direct Affirmative. Cro. Eliz. 273. adjornatur. Where is that Bankrupt Knave? where is that Pillory Knave, being ſaid of a Merchant; actionable. Cro. Eliz. 26. adjudged. (c) Moor 418. Pl. 573. S. C. adjudged.

(L) Words in the Preter Tenſe.

1. If a Man ſays of I. S. a Juſtice of Peace, I. S. was a debauch'd Man, and was not fit to be a Juſtice of Peace; no Action lies, for theſe Words, becauſe it might be that he was ſuch a debauch'd Perſon in Time paſt, and was not then worthy to be a Juſtice of Peace. Paſch. 1650. B. R. between (a) Hamond and Kingſmill adjudged, per Curiam, in Arreſt of Judgment. Intratur, Hill. 22 Car. Rot. 735.

(a) Stile 22. S. C. 1 Judge againſt 1. adjornatur. 210. adjudged niſi. 1 Lev. 52. S. C. cited, and Twiſden ſaid, that Words that ſound in Diſability only, are not actionable, unleſs ſpoke of one that gets his Living by that, in which the Words diſable him.

2. (b) If one Man says to another, Thou art a base Fellow, and hadst the (c) French Pox, no Action lies, for peradventure he had the Pox, but is now cured of it, and so no Body will avoid his Company. Pasch. 6 Jac. B. between (d) Allen and Smith adjudged.

(b) All. 30. S. P. per two Judges. Noy 151. S. P. adjudged.

(c) When the Scandal affects the Mind, as Felony, Perjury, &c. the Slander remains and an Action lies; but not so where charged only (as here) with an accidental Infirmity or Disease of the Body. Noy 151. per Coke, Chief Justice. Cro. Car. 199. (d) 1 Rol. Abr. 67. Pl. 24. S. C.

3. If one says of a Merchant, He (a) came a broken Merchant from *Hamborough* and that I will justify; an Action will lie, the Plaintiff alledging in his Declaration that he came thence about eight Years before, for if he was broken then, he will be presumed to continue so still. *Trin.* 9 *Car.* between (b) *Leycroft*, and *Dunker*. *Cro. Car.* 317. upon a Motion in Arrest of Judgment adjudged, *per totam Curiam præter Richardson* Chief Justice.

(a) He hath broken twice, not actionable, because he may now be sufficient. per Latch. 114. per Dod' and Jones. Noy 77. adjornatur.—I will prove he hath been a Bankrupt, and hath agreed with his Creditors for a Noble in the Pound; actionable. New Dyer 72. b. Margin. (b) 1 Jon. 321. S. C. adjudged per Curiam, præter Richardson.

4 If one Man says of another, I am no Traitor, I have seen you in Rebellion, the Action lies, tho' the Words are spoke of the Time past, and perhaps there may have been a general Pardon since he was in Rebellion, but the Court will not intend it, but if so the Defendant ought to shew it in Pleading: *Mich.* 20 *Car.* 2. between *Dalton* and *Sudde.* 1 *Lev.* 251. adjudged.

(M) Conditional Words.

1. If a Man says, if J. S. might have his Will, he would kill the King, an Action upon the Case lies for these Words, tho' he refers it to the Will of J. S. for it is a great Offence to have such a Will. Hy Report. 14 Jac. between (a) Sir J. Sydnam and Mayo.

(a) Cro. Jac. 407. S. C. adjudged and affirmed upon Error, and S. P. appears. 1 Rol. Rep. 427. S. C. adjudged and S. P. appears. 3 Bulst. 260. 1, 2. S. C. adjudged. Hob. 180. S. C. adjudged, and S. P. appears. 1 Rol. Abr. 49. O. 1. P. 1.

(N) (a) Disjunctive Words.

1. If A. says of B. to C. the Brother of B. Sirrah, thy Brother B. was Whipt about Taunton-Castle for stealing of Sheep, or else was burnt in the Hand or Shoulder; where he in Truth never did any such Felony, B. shall not have an Action for these Words; for tho' peradventure if he had said that he was Whipt about Taunton-Castle for stealing of Sheep, or else was burnt in the Hand, without more, it should be intended that he meant that he was burnt in the Hand for stealing of Sheep, and so the Action should lie; yet when he adds the last Words, or Shoulder, this makes the Words uncertain, for he could not be burnt in the Shoulder for stealing of Sheep; and then to say a Man stole Sheep, or was burnt in the Shoulder, implies no Certainty, (b) for to say that he spoke some Words that will bear an Action,

(a) She had a Child, and either She, or some Body else made it away, not actionable. Cart. 55, 56. adjudged by 3 Judges against Bridgman, Chief Justice, who said, the Plaintiff having averr'd she was a Virgin, tis now all one as if the Words had been, She had a Child and made it away. —A. or B. killed J. S. A. may have an Action, averring that neither he nor B. did kill him, per Cart. 56 per Bridgman. But vide 1 Rol. Abr. 81. Pl. 3. (b) Thou hast stole my Mare, or consented to the Stealing of her; not actionable, because Disjunctive, and the last Words are not. Griffith's Case. Cro. Eliz. 780. adjudged by 2 Judges. Noy 172. adjudged by 2 Judges.

or other Words that will not bear an Action, an Action does not lie. Mich. 8 Car. B. R. between (b) Churly and Hill adjudged in Arrest of Judgment against the Plaintiff. I my self being de Consilio Querentis Intratur. Trin. 8. Rot.

(b) Cro. Car. 283. S. C. adjudged. 1 Jon. 308. S. C. adjudged.

But after he brought a new Action, For saying that he was Whipt about Taunton-Castle, for stealing of Sheep, and (c) Mich. 9 Car. adjudged, in B. R. that the Action lies, this being moved in Arrest of Judgment.

(c) 1 Rol. Abr. 50. Pl. 9. S. C.

(O) For what Words it lies in respect of the Uncertainty of the Time.

Fol. 49.

(c) In Futuro.

1. If one Man says of another, if he might have his Will he would do such a Thing, which is a Matter Actionable, an Action lies tho' they are spoke in futuro, because they prevent occasionem ruinæ. My Reports. 14 Jac. (d) Sir J. Sydnam and Mayo adjudged, and so it was resolved, per totam Curiam, Pasch. 16 Jac. in a Writ of Error upon this in Camera Scaccarii.

(c) Thou art a forsworn Fellow, and we will prove thee so, and thou canst take no Benefit of the Law; not actionable because in futuro. 1 Sid. 48. adjudged. (d) Cro. Jac. 407. S. C. adjudged and affirmed upon Error; and S. P. appears. 1 Rol. Rep. 427. S. C. adjudged. 3 Bulst. 260. S. C. adjudged. 1 Rol. Abr. 48. M. 1. infra P. 1. S. C. Hob. 180. S. C. adjudged, and S. P. appears.

2. So if a Man says of a Merchant, (e) That he will be a Bankrupt within (f) two Days, an Action lies, tho' the Words are spoken in futuro (g) my Reports. 14 Jac.

(e) Diversity, where the Words are, He will break, &c. and where I will make him break, &c. Latch 114. Noy 77. (f) J. S. will be a Bankrupt not actionable. 2 Rol. Rep. 433. said per Henden, arguend'. But vid. Cro. Car. 237. like Point per Richardson, Chief Justice Con. (g) 1 Rol. Rep. 427. per Cur' arguend'. 3 Bulst. 261. S. P. per Dod'. Dyer 72. b. S. P. adjudged. 2 Rol. Rep. 433. S. P. per Henden Serj. arguend'.

3. So if a Man says, That he will Rob J. S. within two Days, an Action lies, (h) my Report. 14 Jac. per Dod'.

(h) 1 Rol. Rep. 427. and 3 Bulst. 261. S. P. per Dod'.

(P) For what Words it lies in respect of the Uncertainty.

Where there are not direct Affirmative Words.

1. If one Man says of another, I think in my Conscience, if he might have his Will he would kill the King, or other such scandalous Matter, an Action lies, tho' he does not say them precisely, but refers them to his Conscience, and to the Will of another. My Reports. 14 Jac (i) Sir J. Sydnam against Mayo adjudged, and so it was resolved, per totam Curiam at Serjeants-Inn in a Writ of Error. Pasch. 16 Jac. B. R. in the same Case. Vide same Case. Hob. Rep. 243.

(i) 1 Rol. Abr. 48. Pl. 1. S. C. 49. Pl. 1. S. C. Cro. Jac. 407. S. C. adjudged quoad this Point per tot' Curiam, and affirm'd upon Error. 1 Rol. Rep. 417. S. C. adjudged. 3 Bulst. 260. S. C. adjudged Winch. 124. S. C. cited.

2 (k) If

(k) Hains and Spriot, like Point Con. Cro. Jac. 247. adjudged. Cro. Car. 269. cited. Barter's Case, like Point. Moor 401. Pl. 531. dubitatur. Goulf. 130. adjudged Con. and a Diverfity taken per Fenner, where the Words are, He is in Gaol for Stealing, and where for Suspicion of Stealing. 2 Rol. Rep. 104. vide Moor 866. Pl. 1196. like Point adjudged. 1 Bulf. 40. like Point dubitatur. Gainford and Duke like Point Con. Cro. Jac. 536. adjudged. 2 Rol. Rep. 104. adjudged by 2 Judges againft 1. Showel and Hayman, like Point Con. Cro. Jac. 154. adjudged. 2 Rol. Rep. 104. cited. (l) 1 Brownl. 16. S. C. adjudged. Noy 24. S. C. adjudged. Hut. 2. S. C. adjudged. Hob. 177. S. C. adjudged. Palm. 68, 69. S. C. cited and agreed per Curiam 2 Sid. 16. S. C. cited. 1 Lev. 82. S. C. cited. and its Authority queftion d.

2. (k) If a Man fays of J. S. He is in **Warwick** Gaol for ftealing of a Mare and other Beafts, **no Action lies for thefe Words, becaufe they do not directly affirm that he hath ftole the Cattle, as if he had faid he ftole them and was in Gaol for it; but they are only a Report of his Imprifonment, and of the fuppofed Reafon thereof.** Hob. Rep. 239. **between** (l) Steward **and** Bifhop **adjudged.**

(n) He is a Knave and a Rogue, and I will prove it, and he is in Newgate, and he is to be Hang'd for Counterfeiting the King's Hand and Seal; actionable. Raym. 17. adjudged.— I have ferved thee with the Queen's Letter for ftealing of Goods out of my Mother's Houfe; not actionable, for that might be, tho' he did not fteal them; So that the Charge is by Implication only. Cro. Eliz. 234. adjudged.—Thou wert detected of Perjury in the Star-Chamber; not actionable, for an honeft Man may be detected but not convicted, Weaver and Carden. Cro. Eliz. 371. adjornatur. 4 Co. 16. a. adjudged.—You were cooped up for Forging of Writs, faid of an Attorney; not actionable. Cro. Car. 268. cited. Moor 409. cited. Hut. 2. cited. 58. cited. Cro. Eliz. 234. cited. (o) 1 Rol. Abr. 64. Pl. 6. S. C.

3. **If a Man fays of** B He was taken for ftealing of two Horfes, and I have fufpected him thefe four Years; **in an** Action upon the Cafe **for thefe Words, tho'** B. **avers that he has been at all Times free from any Suspicion of Felony, yet the Action does not lie, becaufe** (n) **there is no Affirmative that he ftole the Horfes, for a true and good Man may be fufpected and taken for ftealing of Horfes, as a Man may be imprifoned or indicted for the Stealing of Things, and yet may be free from Felony.** Pafch. 16 Car. B. R. **between** (o) Curfon **and** Wood **adjudged**, per Curiam **in Arreft of Judgment, but** Quære **if he had aver'd that he was never taken for the Stealing of any Horfes.**

4. **If** A. **fays of** B. Thou art a bafe Rogue, and a dogged Rogue, and I will make thee an Example and Precedent for a perjured Rogue, **an Action lies for thefe Words, for they are affirmative with an Affeveration.** Pafch. 16 Car. B. R. **between** Daniel **and** Rookes, per Curiam **adjudged, this being moved in Arreft of Judgment.**

(p) He hath been in F.'s Tub, (innuend' the Tub of one F. a Surgeon, in which Tub none had been but what were laid of the Pox) I will not fay of the Pox, but he lay in the Tub that Time that L's Wife was laid of the Pox, &c. not actionable. Goulf. 135. adjudged. (q) Stile 199, 219. S. C. adjudged per Curiam præter Jerman qui dubitavit.

5. **If** A. **fays** of B. She went to the Spaw (p) to be cured of the **French Pox, an Action lies, for none go to be cured of a Difeafe they have not, and therefore this is an implied Affirmative that fhe had this Difeafe, for this is ftronger than to fay fhe was laid for the Pox.** Trin. 1650. **between** (q) Hobfon **and** Judfon **adjudged**, per Curiam, **this being moved in Arreft of Judgment.**

(r) 1 Rol. Abr. 43. Pl 3. like Cafe. 1 Rol. Abr. 72. Pl. 10. like Cafe. (s) I hold it not fit this Girl fhould live with her Aunt, fhe keeping a Bawdy-houfe. 2 Sid. 15. 33. no Judgment.

6. (r) **If a Man fays, I** do accufe I. S. of (s) poifoning his Aunt, **an** Action upon the Cafe **lies, for this is an Affirmative that he poifoned his Aunt.** Trin. 39 Eliz. **per Fenner.**

Fol. 50.

(t) Yelv. 160. like Point adjudged March 19. like Point per Cur', Cro Jac. 215. like Point adjudged, but reverfed upon Error. 276. like Point and the Court divided. (u) I doubt not to prove he hath fpoke Treafon; actionable. Fitcham and Brook, Winch. 123, 4. adjudged. Hut. 75. adjudged, &c. vide 4 Co. 16 b. Beomans and Perts Cafe.— I have indicted J. S. for Perjury, and I doubt not to prove him a perjured Perfon to all Intents and Purpofes; not actionable, leaft Profecutions fhould be difcouraged. 1 Sid. 220. adjudged. I will prove thee a Thief and a Plotter of Thievery, and I will prove it by thine own Son, or elfe I will

7. (t) **So if one Man fays to another,** (u) I will prove you have poifoned my Aunt, an Action upon the Cafe **lies, for this is a more vehement Affirmative that he had poifoned her, than to fay that he had poifoned her.** Trin. 39 Eliz. B. R. per Poph.

ſend him to the Devil, not actionable, for this is no direct Affirmation; and the laſt Words ſhew he was doubtful thereof. Cro. Jac. 214. adjudged upon Error; but the firſt Judgment revers'd accordingly.

8. **So if one Man ſays of another,** I will call him in Queſtion for poiſoning of his own Aunt, and I make no Queſtion but to prove he hath poiſoned his Aunt, **an Action upon the Caſe lies, for this is a direct Affirmative that he had poiſoned his Aunt, and more vehement than the other before, in as much as he ſays I make no Queſtion but to prove it.** Trin. 39 Eliz. B. R. (u) **between** Webb **and** Poor **adjudged.**

(u) Cro. Eliz. 569. S. C. adjudged. Noy 63. S. C. adjudged, per tot' Curiam. 1 Rol. Abr. 77. Pl. 7. S. C. 71. Pl. 3. S. C.

9. **If A. ſays of** B. He was Whipt about **Taunton-Caſtle** for ſtealing of Sheep, tho' this is not a direct Affirmative that he ſtole the Sheep, yet it is a direct Allegation that he was Whipt for the ſtealing of Sheep, which is a great Slander. Mich. 9 Car. B. R. **between** (w) Churly **and** Hill **adjudged, this being moved in Arreſt of Judgment.**

(w) 1 Rol. Abr. 48. Pl. 1. S. C.

10. **If A. ſays to** B. **the Wife of** C. Wherefore will your Husband hang I. S. to which B. anſwers, for coming in the Night and breaking our Houſe, and ſtealing our Goods, I. S. **ſhall have an Action for theſe Words** againſt B. **and** C. **her Husband, for tho' the Words are ſpoke** (x) **by way of Anſwer to a Queſtion, yet is this a direct Affirmative.** Paſch. 11 Car. B. R. **between** Haywood **and** Nayler **adjudged in a Writ of Error, and the Judgment given in** B. **affirmed accordingly.** Intratur Hill. 11 Car. Rot. 527.

(x) If A. asks B. why C. did not come to Church, and B. reſponden-do dicit. It is no Marvel ſhe comes not to Church, for it is thought ſhe is with Child, and I fear it is true, by which ſhe loſes her Marriage with the ſaid A. yet not actionable, for it appears B. had no Intention to ſlander C. for the Words aroſe upon the Queſtion of A. and the Anſwer does not imply any direct Slander; for her Honeſty was not in Queſtion, but her Abſence from Church, and he only tells his Thoughts and Fears, which looks as if he rather wiſh'd it not true. Yelv. 113. adjudged per Curiam præter Fenner. But if A. asks B. concerning a Robbery, and he anſwers, that he believes the Robbery was done by C. and fears it is true, an Action will lie; for this is a direct Anſwer to B's Queſtion. Yelv. 113, 114. ſaid arguend', but vide 3 Bulſt. 83. a good Caſe with Arguments upon this Learning.

11. **If A. ſays of** B. **and** C. We will have them ſtand upon the Pillory, and have their Ears for Perjury, and Subornation of Perjury, **an Action lies; for this is a direct Affirmative that he was perjured and guilty of Subornation of Perjury.** Trin. 15 Car. B. R. **between** Pell **and** Jellow; **and another Action between** Pell **and** Chapman, **adjudged in a Writ of Error, and the firſt Judgment affirmed.** Intratur Paſch. 15 Car. B. R. Rot. 162, 163.

12. (a) If the Plaintiff declares that *I. S.* was lately murdered, and that the Defendant ſpoke theſe Words of the Plaintiff, He is infected of the Murder and Robbery (*innuendo feloniam & murdrum præd'*) lately committed, and doth ſmell of the Murder; the Action doth lie by reaſon of the Word infected. *Mich.* 14 and 15 *Eliz.* between (b) *Hawly* and *Sydenham. Dyer* 317. *b.* adjudged.

(a) Goulſ. 138. S. P. admit' per Curiam arguend'.
(b) Dal. 96. 103. S. C. with the Argument at large, but no Judgment. Dyer 72. Pl. 6. S. C. cited. Hut. 58. S. C. cited. Godb. 90. S. C. cited. Cart. 214. S. C. cited. New Dier. 317. b. Margine, it is ſaid this Caſe was cited in the Argument of Grimſton's Caſe, and denied to be Law per Anderſon and Owen.

13. If *A.* ſays to *B.* thou art a forſworn Fellow, whereupon *B.* asks whether he would ſay he was perjured? and *A.* anſwers yes, if you will have it; no Action lies. *Paſch.* 35 *Eliz.* between *Levermore* and *Martin. Cro. Eliz.* 297. adjudged; the Action being brought for ſaying he was forſworn, and the ſpecial Matter found by the Jury.

14. If one Man ſays of another, Many an honeſter Man hath been hanged, and a Robbery hath been committed, (c) and I (d) think he was at it, and I think he is a Horſe-ſtealer; an Action lies tho' he is not expreſly charged therewith. *Mich.* 36 and 37 *Eliz.* between (e) *Stitch* and *Wiſdom. Cro. Eliz.* 348. adjudged.

(c) As ſure as you believe that God rules the World, he ſtole, &c. actionable, tho' refer'd to the Thought of another, and perhaps he did not believe it. Winch 124. cited.—I do not know but J. S. is a Bankrupt; actionable. 1 Sid. 434. ſaid by Twiſden to have been adjudged, (d) Stil. 221. like Point appears. (e) Owen 18. S. C. adjudged the Words there being many, &c. and

and a Robbery hath been committed, whereof I think him to be one, &c. Goulſ. 186. S. C. adjudged, the Words there being, He did better then many an honeſt Man, for there is many, &c. and a Robbery was committed, whereof I think him to be one, &c.

15. If the Plaintiff declares, whereas he had been indicted and arraigned before *A.* and *B.* Juſtices of the Peace, for robbing the Defendant, and was thereof acquitted, that the Defendant ſaid of him, if *A.* and *B.* (f) had done Juſtice, he had been hanged for robbing me; the Action does well lie, for this is *quaſi* an Affirmative, and tho' being acquitted his Life is not in Danger, yet is the Scandal great. *Mich.* 42 *Eliz.* between (g) *Royal* and *Peckam.* *Cro. Eliz.* 786. adjudged.

(f) If thou hadſt had thy Right, thou hadſt been hanged for breaking P's Houſe; not actionable, per 1 Brownl. 3. adjudged.—Thou and thy Father had been hanged for Coining of Money if you had had your Deſerts long ſince; actionable; for the Conditional Words imply an Affirmation. Palm. 68, 69. adjudged.——Go follow Suit againſt W. for Stealing thy two Kine, and hang him, or I will hang thee; actionable; for this imports he had ſtole them, or elſe he could not hang him. Cro. Eliz. 904. adjudged per 2 Juſtices.—He ſhould have been hanged for a Rape, but it coſt him all the Money in his Purſe; actionable. Cro. Eliz. 589. adjudged. (g) 3 Bulſt. 260. S. C. cited Con.

16. If one Man ſays to another, He ſtruck his Cook on the Head with a Cleaver, and cleaved his Head, the one Part lay on the one Shoulder, and another Part on the other; no Action lies, for it is not directly alledged, the Cook was killed, but by Inference and *argumentative* only. *Mich.* 5 *Jac.* between Sir *Thomas Holt* and *Aſtgrigg.* *Cro. Jac.* 184. adjudged, *Flamming* and *Williams*, *abſentibus*, but *vide* the Caſe.

17. If one Man ſays of another, Bear witneſs Miſtreſs, he hath ſtole my Hair-cloth; no Action lies, for this is not a direct Affirmation to charge him with the Stealing thereof, but altogether depends upon the Teſtimony of another. *Paſch.* 6 *Jac.* between (h) *Bury* and *Wright.* *Yelv.* 126. adjudged.

(h) Palm. 68. S. C. cited.

18. If one Man ſays of another, It would be proved by many vehement Preſumptions, that he was a Plotter and Contriver of the Death of one *P.* becauſe he would not ſell him his Land; no Action lies, for he affirms nothing, but refers to Preſumptions that are uncertain, and ſlanderous Words muſt be ſpoken affirmatively. *Paſch.* 7 *Jac.* between *Weblin* and *Mayer.* *Yelv.* 153. adjudged.

19. If one Man ſays of another, He did ſteal a Mare elſe *G.* is forſworn; no Action lies with an Averment, that *G.* never ſwore any ſuch Matter, for this is no direct Slander, nor is his Life thereby in Danger. *Paſch.* 17 *Jac.* between *Sparham* and *Pye.* *Cro. Jac.* 530. adjudged.

20. If one Man ſays of another, He ſays I am perjured, but he is a perjured Knave as well as I, for he and *F.* ſwore one for another, an Action will lie, tho' he charges him only by way of Relation. *Mich.* 13 *Car.* 2. between (i) *Orton* and *Fuller.* *Raym.* 51. adjudged.

(i) 1 Lev. 65. S. C. adjudged.

21. If *A.* ſays of *B.* ——You *B.* you will lie with a Cow again, if you had your Deſerts you deſerve to be hanged——an Action will lie for theſe Words. *Mich.* 16 *Car.* 2. between *Poturite* and *Barrel.* 1 *Sid.* 220. adjudged.

22. If one Man ſays to another, (k) I dealt not ſo unkindly with you when you ſtole a Sack of my Corn; an Action lies. *Mich.* 27 *Car.* 2. between *Cooper* and *Hawkſwell.* 2 *Mod.* 58. *per Curiam.*

(k) You never thought well of me ſince G. did ſteal my Lambs; actionable. Cro. Eliz. 289. adjudged.——I will not keep a Thief as J. S. doth; Actionable. Dol. 97. arguend' ſaid to have been adjudged, tho' cited by Bromly Con.——You might have known your own Sheep, and not have ſtolen mine. Yelv. 144. the Court divided, and no Judgment.

23. If one Man ſays to another, I know my ſelf and I know you (l) I never buggered a Mare; an Action will lie, or elſe by (m) ſuch ſly ways any Man might be ſlandered. *Mich.* 27 *Car.* 2. (n) *Anonymus.* 1 *Vent.* 276. adjudged.

(l) You are a buggering Rogue, go home and bugger another Mare; actionable; for the Words ſuppoſe him guilty. All. 61. per Curiam ſed adjornatur. (m) So if one ſays, I heard a Bird ſing, or I dreamt J. S. ſtole a Horſe, an Action lies. 1 Lev. 277. 1 Vent. 60. and vide 1 Sid. 434. (n) Snell and Webling, S. C. 2 Lev. 150. adjudged.

24. If one Man ſays of another, He broke my Houſe like a Thief; no Action will lie. *Paſch.* 2 *Will.* and *Mar. Anonymus* 2 *Vent.* 172. adjudged.

(Q) For what Words it lies.

In what Caſes where there is but an Intention.

1. If one Man ſays to another, That he Sacrificed or gave one of his Children to the Devil, to the Intent to bewitch the Mother of the Speaker; tho' here was only an Intent to do Ill, and no Act of Witchery done, yet becauſe there is an ill Act ſcilicet, the Sacrificing and the Giving of an Infant joined with an ill Intention of Witchery, an Action upon the Caſe lies, for an Invocation or Conference with Spirits, is puniſhable by the Statute of 1 Jac. Paſch. 15 Jac. B. R. between (a) Lock and Lock adjudged, this Matter being moved in Arreſt of Judgment.

(a) 1 Rol. Abr. 44. Pl. 13. S. C. Poph. 128. S. C. adjudged.

2. (b) If one Man ſays of another, That he lay in wait at Shooter's Hill (c) to rob him, an Action upon the Caſe lies, becauſe there is an ill Act done, ſcilicet, the Lying in wait. Paſch. 15 Jac. B. R. in Lock and Lock's Caſe agreed per Mount' and Hought'.

(b) Lane 98. like Caſe cited and ſaid to have been affirm'd upon Error in Camera Scac'. Cro. Eliz. 618. like Point cited.

(c) So if to kill him. Cro. Eliz. 6. per Wray. Godb. 43. cited, yet 2 Bulſ. 206. it was adjudged no Action lay for theſe Words, Thou art a Knave, and haſt laid in wait to kill me, and haſt hired one W. to kill me. Yet 3 Bulſ. 167. per Houghton Juſtice, an Action lies, for Saying, He hired a Man to rob me; to which Coke agreed. Moor 186. Pl. 332. vide.

3. (d) If a Man ſays of A. That he and J. S. knowing that B. a Goldſmith carried Plate, they lay in wait and (e) attempted to rob him; but B. raiſed the Country upon them, ſo that they were forced to fly both upon one Horſe, an Action lies for A. for tho' this was not Felony, yet was it a great Offence, and ſlandered him as much as if he had charged him with Felony. Mich. 4 Car. B. R. between (f) Lewkenor and Burchly adjudged, this being moved in Arreſt of Judgment.

(d) Weeks and Taylor, like Point. Moor 409. Pl. 555. adjudged. Cro. Eliz. 349. adjudged. Cro. Car. 140. cited.

(e) He aſſaulted my Wife with an Intent to Raviſh her; actionable. 2 Sid. 76. per Glyn Chief Juſtice. Nine Perſons ſet upon me to rob me, and you were one of them; actionable. Cro. Car. 140. cited.

(f) Cro. Car. 140. S. C. adjudged. 1 Jon. 195. S. C. adjudged.

4. (g) If one Man ſays to another, That he (h) keepeth Men to rob me; no Action lies, becauſe there is but a naked Intention without any Act. Paſch. 15 Jac. B. R. in Lock's Caſe put per Hought' to have been lately adjudged.

Fol. 51.

(g) 3 Bulſt. 167. S. P. adjudged.

(h) Thou maintaineſt Thieves to rob my Maſter; actionable; and it will be preſumed he knew them to be ſuch. Palm. 278. adjudged; but for this Matter vide Poſt.

5. (i) If one Man ſays to another, Thou haſt procured J. S. to come thirty Miles to commit Perjury againſt his Father, before the Lord Biſhop of Wincheſter, and haſt given him 10 l. for his Pains; no Action lies for theſe Words, (k) for he does not ſay that J. S. committed the Perjury, and then the Hiring, without the Committing of Perjury, is no Offence. Paſch. 3 Jac. B. R. between (l) Harris and Dixon adjudged.

(i) 1 Rol. Abr. 41. Pl. 21. like Caſe. 79. Pl. 2. like Caſe.

(k) Thou haſt given J. S. 9 l. for forſwearing himſelf in Chancery, and haſt hired him to forge a Bond; actionable; tho' he ſhew not that he was ever Sworn, or that any Bond was forged. Cro. Car. 337.

(l) Cro. Jac. 158. S. C. adjudged Con. but Yelv. 72. S. C. adjudged, becauſe not ſhewn that J. S. had committed Perjury, nor what Authority the Biſhop had to adminiſter the Oath, and tho' the Words in Yelv. were, Thou haſt procured and ſuborned, &c.

6. If a Man ſays to B. I charge you in the Queen's Majeſty's Name to Aid me, for I am ſet upon to be rob'd; and I charge you to go with me to

Bonaventure

Bonaventure Tibbals's Houſe to apprehend him, for old Tibbals (innuendo dictum Authonium) hath been a Setter of them (innuendo the ſaid Bonaventure and another) often times to rob me, an Action upon the Caſe lies for Anthony Tibbals for theſe Words. Mich. 40, 41 Eliz. B. R. between (a) Tibbals and Brooke adjudged, for tho' he was not rob'd by them, yet the Action lies for the Slander of ſetting others to rob him.

(a) Cro. Eliz. 618. S. C. adjudged; but upon Error was after reverſed, becauſe the Words are not expreſly ſaid of the Plaintiff, but only Old T. &c. and an innuendo would not help it.

7. If one Man ſays of another, (b) He would have rob'd me if J. S. would have conſented to it; and he perſwaded I. S. to go with him, and ſaid unto him, that he would have Money enough, an Action upon the Caſe lies for theſe Words. Mich. 41 & 42 Eliz. B. R. (c) Leverſet's Caſe adjudged.

(b) Thou wouldſt have taken my Purſe from me on the Highway, not actionable. Godb. 202. per Coke Chief Juſtice.—Thou wouldſt have rob'd me; not actionable, becauſe no Act is ſhewn to be done in Order thereto. Cro. Eliz. 250. per Curiam. (c) Cro. Eliz. 710. S. C. adjudged.

8. (d) If one Man ſays to another, (e) Thou would have killed me, no Action lies, becauſe he charges him with an Intention only. Hill. 11 Jac. B. R. Pott's Caſe adjudged.

(d) 3 Leon. 231. like Point cited, Cro. Eliz. 250. like Point adjornatur, and like Point cited.—Sir John Harpur againſt Beamont, like Point. Yelv. 57. adjudged by 3 Judges againſt 2. vide. Cro. Jac. 56. adjudged by 3 Judges againſt 2. vide.—Bray and Andrews, like Point. Dal. 62. 2 Judges againſt 2. Moor 63. Pl. 174. by 2 Judges againſt 2. (e) You have ſought to Murder me and I can prove it; actionable. Cro. Eliz. 308. adjudged.

9. If one ſays of another, She would have cut her Husband's Throat, and did atttempt to do it, an Action lies for the Attempt, for this is a great Slander, and good Cauſe for the Husband to be Divorced. Hill. 8 Jac. Scaccario (f) Scott and Hilliers, per Curiam.

(f) Lane 98. S. C. adjudged.

10. If one Man ſays of another, (a) He did wrap Gunpowder in a Piece of Tow, and laid it under my Window, and put Fire to it, minding to Burn my Houſe; an Action lies. *Trin.* 24 *Eliz.* (b) *Edward's* Caſe. *Cro. Eliz.* 6. adjudged.

(a) Thou didſt bring Faggots a Mile and a half to the burning of the Colliers; actionable, the Plaintiff ſhewing that 3 Colliers were feloniouſly burnt in a Houſe. Hut. 122. adjudged. (b) Godb. 43. ſeems to be the ſame Caſe cited Con.

11. (c) If one ſays of my Lady C. She did offer 2 *s.* to a Woman with Child to get her a Drink to kill her Child, becauſe it was gotten by *J. S.* Sir *T. C.*'s Butler; an Action lies, for the Scandal is great, (d) tho' no Money given or Hurt done, but ſhe only offered, *&c. Trin.* 28 *Eliz.* between (e) Sir *Tho. Cockain* and his Wife againſt *Witnam. Cro. Eliz.* 49. adjudged.

(c) Godb. 43. like Point, adjornatur. (d) A. ſays of B. he would have given D. Money to have rob'd G.'s Houſe, and he did rob the Houſe; B. may have an Action, as if ſaid, He lay in wait, &c. and the Court ſaid the laſt Words might refer to B. alſo. 1 Vent. 223. adjudged. (e) Moor 419. S. C. cited 2 Leon. 30. S. C. cited. 2 Bulſ. 206. S. C. cited & dubitatur per Coke and Houghton. Godb. 43. S. C. cited Con.

12. If one Man ſays of another, He is a Brabler and a Quarreller, for he gave his Champion Counſel to make a Deed of Gift of his Goods (f) to kill me and then to fly out of the Country, but God preſerved me; no Action lies for the Intent or Purpoſe of a Man without any Act, is not puniſhable by our Law, and when it was formerly in the Star-Chamber, that was by the Arbitrary Power of that Court, and not by the Courſe of the Common-Law. *Trin.* 40 *Eliz.* between (g) *Eaton* and *Allen.* 4 *Co.* 16. b. adjudged.

(f) T. and G. agreed to have hired a Man to kill me, and that G. ſhould ſhew me to the hired Man to kill; actionable. Tibbot and Gough. Cro. Eliz. 191. adjudged. 4 Co. 16. b. cited. (g) Cro. Eliz. 684. S. C. adjudged per Curiam, præter Glanvill. Cro. Car. 140. S. C. cited.

13. If one says of another, (h) She sent a Letter to my Master, and therein willed him to poison his Wife; an Action lies. *Hill.* 42 *Eliz.* between (i) *Passy* and *Mondford*. *Cro. Eliz.* 746. adjudged and affirmed upon a Writ of Error in *Camera Scaccarii*.

(h) He hath placed a Woman in J. S's House, with an Intent to Poison her;

actionable, tho' no Act done, the Words being malicious. 2 Bulst. 201. adjudged. (i) 1 Bulst. 201. S. C. cited to be adjudged and affirm'd upon Error, in Camera Scaccarii.

(R) In what Cases the subsequent Words shall be Explanatory of the former.

1. If one Man says to another, Thou art a Thief, or such Words that will bear an Action, and hast stolen my Trees; an Action lies, for the last Words are by way of Addition, and not given as a Reason of the first. Mich. 4 Jac. B. R. between (a) Minors and Lydford. Hob. Rep. 106. there cited a Judgment in B. R. 7 Jac. accordingly. Contra Mich. 13 Jac. B. between (b) Coote and Gilbert adjudged. Vide the same Case. Hob. Rep. 106.

(a) Hob. fol. 331. S. C. cited Cro. Jac. 114. S. C. adjudged per Curiam, præter Fenner qui dubitavit. (b) Hob. fol, 77. S. C. adjudged. 1 Brownl. 2. S. C. adjudged.

2. But if one Man says of another, Thou art a Thief, for thou hast stolen my Trees, no Action lies; for the last Words (c) are explanatory, and given for a Reason of the first. Mich. 4 Jac. B. R. between (d) Minors and Lydford agreed.

(c) For Proof of the Diversity of Construction between And and For, vide Cro. Jac. 145. adjudged by 3 against 2. All. 11. by Rol contr' Bacon. Noy 135. adjudged. 2 Brownl. 280. adjudged. 2 Bulst. 142. per Hob' Cro. Jac. 231. said Goulst. 56. Stil. 115. —But for Proof that there is no such Diversity, and that in both Cases the subsequent Words shall be taken to be Explanatory, vide Cro. Jac. 66. adjudged by 4 against 1. Yelv. 34. adjudged. Cro. Jac. 205. adjudged. Hut. 113. adjudged, after a Conference with all the Judges at Serjeants-Inn; But All. 31. Bacon Justice cited this Case in Hut. and Roll denied it to be Law, and said it was adjudged upon the Authority of the Case in Hob. 331. which he said had often been denied to be Law, vide Winch 4. 10. 1 Rol. Abr. 52. Pl. 6. (d) Cro. Jac. 114. S. C. and S. P. agreed.

3. (e) If one Man says to another, Thou art a Thief, for thou tookest my Beasts by reason of an Execution, (f) and I will hang thee, no Action lies, because all the Words together are not actionable, and the last Words are explanatory of the first. Mich. 7 Jac. B. Wilk's Case held.

(e) Hob. 77. like Case cited and agreed, per Curiam. (f) Thou hast ravished a Woman twice, and I will make thee stand in a white Sheet for it. Godb. 287. adjornatur. Cro. Jac. 666. adjornatur. — I have Felony to lay to his Charge, for he would have rob'd me. Cro. Eliz. 250. adjornatur.

4. If one Man says to another, Thou art a Coney-catching and a cheating Thief, and didst cheat the Company of 23 Nobles (innuendo the Company of Watermen of Newcastle upon Tyne) an Action lies for these Words, for the last Words are not explanatory of the first, but cumulative; dubitatur, Mich. 9 Car. B. R. between (g) Redhead and Smith (*) Intratur, Trin. 9 Car. 1248. but Hill. 9 Car. Judgment in this Case was given for the Plaintiff.

* Fol. 52.

(g) 1 Rol. Abr. 47. Pl. 7. S. C. Hard. 7. S. C. cited.

5. If a Man says to I. S. Thou art a Thief and hast stole my Dung, an Action lies for these Words, (and hast stole my Dung) takes not away the Force of the Word Thief, for Dung may be a Chattel, and may be stole and so a Felony may be committed of it. Mich. 23 Car. B. R. between (i) Yerworth

(i) All. 31. S. C. adjudged. Carver and Pierce. Stil. 66. 73. S. C. adjudged.

(i) Yerworth and Pearce adjudged, this being moved in Arreſt of Judgment after a Verdict for the Plaintiff.

6. (k) If one Man ſays to another, Thou art a Thief, and haſt ſtole 20 Load of my Furze, an Action lies, for the laſt Words ſhall be taken cumulative, and alſo the Words rather imply, that they were Furze cut then growing, inaſmuch as he ſays 20 Load, Contra Hob. Rep. Caſe 406. between (l) Clarke and Gilbert.

(k) 1 Rol. Abr. 70. Pl. 49. like Caſe. Moor 396. like Point ſaid. Ow. 57. like Point per Popham. (l) Hob. fol. 331. S. C. adjudged. All. 11. 31. S. C. denied, per Roll. vide ſupra Margin. Goddard and Gilbert. S. C. 1 Jon. 11. adjudged. Winch 3. 10. adjudged. Poph. 152. adjudged. Hut. 113. cited.

7. If one Man ſays to another, Thou art a Thief, and (m) haſt ſtolen my Corn, an Action lies, for the laſt Words Abridge not the Force of the firſt Words. 2 Jac. B. R. between (n) Kelham and Maudi adjudged, Contra Hob. Rep. Caſe 406.

(m) Diverſity where ſaid Thou art a Thief, for thou haſt taken my Corn; and where, Thou art a Thief, for thou haſt ſtole, &c. Cro. Jac. 683. per Hob. (n) Cro. Jac. 39. S. C. adjudged, becauſe Stealing of Corn muſt be taken in the worſt Senſe, and as to that, Hob. fol. 331. agreed Winch 10. S. C. cited.

8. If one Man ſays of another, He is a Thief, and has ſtolen my Turneps ſeveral Nights, and my Graſs; (o) tho' the laſt Words may imply, that the Turneps and Graſs were growing when he ſtole them, yet it may be otherways, and this is ſpoken Cumulative, for he has called him Thief abſolutely, and has added further, that he ſtole his Turneps and Graſs, which is for Aggravation thereof, and not by way of Explanation; for we cannot pervert the Words, nor alter the ordinary Conſtruction of them, as where the Words imply an Aggravation, to interpret them to extend to an Explanation, which was contrary to the Intent of the Defendant, for what appears to us. Mich. 1650. between (p) Bonyon and Trotter adjudged, this being moved in Arreſt of Judgment. Intratur Trin. 1650. Rot.

(o) Cro. Jac. 674. like Point agreed per Curiam.

(p) Stile 231. S. C. adjudged.

(S) For Words in Diſgrace of a Profeſſion.

1. IN an Action upon the Caſe, If the Plaintiff declares, that whereas he was an Attorney de B. for ſeveral Years before, and whereas he was retained ſuch a Day by one Helmes, to proſecute a Suit for him againſt I. S. in B. the Defendant præmiſſorum non ignarus, yet of his Malice to ſlander him, having a Diſcourſe with the ſaid Helmes about the Plaintiff, ſaid theſe Words of the (q) Plaintiff, You may be aſhamed to employ that Knave (naming him) for you will receive Diſgrace and Shame by it; for he is a Knave, and a proclaim'd Knave in open Market, by which he loſt ſeveral Clients, &c. an Action lies for theſe Words, for upon the whole Matter it appears that this is ſpoke of him in his Profeſſion of an Attorney, in as much as it is alledged that the Defendant was not ignorant of the Imployment of the Plaintiff by the ſaid Helmes, and the Words that he ſhould not imploy him, &c. Paſch. 12 Car. B. R. between (r) Nichols and Dr. Webbe adjudged, in a Writ of Error upon a Judgment in B. and a Judgment given in B. affirmed, per Curiam. Trin. 11 Car. Rot. 372. B. R.

(q) Is N. your Attorney, take heed and follow him well, or elſe he will make you throw your Purſe over your Boſom; actionable; for it ſhall be taken to be as much as if he had ſaid, he would make him ſpend all his Money; ſo a Scandal to his Profeſſion. Winch 41. cited. (r) Cro. Car. 459. S. C. affirm'd upon Error.

2. If A. having a Diſcourſe of B. an Attorney, and of his Office of an Attorney, ſays before the Clients of B. that B. is (s) a baſe Rogue and Knave, and maintains his Wife and Children by his Knavery and cheating Tricks; an Action lies for theſe Words. Mich. 14 Car. B. R. between (t) Shawe and Wakeman, per Curiam adjudged, in a Writ of Error upon a Judgment (*) in Bathe, and the Judgment affirmed accordingly. Intratur Trin. 12 Car. Rot. 125.

* Fol. 53.

(s) He is the falſeſt Knave in England, and will cut my Throat, &c. actionable, being ſpoke of an Attorney. Dal. 63. adjudged. Hetl. 140. cited Hern's Pleader 111. S. C. adjudged. —Thou haſt cozened Mr. W. of his Fee, and I will ſue thee in the Star-Chamber, for that thou didſt not come for Mr. W. actionable, Stephens and Battyn. 1 Brownl. 3. adjudged. 2 Rol. Rep. 73. cited and there ſaid the Plaintiff was an Attorney, and W. an Officer of the Court. (t) Cro. Car. 515. S. C. affirmed upon Error.

3. In an Action upon the Caſe, if the Plaintiff declares that he was an Attorney de B. R. and a Filizer there, and retained to ſolicit Cauſes in the Exchequer, Co. B. and Spiritual Court, for one Jones, and was to receive 15 l. of him for the Proſecution thereof, and that the Defendant having a Diſcourſe of the Plaintiff and of the ſaid 15 l. and of the ſaid Suits ſaid of the Plaintiff, (u) He is a cozening cheating Knave, and Mr. Jones hath left with me 15 l. but I will not deliver it him, but will ſee the laying it out, for he is a cozening Knave; an Action upon the Caſe lies for theſe Words, for this diſgraces him in his Profeſſion, for it is lawful for an Attorney to proſecute Suits in other Courts as a Solicitor, being retained ſo to do. Trin. 16 Car. B. R. between Eveleigh and Parker adjudged, per Curiam, this being moved in Arreſt of Judgment.

(u) He is a Knave and a Raſcal, and deals falſly in his Place, being ſpoke of an Attorney, and of his Office upon a Colloquium thereof. Hern's Pleader 127.—Thou art a falſe Knave, and a cozening Knave, and haſt gotten all thou haſt by cozenage, and thou haſt cozened all that have dealt with thee; actionable. Cro. Jac. 586. adjudged; the Words being ſpoke of an Attorney.

But then was vouched a Caſe about 2 Years paſt, of one Pain an Attorney, de B. R. againſt where it was ſurmiſed that he proſecuted a Cauſe in the Court of Requeſts, &c. and that ſuch Words were ſpoke of him in the Proſecution of the ſaid Suit, and the Court was of Opinion upon my Motion for Payne, that the Action lay not, and gave a peremptory Rule accordingly for Judgment againſt the Plaintiff, but now the Court retracted this Opinion, and after this ſame Term Payne moved for Judgment in this Cauſe alſo, but it was adjourned; but after Judgment was given for the Plaintiff.

4. If A. ſays of an Attorney, having a Diſcourſe with him concerning 20 s. due to I. S. in full Diſcharge of a Judgment obtained by the ſaid I. S. againſt the ſaid A. in Treſpaſs, You are a ſherking Attorney, and at another Time ſays of him, He is a cheating Attorney, and he may be thrown over the Bar, an Action lies. Hill. 18 Car. Rot. B. R. between Bird and Woodcoke adjudged, this being moved in Arreſt of Judgment.

5. If A. has a Diſcourſe with B. touching C. an Attorney, who before was retained by B. to be his Attorney, and A. ſays to B. your Attorney (innuendo the ſaid C.) is a (w) bribing Knave, and hath taken 20 l. of you to cozen me; theſe general Words will maintain an Action, and the laſt Words do not extenuate them, for if any Man has any Intermedling in Caſe of Juſtice, be he Judge, Officer, or Attorney, if he receives any undue Reward for any Thing againſt Juſtice, this is a Bribe. Hob. Rep. 13. between (x) Yardly & Ellis adjudged.

(w) 1 Rol. Abr. 56. Pl. 25. vide.

(x) Hob. fol. 7. S. C. adjudged. Moor. 855. Pl. 1173. S. C. adjudged. 1 Brownl. 6. S. C. adjudged. Winch 39. S. C. cited Con. but Winch ſaid it was adjudged as here. 1 Rol. Abr. 54. Pl. 13. S. C. Hetl. 173. S. C. cited.

6. If a Man ſays of an Attorney, Thou art a common Maintainer of Suits, and a Champertor, and I will have thee thrown over the Bar next Term; an Action lies for theſe Words, Thou art a Champertor; for this is againſt his Office and the Statute, but no Action lies for the other

(y) He is a common Stirrer up of Suits, and a Diſturber of the Peace, and ſo a Mover of unjuſt Actions, being ſpoke of an Attorney, actionable. Hetl. 140. per 3 Judges. He ſets People together by the Ears, and we ſhall have him Indicted for a Common Barretor; actionable. Car. 214. adjudged.

Words,

Words, (y) Thou art a Maintainer of Suits, for this is lawful for him to do, and justifiable, and the other Words of throwing over the Bar are of an uncertain Sense. Hob. Rep. 163. between (z) Box and Barnaby adjudged.

(z) Hob. fol. 117. S. C. adjudged. Moor. 867. Pl. 1200. S. C. adjudged. 1 Brownl. 15. S. C. adjudged, there being several other immaterial Words. Hetl. S. C. cited infra Pl. 20, 21. S. C.

7. If a Man says of an Attorney, He is an Extortioner, and one I. S. told me, That he had Cozened him in a Bill of Cost of 10 l. an Action lies for these Words; for it is against the Oath of an Attorney to commit a Falsity. Hill. 40 Eliz. B. between (a) Stanly & Boswell adjudged.

(a) Cro. Eliz. 602. S. C. adjudged, the Words there being, Thou art a cozening Knave, and getteſt thy Living by Extortion, and didſt cozen, &c. 1 Rol. Abr. 55. Pl. 23. S. C.

8. If one says to an Attorney, You are a Knave, You were an Attorney for my Mother against my Husband, and set her on to Sue him, and made him spend 1000 l. and such Knaves as you are, have (*) made my Husband spend almost all his Estate; an Action lies for these Words, for this disgraces him in his Office of an Attorney. Pasch. 23 Car. B. R. between (b) Hilton and Playters adjudged, per Curiam, in a Writ of Error upon a Judgment in B. and the Judgment affirmed accordingly. Intratur Hill. 21 Car. Rot. 30.

*Fol. 54.

(b) All. 13. S. C. adjudged.

9. If a Man says of an Attorney, He keepeth many Markets, and stirreth up Men to Suits, and promiseth if he do not recover in their Cause he will take no Charges: And he once promised me, That if he did not recover in a Cause for me, he would take no Charges of me; yet afterwards he prosecuted a Suit, and obtained Judgment, and got Charges of me for that Cause, and that I can prove: Now there are such Articles against him, that if he were worth 3000 l. he would not be left worth one Groat, an Action lies for these Words, because for an Attorney to stir up Men to Suits is not lawful, but is a Badge of a Barretor, and to contract before Hand, not to take Charges if he does not recover, is a Badge of Maintenance and not lawful. Mich. 1649. between Smith and Andrews adjudged, in a Writ of Error upon a Judgment in B. and the Judgment affirmed accordingly. Intratur Trin. 1649. Note, the Action was also brought for other Words mentioned in the Declaration to be spoke at another Time, of which no Question was but they were actionable; but the only Question was upon the Words here before mentioned.

10. If a Man says to a Dr. of Physick, Thou art a Quacksalver; an Action upon the Case lies, for it is well known what is intended thereby, and it is a great Disgrace to him. Mich. 5 Car. between Allen and Eaton adjudged; this being moved in Arrest of Judgment, where the Plaintiff was Physician to the King, and the Defendant said, He is not the King's Physician, but a Quacksalver.

11. If a Man says to a Dr. of Physick, Thou art a drunken Fool and an Ass; thou never wast a Scholar, thou art not worthy to speak to a Scholar; this I will prove and justify; an Action lies for these Words, tho' there was no Discourse of his Profession before; for he cannot be a good Physician if he be not a Scholar in other Matters. Mich. 8 Car. B. R. between (c) Cawdry and Chickly, this being moved in Arrest of Judgment, and after Trin. 9 Car. Judgment was given per Curiam for the Plaintiff.

(c) Cro. Car. 270. S. C. adjudged. Godb. 441. S. C. per 2 Judges.

12. If a Man says of a Dr. of Physick, He is an Emperick, and Mountebank and base Fellow, an Action lies without any Averment of the Signification of the Words, for these are Terms of Disgrace well known, and in Disgrace of his Profession Pasch. 12 Car. B. R. between Dr. Goddard and Haselfoot adjudged, this being moved in Arrest. Intratur Trin. 11 Car.

13. If A. having a Discourse with B. about his Attorney, says to him, Your Attorney is a bribing Knave, and hath taken 20 l. of you to cozen me, an Action lies for the Attorney, because this disgraces him in his Profession, for it is a Scandal to him to give a Bribe to any. Pasch. 12 Jac. B. Trin. 12 Jac. B. between (d) Yardly and Ellett, per Curiam adjudged.

(d) 1 Rol. Abr. Pl. 5. which vide with Notes thereupon.

14. If

14. If a Man ſays to an utter Barreſter, Thou art no Lawyer, thou canſt not make a Leaſe, thou haſt that Degree without Deſert, they are Fools that come to thee for Law; an Action lies. Mich. 13 Jac. B. between Banks and Allen.

15. If a Man ſays to an (a) Attorney, Thou art a (b) common Barretor, (c) a Judas and a Promoter; an Action lies for theſe Words, for to be a common Barretor is a great Diſgrace to an Attorney. Trin. 6 Car. B. R. between (d) Starky and Taylor adjudged, in a Writ of Error, and the firſt Judgment given in B. per Curiam affirmed.

(a) Not ſo if to another Man, vide 1 Rol. Abr. 44. Pl. 7. 59. Pl. 3.

(b) Hob. 140. S. P. per Curiam. Moor 180. Pl. 320. S. P. adjudged. (c) You have play'd the Judas with your Clients; actionable. Hetl. 141. per Curiam. (d) Cro. Car. 192. S. C. affirm'd upon Error. Hut. 104, 139, 143. S. C. adjudged.

16. In an Action upon the Caſe for Words, If the Plaintiff declares that he is an Utter Barreſter of the Middle-Temple, and has been a Practiſer of the Common Law for ſeveral Years, and the Defendant of purpoſe to defame him, maliciouſly ſaid of him to I. S. his Father-in-law, did Ay. Peare the Plaintiff marry your Daughter, to which I. S. ſaid yes, to which the Defendant replied (e) He is a Dunce, und will get nothing by the Law, to which I. S. anſwered, Other Men have a better Opinion of him; to which the Defendant replied, He was never accounted otherways in the Houſe. The Action lies upon this Declaration; for a Man may be heavy, and not ſo witty as others are, and yet be a good Lawyer; but here upon the whole Matter it appears it was ſpoke maliciouſly, and he ſaid that he would get nothing by the Law, which diſgraced him in his Profeſſion. Mich. 10 Car. B. R. between (f) Peares and Jones adjudged; this being moved in Arreſt of Judgment after a Verdict for the Plaintiff. Intratur 10 Car. Rot. 411.

Fol. 55.

(e) A Corporation being aſſembled to elect a Steward, and J. S. a Lawyer, being propoſed, one of the Members ſaid to his Brethren, He is an ignorant Man, and not fit for the Place, per quod he was refuſed, and thereupon J. S. brought his Action for theſe Words, and the Court inclined for him, March 146. but no Judgment. But note, it does not appear whether the Plaintiff was a Barreſter or an Attorney. (f) Cro. Car. 362. S. C. adjudged.

17. If a Man ſays of a Counſellor of Law in the North, Thou art (g) a Daffa-down-dilly, an Action lies, with an Averment that the Words ſignify that he is an (h) Ambodexter. Mich. 10 Car. B. R. in (i) Peare's Caſe, ſaid to have been adjudged in Scaccario, and agreed per Curiam.

(g) So if he calls him Ambodexter. Dal. 97. cited Moor 409. ſaid Godb. 214. adjudged. (h) B. is a good Attorney, but that he will play on both Sides; actionable; 1 Brownl. 5. per Curiam, tho' Judgment was given againſt the Plaintiff for a Fault in the Declaration. —He is a Paltry Fellow, for he deals on both Sides, and deceives them which put him in Truſt; actionable, being ſpoke of an Attorney. Noy 11. adjudged niſi. Yelv. 32. adjudged. (i) Cart. 214. S. C. cited. Noy 98. S. C. cited.

18. If a Man ſays to an Attorney, Thou ſayeſt thou art an Attorney, but I think thou art but an Attorney's Clerk; and if thou be, (k) I will have thee (l) pitched over the Bar next Term. No Action lies for theſe Words, becauſe it is uncertain whether he intends that he himſelf will pitch him over, or the Court. Paſch. 7 Jac. B. (m) Tootman's Caſe adjudged.

(k) Dal. 97. like Point, cited Con. 1 Rol. Abr. 53. Pl. 6. vide. (l) Is J. S. your Attorney, no honeſter Attorney than he? He was pitched over the Bar at Weſtminſter for his Knavery. Hern's Pleader 137, 138. (m) 2 Brownl. 253. S. C. adjudged.

19. If a Man ſays to an Attorney, That he is a common Maintainer of Suits, no Action upon the Caſe lies, becauſe it is no Diſcredit, for it is his Profeſſion to maintain Suits. Hill. 14 Jac. B. between (m) Boxe and

(m) 1 Rol. Abr. 53. Pl. 6. S. C. which vide, with Notes thereupon.

20. If a Man ſays to an Attorney, That he is a common Champerter; an Action upon the Caſe lies, for this is to have Part of the Thing in Demand pending the Writ, which is not lawful for an Attorney to do, and ſo is a Diſgrace to his Profeſſion. Hill. 14 Jac. B. between (n) Boxe and adjudged.

(n) 1 Rol. Abr. 53. Pl. 6. S. C. which vide with Notes thereupon.

21. If a Man ſays of an Attorney, That he has the Falling-ſickneſs, an Action lies, becauſe this diſables him in his Profeſſion, for by rea-

(o) 1 Rol. Abr. 44. Pl. 4, 5. S. C. Noy 117.

ſon thereof he cannot follow the Duty of his Profeſſion. Hill. 4 Jac. in (o) Taylor and Perr's Caſe held.

S. C. adjudged; but S. P. does not appear. Cro. Jac. 250. S. C. adjudged; but S. P. does not appear.

(p) You a Counſellor? a Fool, an Aſs, an Hangman, a Counſellor of Law a Fool in the Profeſſion; actionable. Error.

22. If a Man ſays to a Counſellor, (p) Thou a Barreſter? thou a Barretor; thou called to the Bar? thou wert put from the Bar, an Action upon the Caſe lies, tho' the Words are not certain, nor is it ſaid that he is a common Barretor in his Profeſſion. Paſch. 8 Jac. in Camera Scaccarii adjudged. Vide the ſame Caſe among the Reports. de Paſch. 8 Jac. B between (q) Beſtley and Diſon.

Poph. 207. adjudged. (q) Preſton's Caſe. Noy 98. S. C. adjudged, and affirm'd upon

(r) 1 Rol. Abr. 53. Pl. 7. S. C. which vide with Notes thereupon.

23. If a Man ſays to I. S. an Attorney, He is an Extortioner, and one B. told me, that he had cozened him in a Bill of Coſts of 10 l. an Action lies for theſe Words, for it is againſt the Oath of an Attorney to commit a Falſity. Hill. 40 Eliz. B. between (r) Stanly and Boſwell adjudged.

24. If a Man ſays to a common Smith, Thou art a Rogue, and a cozening Rogue; and in one Tire of Wheels which thou didſt ſend to J. S. thou didſt cozen him of a Noble, no Action lies for theſe Words, for it may be intended (and the Words in themſelves import that he intended) that he had cozened J. S. in the Price only, and not in the ill making of the Wheels, and to ſay to ſuch a Man of Trade, who ſells (*) Things, that he cozens (s) in the Price, is no Scandal, for every Trader cozens in the Price when he ſells for more than the Thing is worth, and here it is not ſaid that the Smith made this Tire of Wheels, and if he did not make it, it can be no Diſgrace of his Trade. Paſch. 16 Jac. B. between (t) Ticknell & Snelling, per Curiam.

* Fol. 56.

(s) He is a Caterpillar, for he lives by robbing of his Gueſts; not actionable, being ſpoke of an Inn-keeper, for it is as much as if he had ſaid he lived by Powling and Pilling, which is incident to his Trade. Moor 179. Pl. 319. adjudged. (t) 1 Rol. Abr. 62. Pl. 24. S. C.

25. If a Man ſays to an Utter Barreſter, who is a Town-clerk of the Town, and a Steward of the Town-Court, Thou art a preciſian Knave, a puritan Knave, a bribing Knave, a baggage Knave, a diſſembling Knave, a corrupt Knave, and I will prove it, &c. and thou haſt not carried thy ſelf as thou oughteſt, and I will make thee know thou haſt wronged me in the Court of Plymouth (where he was before, and at the Time of the ſpeaking, Town clerk and Steward, as he avers in the Declaration) and (u) thou haſt not performed thy Office according to Law; an Action lies for theſe Words, for it appears by the laſt Words, that he was Corrupt in regard of his Miſdemeanour in his Court and Office. Paſch. 16 Jac. B. R. between (w) Fowell and Cowe adjudged, this being moved in Arreſt of Judgment.

(u) Thou haſt made many falſe Certificates to the Mayor and Burgeſſes in the Court,

and the more thou ſtirreſt in it, the more it will ſtink, being ſpoke of a Town-Clerk, vide the Caſe. Hut. 123. (w) Poph. 139. S. C. adjudged, but many of theſe Words omitted in the Report thereof, and there the Judgment was given upon the Words, Corrupted Knave only; which upon the Whole muſt be intended in his Office! and as for the Word Bribing, it is ſaid it did not import a Taking of any Bribe. 2 Rol. Rep. 23. S. C. adjudged, and more of the Words omitted in the Report thereof.

26. If there be a Matter depending in Chancery between A. and B. and upon this a Commiſſion is directed to G. M. who is a Juſtice of Peace, and others, to examine Witneſſes therein, and alſo to hear and determine the ſame Cauſe, and G. M. and the reſt Act in the Execution of this Commiſſion, and after A. ſays of G. M. Sir G. Moore, (which was his Name at large) is a corrupt Man, (x) and hath taken Bribes of B. innuendo, Bribes for Favour to be done to B. in the Execution of this Commiſſion; And at another Time he ſays, B. hath ſet Sir G. Moore on Horſeback with Bribes, whereby to defraud Equity and good Conſcience. Though it doth not appear that the Commiſſion was

(x) If A. and B. refer a Controverſy to C. and after A. ſays, C. has taken ſuch Bribes from B. that he is fallen from hearing any Thing on his Side; this is a Slander puniſhable. Yelv. 62. ſaid.

returned, yet it is alledged that he dealt in the Execution thereof, in which he might Act corruptly, and tho' he was no Judge nor Officer sworn in this Commission, but elected by one Party, and so might be partial to this Party, and take a Reward for his Pains; yet the Action upon the Case lies for these Words, because by this Commission of Oyer and Terminer the King intrusts him; and corrupt Dealing therein, and in the Examination of Witnesses, as in taking of Bribes, is punishable. Pasch. 3 Jac. B. R. between (y) Sir George Moore and Foster adjudged. (y) Cro. Jac. 65. S. C. adjudged by 4 Judges against 1. Yelv. 62. S. C. adjudged by 3 Judges against 2.

27. If a Man says of a Justice of Peace, He was the true Patron of the Advowson of S. but he hath lost that Patronage and Presentation, by being a Symonist and Recusant, both which I will prove him to be; yet no Action lies for these Words, for tho' the Recusancy, which is the most material Word, be a good Cause to remove him from his Office, yet does not this touch him in the Male Administration of his Office, nor in his Oath nor Allegiance, and it is not certain what Recusant he intends, for perhaps he intends a Recusant according to 1 Eliz. Trin. 16 Jac. B. R. between (z) Sir John Tasborrough Plaintiff, and adjudged in Arrest. (z) 1 Rol. Abr. 38. Pl. 24. S. C. Cro. Jac. 484. S. C. adjudged. 2 Rol. Rep. 43. S. C. adjudged.

28. If a Man says of a Steward of a Court-Baron and Leet, He hath put a Presentment into the Jury's Verdict against me of 3 s. and 4 d. for suing of P. W. out of the Court, contrary to a Pain, without the Consent of the Jury; an Action lies for these Words, for this Deceit scandalizes him in his Profession. Mich. 4 Jac. B. R. between (a) Carr and Read, per Curiam præter Popham. (a) 1 Rol. Abr. 65. Pl. 7. S. C.

29. If a Man says of a Justice of Peace and Judge of the Court of Marches of Wales, He is a Blood-sucker and seeks after Blood, if a Man will give him a couple of Capons, or half a Score of Weathers he will (*) take them; yet no Action lies, for the Words can have no ill Sense. Mich. 37, 38 Eliz. B. R. between (c) Sir Christopher Hilliard and Constable adjudged. * Fol. 57. (c) Moor 418. Pl. 574. S. C. adjudged. Cro. Eliz. 306. S. C. adjudged, the Words there being, He is, &c. if any Man will give him a Bribe, as a couple of Capons, &c. and it is there said, the Defendant was found Not Guilty, as to the last Words; but Cro. Eliz. 433. it is said the same Case was moved again, and that it was then agreed by the Judges, that the last Words were not actionable: And as to these Words, He is a Blood-sucker and seeketh others Blood, the Court was divided; but after being argued at Serjeant's-Inn before all the Judges, Judgment was given for the Defendant, according to the Opinion of the Major Part of them.

30. If a Man says of a Justice of Peace, Thou art a Blood-sucker, and art not worthy to live in a Common-Wealth, the Child not born will curse thee; no Action lies for these Words. Mich. 38, 39 Eliz. B. R. between (d) Pinchbanck and Warwick adjudged upon a special Verdict cited. Mich. 37, 38 Eliz. B. R. (d) Thimmelthorp's Case. Noy 64. seems to be S. C. adjudged. 2 Mod. 163. S. C. cited.

31. (e) If a Man indicts a Justice of Peace for a common Barretor, and he upon this is found Not guilty, and after the Indictor calls the said Justice common Barretor, an Action upon the Case lies against him; because this discredits him in his Office. Pasch. 38 Eliz. B. R. between Poole and Benbrick adjudged. (e) Hob. 140. S. P. per Curiam.

32. If a Man says of a Justice of Peace, He hath taken Money of a Thief that was brought before him for stealing of Sheep, (f) to deliver him, and keep him from the Gaol, an Action upon the Case lies for these Words. Trin. 38 Eliz. B. R. (g) Cotton's Case adjudged. (f) You are a sweet Justice, you sent your Warrant for J. S. to be brought before you for Suspicion of Felony, and after sent J. D. unto him to give him Warning that he might absent himself; actionable. Burton and Tokin. Cro. Jac. 143. adjudged, per totam Curiam. Hetl. 173. cited. He 5 or 6 Years since had two Servants prosecuted for Stealing of Sheep, and he desired me not to Prosecute them; actionable, being spoke of a Justice of Peace. Latch. 49. no Judgment. (g) Moor 695. Pl. 965. S. C. adjudged and affirmed upon Error, in Camera Scaccarii.

33. If

33. If a Man ſays of a Juſtice of Peace, He is a Corrupt Man, he is a Vermine in the Common-Wealth, &c. an Action upon the Caſe lies, Mich. 42, 43 Eliz. B. R. between (h) the Biſhop of Coventry and Litchfield, and Wortly, dubitatur.

(h) 1 And. 119. S. C. where theſe Words among others were writ & per Curiam 120. it is agreed theſe Words were not actionable; but for theſe among others, Judgment was given for the Plaintiff. Moor 141. Pl. 283. S. C. adjudged. Cro. Eliz. 192. S. C. cited to be adjudged by reaſon of theſe Words.

34. If at a Quarter-Seſſions J. S. makes Information upon Oath againſt J. D. of a Miſdemeanour, upon which the Juſtices bind him to his good Behaviour, and after J. D. ſays to one of the ſaid Juſtices, By your Means I had Wrong at the Seſſions, and there you cauſed J. S. to Swear that which was untrue againſt me; The ſaid Juſtices ſhall have an Action upon the Caſe againſt him for theſe Words, becauſe a Juſtice ought not to procure any Man to make a falſe Oath, and ſo it is againſt his Office. Mich. 10 Jac. B. between (i) Sir Walter Chetwin and Meeſon adjudged.

(i) Cro. Jac. 308. S. C. adjudged. Yelv. 220. S. C. adjudged.

35. If a Man ſays of a Commiſſioner upon a Commiſſion returned by him into Chancery, He hath put out ſome Depoſitions that were taken, and (k) added others that were not; an Action lies, for this diſcredits him in his Reputation, ſo as not to be a Commiſſioner again, and ſubjects him to a Fine in Camera Stellata. Hill. 17 Jac. B. R. between (l) Sir Nicholas Parker and Large, per Curiam.

(k) He hath returned Depoſitions of Witneſſes that were never Sworn, being ſpoke of a Commiſſioner, actionable. Fiſh and Thorowgood, Cro. Eliz. 623. adjudged. Palm. 67. cited. (l) Palm. 67. S. C. adjudged.

36. If there be a Diſcourſe between C. and D. of M. F. and C. ſays to (m) D. Mr. Deceiver hath deceived and cozened the King, and I have him in Queſtion for it, and I doubt not but to prove it againſt him: M. F. ſhall have an Action, averring that he was the King's Receiver of the Court of Wards, and that the Words were ſpoken of him, for it appears by the Nick-name given to him, Scilicet Deceiver, that he intends the Deceit to have been in his Office of Receiver, and by the other Words alſo. Hill. 17 Jac. B. R. between (n) Sir Miles Fleetwood and Auditor Curl adjudged, in a Writ of Error upon a Judgment in B. where it was ſo adjudged alſo, per Curiam vide, the ſame Caſe adjudged. Trin. 17 Jac. B.

(m) This is B. in the Original, and ſo appears plainly to be miſprinted.

(n) Cro. Jac. 557. S. C. affirm'd upon Error. Hob. 267. S. C. adjudged.

Palm. 69. S. C. affirm'd upon Error. March 82. S. C. cited and ſaid to be affirm'd upon Error. Godb. 341. S. C. cited. 1 Rol. Abr. 82. Pl. 18. S. C.

37. If a Man ſays of a Counſellor of Law, (o) Go you to him to be of your Counſel? he will deceive you, he was of Counſel with me, and revealed the Secrets of my Cauſe; an Action lies for theſe Words, for it appears by all the Words that he intends a Slander, by the divulging of what he ought not. Trin. 13 Eliz. B. R. Rot. 114. between (p) Snag and Gray adjudged, this being moved in Arreſt.

(o) He hath dealt falſly with me, being his Client, and hath joined with mine Adverſary; actionable. Stile 231. adjudged, tho' Judgment ſtaid for a Fault in the Declaration.—Thou didſt diſcloſe my Counſel; actionable. Cro. Eliz. 358. per Anderſon.——He hath delivered Copies of my Evidence to my Adverſary; not actionable, for it might be to ſome good End. Moor 409. cited; but Cro. Eliz. 358. per Beamond, Con.— Diverſity where the Words are, He hath revealed the Secrets of my Cauſe, and where, Go not to him, for he hath revealed, &c. Hetl. 174. per Bramſton, arguend'. (p) Dal. 97. S. C. cited, the Words being, He did diſcover all my Counſel to my Adverſary. Co. Ent. 22. N. 19. S. C. with the Reaſons of the Judgment.

38. If a Man ſays of a Juſtice of Peace, I have often been with him for Juſtice, but (q) could never have Juſtice at his Hands, but always Injuſtice, an Action lies. Mich. 3 Car. between (r) Sir John Iſam and York adjudged, this being moved in Arreſt of Judgment.

(q) You have perverted Juſtice, and to your Shame and Diſhonour I will prove it; actionable. Moor 409. Pl. 554. adjudged.—Thou doſt not adminiſter true Juſtice; actionable. Cro. Eliz. 358. per Anderſon.—You out of Malice and Spleen have perverted Juſtice, and have wreſted the Law many Times, to ſerve your own Turn; actionable. Haſtings and Beamont. 1 Bulſt. 36. adjudged. Cro. Jac. 240. adjudged, and affirm'd upon Error. (r) Cro. Car. 14. S. C. adjudged.

39. In an Action upon the Case by a Justice of Peace, if he declares that he was a Justice of Peace, and that J. S. was brought before him to be examined concerning the stealing of a Lamb, upon which he was examined accordingly, and after the Defendant spoke these Words of him falsly and maliciously. He did of his own Head put into J. S's Examination, that he had confessed that he had stolen the Lamb; an Action lies for these Words, for this disgraces him in his Office of Justice of Peace, for these Words imply that he put it in his Examination without the Confession of J. S. for if he put it in of his own Head, this could not be upon the Party's Confession, for this is as much as to say he devised it of himself. Pasch. 1650. between (s) Hamond and Kingsmill adjudged, per Curiam, this being moved in Arrest of Judgment. Intratur Hill. 22 Car. B. R. Rot. 735. Fol. 58.

(s) (t) Stile 22. 210. S. C. adjudged.

40. If one says to an Attorney, having a Discourse of his Dealing in his Profession, You are well known to be a corrupt Man, and to deal corruptly, an Action lies; for these Words affect him in his Oath, and the Duty of his Profession. *Mich.* 27 and 28 *Eliz.* (a) *Birchly*'s Case, 4 *Co.* 16 a. adjudged; but if there had been a Precedent Discourse how he was an Usurer, *&c.* and thereupon these Words had been spoke, the Court resolved no Action would have lain.

(a) Hob. 9. S. C. cited NewCo.Rep. Margine vide the several Books where this Case is cited, many of which mention not the precedent Communication, but say 'twas adjudged upon the Rule quod Sermo relat' ad personam intelligi debet de conditione personæ.

41. If at a Court of Survey holden at *D. &c.* for the Manor of *D. &c.* *A.* being an utter Barrister and Bencher of, *&c.* shews forth certain Letters Patents, by which *B.* had purchased the said Manor from the Crown, and thereupon says to the Tenants, I assure you the Fee-simple of the Manor is in *B.* and requires the Tenants to shew their Copies and Leases, *&c.* upon which *C.* says it is requisite the Tenants should be better informed; to which it is answered by several of them, that what *A.* had said, was a sufficient Warrant to them; to which *C.* replies, No Friends, I know well a great Number in this Country trusting to his Warrants, have been thereby undone. *A.* may have an Action against *C.* for these Words, in as much as they scandalize him in his Profession and way of Living. *Trin.* 33 *Eliz.* between (b) *Hele* and *Giddy*. 2 *And.* 40. adjudged and affirm'd upon a Writ of Error in *Camera Scaccarii*.

(b) Moor 695. S. C. adjudged and affirm'd upon Error. 1 And. 269. S. C. cited March 8. S. C. cited. 2 Rol. Rep. 145. 6. S. C. cited, and said, that for the Uncertainty of the Word Warrant it was reversed in Cam' Scacc'. Winch 39. S. C. cited, and said to be reversed in Cam' Scacc'; but Winch answer'd, it was not revers'd for this Error. Palm. 65. 6. S. C. cited, and said it was reversed in Cam' Scacc', because of the Uncertainty of the Word Warrant.

42. If one says of a Chirurgeon, He poisoned the Wound of *J. S.* for Gain, an Action will lie; for the Words scandalize him in his Profession. *Mich.* 33 and 34 *Eliz.* *anonymus*, 2 *And.* 268. adjudged, and the Court agreed it for a General Rule, (c) That where one gets his Living by any Art or Science, if Words affect him with any Falsity or wicked Dealing therein, they are actionable.

(c) 1 Rol. Abr. 71. Pl. 58.

43. If the Plaintiff declares that he is an utter Barrister and Practiser of the Law, and Steward of the Courts of *I. S.* and that the Defendant said of him to the said *I. S.* I Marvel you will have such a paultry Lawyer for your Steward, for (d) he hath as much Law as a Jackanapes, by reason of which Words he was displaced from his said Office; the Action does well lie, for he is slandered in his Profession, and thereby lost his Stewardship. *Mich.* 36 and 37 *Eliz.* (e) *Palmer*'s Case. *Owen* 17. adjudged, and the rather because a Jackanapes is an unreasonable Creature, for 'tis there said, if the Words had been that he had no more Law than *I. N.* tho' *I. N.* was no Lawyer; yet no Action would have lain.

(d) He hath no more Law than Bp. C's Bull; actionable. 1 Sid. 327. adjudged.—He hath no more Law than Notice taken Cro. Eliz. 342.

the Man in the Moon. 1 Sid. 327. Query. (e) Goulf. 126. S. C. adjudged without any of the Special Damage, for this is tantamount as if said, He has no more Law. S. C. adjudged, tho' objected; 'tis not said, He has no more Law, &c. and no Notice there taken of the Special Damage. Moor 409. S. C. cited, Godb. 441. S. C. cited, the Words there being, Thou hast

no more Law, &c. and said it was otherways if it had been No more Wit, &c. Winch 40. S. C. cited March 60. S. C. cited Con. per Barkly, who said if the Words had been no more Law, &c. they had been actionable. Hetl. 172. S. C. cited.

44. If one says of *M.* being an Attorney, Is *M.* your Attorney, he is the foolishest and simplest Attorney towards the Law, and if he doth not overthrow your Cause I will give you my Ears, he is a Fool and an Ass; an Action will lie for the saying he will overthrow his Client's Cause, touches him in his Profession. *Mich.* 39 and 40 *Eliz.* between (f) *Martin* and *Burlins*, *Cro. Eliz.* 589. adjudged.

(f) Goulsb. 128. S. C. adjudged, per tot' Curiam.

45. If *A.* having a Discourse with *B.* concerning *D.* his Attorney, and of his Honesty in his Profession, and of a *Latitat* before that Time by *D.* for *B.* against *A.* taken out, by Vertue of which *A.* was arrested, and says to *B.* Go tell your Lawyer *D.* that I say he is a base Rascal, and I will make him (g) lose his Ears, and I will teach him or any Lawyer of them all to have a Writ served on me; *D.* may have an Action. *Trin.* 3 *Car.* between (h) *Roberts* and *Lord. Ley* 70. adjudged, and there said, that it was the Opinion of the Court, that the Defendant (i) ought to be bound to his good Behaviour, but upon the Importunity of his Counsel it was remitted.

(g) He deserves to have his Ears nail'd to the Pillory, being spoke of an Attorney, actionable. Moor 401. Pl. 529. adjudged. (h) Trowbridge and Hard. Latch. 220. S. C. adjudged, and there the Chief Justice said, if the Words had been that he would have his Ears, that might be intended to be by Violence: And note, 'tis there said the Defendant was bound to his good Behaviour. 1 Vent. 117. S. C. cited. (i) 1 Lev. 53. vide.

46. If one says of a (k) Midwife, many have perished for her want of Skill; an Action lies, because the Words scandalize her in her Function by which she hath Gain. *Pasch.* 7 *Car. Flower's* Case. *Cro. Car.* 211. adjudged.

(k) She is an ignorant Woman, and of small Practice, and very unfortunate in her Way, there are few that she goes to but lie desperately ill, and Die under her Hands, actionable, being spoke of a Midwife. 1 Vent. 21. adjudged.—She is a Whore, and J. S. keeps her as his Whore; not actionable, being spoke of a School-Mistress that Taught Children to write and read; for a Scandal in such a Profession is not actionable without Special Damage. 1 Vent. 21. cited per Twisden.

47. (l) If the Plaintiff declares that he was a Minister, and recommended to be Chaplain to the Duke of *Ormond*, and that the Defendant said of him, He hath a Bastard on the other side of the River, by reason of which Words (m) he lost his Livelyhood and Preferment; this Action does well lie in respect of the Special Damage. *Mich.* 20 *Car.* between (n) *Dunewick* and *Pain.* 1 *Sid.* 376. adjudged.

(l) 4 Co. 17 a. like Point, said. (m) 1 Rol. Abr. 58. Pl. 2. (n) 1 Lev. 248. S. C. adjudged; it being laid that he had agreed to retain him, &c.

48. So if a Butler of the *Temple*, by reason of such Words loses his Place; he may have an Action, (o) declaring specially, *&c.* 1 *Sid.* 376. *per Curiam.*

(o) The Words are, & nient iffint declare, &c. but I suppose it misprinted, and that the Word nient should be out. Vide.

49. If the Plaintiff declares that he is an Attorney, *de* C. *B.* and that upon a Discourse of the Plaintiff's Profession, the Defendant said to him, Thou canst not read a Declaration, by reason whereof he lost *A. B.* and *C.* his former Clients; this Action will lie. *Mich.* 22 *Car.* 2. between (p) *Jones* and *Powel. Raym.* 196. adjudged and affirmed upon a Writ of Error.

(p) 1 Mod. 272. S. C. adjudged, and said per Curiam, the Action would have lain, tho' there had been no Special Damage. 1 Vent. 98. S. C. and there said the Court inclined for the Defendant, and that the Allegation of Special Damage is immaterial, unless the Words import Slander, which these do not, (unless brought in upon a Discourse of his Knowledge in his Profession) for perhaps it was so ill writ it could not be read, but no Judgment appears there to have been given. Note, It does not appear by the Report in Vent. that there was any Discourse of his Profession. 1 Lev. 297. S. C. adjudged; a Colloquium being laid of the Plaintiff and his Profession.

50. If the Plaintiff declares that he was a Practiſer of the Law, and had ſeveral Perſons of Honour for his Clients, and in particular the Counteſs of, *&c.* and that the Defendant wrote a Letter to the ſaid Counteſs, wherein he ſaid of the Plaintiff, he would give vexatious and ill Counſel, and ſtir up a Suit, and that he would milk her Purſe, and fill his own large Pockets, *per quod* he loſt the ſaid Counteſs and other Clients, the Action lies; for theſe Words ſcandalize him in his Profeſſion, and here is ſpecial Damage alſo. *Mich.* 23 *Car.* 2. between *King* and Sir *Edward Lake*, adjudged *per Curiam præter Vaughan*, who argued ſtrongly *Contra*.

(T) For Words in Diſgrace of an Office.

1. (a) **If a Man ſays of a Church-warden, having a Diſcourſe of his Office, and the Plaintiff averring in his Declaration that he was Church-warden, and had received ſeveral Sums of Money to the Uſe of the Pariſh by Force of his ſaid Office,** Thou art a cheating Knave, and haſt cheated the Pariſh of 40 l. **an Action lies, for this is a great Slander of him;** (b) **this being an Office of Truſt, tho' he be not ſworn, yet is he a Temporal Officer as well as a Spiritual, for he is named in ſeveral Statutes, as in the Statute for the Poor.** Trin. 1652. **between** (c) Strode **and** Holmes **adjudged, this being moved in Arreſt of Judgment.** Intratur Hill. 1651. Rot. 999.

(a) Hetl. 36. like Point dubitatur. Cro. Jac. 619. like Point, adjudged Con. Cart. 1. like Point, adjudged. Stile 394. like Point adjudged.

(b) The Mayor of Tiverton has cozen'd the Town and County; not actionable. 1 Jon. 308. adjudged.—Thou haſt beguiled and deceived the Town upon thy Accounts, of 4 l. and it is no marvel thou groweſt Rich, when thou deceiveſt the Town; not actionable, tho' the Plaintiff ſhew'd himſelf to have been Conſtable and Churchwarden, for the Charge is too general. Hutten and Beech. Cro. Jac. 339. adjudged per tot' Curiam. So Hopton and Baker. 2 Bulſ. 228. which ſeems to be the S. C. as in Cro. (c) Stile 338. S. C. adjudged niſi.

2. **If a Man ſays of a Miniſter who is inſtituted and inducted into a Benefice,** (d) He preacheth Lies in the Pulpit; **an Action lies, for a Lie is a falſe Thing againſt his own Knowledge, and this is good Cauſe of Deprivation,** (e) **by which he may have a Temporal Loſs.** Hill. 1652. **between** (f) Drake **and** Drake, **Judgment upon a Demurrer upon the Declaration.**

(d) Thou haſt made a Seditious Sermon, and moved the People to Sedition this Day; actionable. 4 Co. 19. a. cited.—He is a Preacher of falſe Doctrine; not actionable. Stile 49. adjudged niſi. But note, It did not appear there that he had any Benefice. vide. (e) P. is an Adulterer, and hath had 2 Children by the Wife of J. S. and I will cauſe him to be deprived for it; not actionable, becauſe the Matter is examinable in the Spiritual Court only, per Carpenter and Parrat's Caſe. Cro. Eliz. 502. adjudged. Noy 64. adjudged. Cro. Eliz. 94. like Caſe adjudged. And no Special Damage was laid in either of the Caſes. (f) Stile 363. S. C. adjudged niſi.

3. If one ſays of a Judge of the Admiralty-Court, That a Sentence there given was (a) corruptly given; an Action lies, and the Corruption ſhall not be intended in the Witneſſes, but in the Judge that gave the Sentence. *Mich.* 35 and 36 *Eliz.* between (b) Dr. *Cæſar* and *Corſeny*. *Cro. Eliz.* 305. adjudged.

(a) He is a corrupt Judge, actionable. 4 Co. 16. a. cited. 1 Mod. 23. per Keeling. 2 Rol. Rep. 136. arguendo.—Thou dealeſt corruptly; actionable: ſo thou doſt not adminiſter true Juſtice, actionable, being ſpoke of a Juſtice of Peace. Cro. Eliz. 358. per Anderſon. (b) Poph. 35. S. C. and S. P. appears.

4. If one ſays of a Juſtice of Peace, He did ſeek my Life, and offered 10 *s.* to the Under-Sheriff to impanel a Special Jury that might find me Guilty of Felony, an Action will lie. *Hill.* 36 *Eliz.* between *Bleverhaſſet* and *Baſpoole*. *Cro. Eliz.* 313. adjudged.

5. (c) If

5. (c) If the Plaintiff declares, That whereas *Clarenceaux*, King at Arms, had a Patent of his Office, and therein Power by Commiſſion to appoint a Deputy to viſit in Things concerning his Office, and that the ſaid King at Arms by Commiſſion did appoint the Plaintiff to be his Deputy in the Counties of *D.* and *S.* and that by Vertue thereof he did ſit and inquire of Matters belonging to the ſaid Office; and that the Defendant *præmiſſorum non ignarus* ſaid of the Plaintiff, He came and ſate by Force of a forged Commiſſion, and he is a Scrivener and no Herald, This Action does lie, for theſe Words, *viz.* He is a Scrivener and no Herald, touch him in his Office and Profeſſion whereby he got his Living. *Trin.* 36 *Eliz.* between *Brook* and *Clarke*. *Cro. Eliz.* 328, 329. but *vide* the Caſe, and Q. whether what is ſaid *fol.* 329. in relation to the *Præmiſſor' non ignar'* is not miſ-reported.

(c) The Plaintiff declares that he was Maſter of the Mint, and that the Defendant ſaid of him, He hath not made the Money as fine and good as the Standard, by an Half-penny in the Ounce, and ſo he has ſaved 4000 l. 1 Leon. 88. vide.

6. If one ſays of the Clerk of the Company of Merchant-Taylors, before he came to the Service of the Merchant-Taylors he dwelt in *S.* and ſet the Town together by the Ears, and ſo long as he was there, they were never in quiet, but afterwards they lived quietly, and he being Clerk to the Merchant-Taylors, was of Conſent and Counſel with *W. G.* to deliver the Books of the Corporation, which he had in his Keeping, to the Intent that thereby ſome of the Lands of the Corporation might be found concealed; an Action will lie, for the Words touch him in his Office and Credit. *Mich.* 36 and 37 *Eliz.* between *Wright* and *Moorehouſe*. *Cro. Eliz.* 358. adjudged.

7. If one ſays of *J. S.* being a Juſtice of Peace, One *W.* being arreſted as Acceſſary to Felony for ſtealing his own Goods, *J. S.* knowing thereof, diſcharged the ſaid *W.* by an Agreement of 3 *l.* whereunto *J. S.* was privy, whereof 30 *s.* was to be paid to *J. S.* and was paid to his Man by his Appointment; an Action will lie, for a Man may be acceſſary to the Stealing of his own Goods, as where he procures another to ſteal them from his Baily, with a Deſign to charge him; but however, W. being arreſted for Felony, he ought not to have been diſcharged upon an Agreement for Money; ſo that this Scandal affects him in his Office. *Mich.* 38 and 39 *Eliz.* between (d) *Stafford* and *Pooler*. *Cro. Eliz.* 536. adjudged, and upon a Writ of Error in *Camera Scaccarii*, affirm'd by all the Judges and Barons, *præter Walmſly*.

(d) Moor 704. Pl. 981. S. C. adjudged and affirmed upon Error. 1 And. 47. S. C. adjudged and affirmed upon Error.

8. If one ſays of a Juſtice of Peace, He (a) hideth and covereth Felonies, and is not worthy to be a Juſtice of Peace, an Action will lie, becauſe if true, 'tis good Cauſe to put him out of Commiſſion. *Mich.* 44, 45 *Eliz.* between *Stucley* and *Bulhead*. 4 *Co.* 19. adjudged.

(a) He is a Smotherer and Maintainer of Felonies; actionable, tho' ſpoke of a private Perſon. Cro. Jac. 268. adjudged.

9. If one ſays of a Juſtice of Peace, He is a basket Juſtice, a (b) partial Juſtice, I will give him 5 l. every Year (c) for his Gifts for Juſtice Matters; an Action will lie, for theſe Words, partial Juſtice, touch him in his Office, and charge him with Corruption therein. *Mich.* 4 *Jac.* between (d) *Kemp* and *Houſegoe*. *Cro. Jac.* 90. *per Fenner* and *Williams cæteris abſentibus*, but they held that no Action lay for any of the Words except partial Juſtice.

(b) In a Matter wherein I was queſtioned at the Quarter-Seſſions he was Witneſs, Judge, and Party, and did there oppreſs me; being ſpoke of a Juſtice of Peace. Hetl. 169, 170, 172. a long Argument thereupon, but no Judgment. (c) He is a bribing Juſtice, and maintains his Men by Bribery. Hern's Pleader 114, 115. (d) Hetl. 173. S. C. cited, the Words being, He, &c. and I will give him 5 l. every Year for all Gifts that are brought him for Injuſtice done.

10. (e) If the Plaintiff declares, whereas he was Town-clerk to the Mayor, *&c.* of *D.* and Steward of their Courts, that the Defendant ſaid of him (f) he hath taken 40 *s.* for a Bribe; This Action lies, and it muſt neceſſarily be intended

(e) Pal. 53. like Point, per Dier.

(f) Thou art an Extortioner; Diverſity where ſpoken to an Officer of Record, and where to an Officer of a baſe Court. Dal. 45. Moor 182. Pl. 324. vide—Thou art a Cut-throat; actionable, being ſpoken of an Officer of the Court, who was then receiving his Fees. Moor 142. cited.

intended to be ſpoken of him in relation to his Office, in which Capacity he was capable of taking a Bribe. *Mich* 6 *Jac.* between (g) *Nile* and *Swanſon*. *Yelv.* 142. adjudged.

(g) Godb 157. S. C. adjudged.

11. If one ſays of a Juſtice of Peace, He is an (h) half-eared Juſtice, he will hear but one Side, an Action lies. *Trin.* 7 *Car.* between Sir *William Maſham* and *Bridges*. *Cro. Car.* 223. adjudged.

(h) By Lord Chief Baron cannot hear of one Ear; actionable, if ſpoke upon a Colloquium of his Adminiſtration of Juſtice, elſe not. Hetl. 197. cited.

12. If *A.* ſays to *B.* you would be a Juſtice of Peace, like Major *C.* a Fool, an Aſs, a Coxcomb, a Buſle-headed Juſtice; *C.* ſhall have no Action. *Mich.* 13 *Car.* 2. between (i) *Bill* and *Field*. 1 *Sid.* 67. adjudged, tho' upon the firſt Motion the Court inclined for the Plaintiff, becauſe the Words undervalued his Judgment, and ſuch a Liberty in ſlandering Magiſtrates, ought to be reſtrained, yet after it was adjudged for the Defendant.

(i) 1 Lev. 52. S. C. adjudged by three Judges againſt 1. the Words being, He is a Fool, Aſs, and Beetle-headed Juſtice; and Twiſden ſaid, that Words which ſound in Diſability only, are not actionable, if not ſpoke of one that gets his Living by that in which the Words diſable him.

13. If one ſays of a Juſtice of Peace, he is a forſworn Juſtice, and not fit to be a Juſtice of Peace to ſit upon the Bench, and ſo I will tell him to his Face, an Action lies, for the Words plainly affect him in the Execution of his Office, and are therefore actionable. *Mich.* 21 *Car.* 2. between Sir (k) *John Kirle* and *Oſgood*. 1 *Mod.* 22. adjudged.

(k) 1 Sid. 432. S. C. adjudged. 1 Vent. 50. S. C. adjudged, there being ſome ſmall immaterial Variance in the Words in both Books. 1 Lev. 280. S. C. adjudged. tho' there was no Colloquium laid of his Office; for by the Words of themſelves, it appears they were ſpoke in reſpect thereof.

14. If one ſays of a Juſtice of Peace, He is not worth a Groat, and he is gone to the Dogs; no Action lies, notwithſtanding the Statute of *H.* 6. requires that a Juſtice of Peace ſhould have 40 l. *per Ann. Paſch.* 26 *Car.* 2. *Anonymus*. 1 *Vent.* 258. adjudged.

15. If the Plaintiff declares, that he was retained by the Under Poſt-Maſter to carry about Poſt-Letters, and that the Defendant ſaid of him, He hath broken open Letters, and taken out Bills of Exchange, *per quod*, he loſt his ſaid Imployment; no Action will lie for theſe Words, for it does not appear what Letters he had broken open, nor for what Time he was retained, and he is little more than a common Porter, and *Hale* ſaid, That if this Action ſhould lie, one (l) ſhould not ſpeak diſparagingly of a Man's Cook or Groom, but preſently an Action would be brought. *Mich.* 27 *Car.* 2. between *Bell* and *Thatcher*. 1 *Vent.* 275. adjudged; and the Judgment given in the Common Pleas for the Plaintiff there reverſed accordingly.

(l) In Action lies for ſcandalous Words, ſpoke of any Man of any Trade or Profeſſion, be it never ſo mean, if they are ſpoke with Reference to his Profeſſion. 1 Lev. 115. by 3. Judges.

(U) For what Words in Diſgrace of a Trade.

1. IN an Action upon the Caſe, If the Plaintiff declares, that he was for ſeveral Years paſt a Brewer, and got his Living by brewing and ſelling of Beer to his Cuſtomers, and that he brewed wholſome Beer, and that the Defendant having a Diſcourſe with his Cuſtomers about his Trade, and of his Beer brewed by him, to the Intent to diſcredit him and his Beer, as well to his Cuſtomers as Neighbours; with whom he had before traded, ſaid theſe Words of the Plaintiff and of his Beer, I will give my Mare a peck of Malt, and lead her to the Water and let her drink, and ſhe will piſs as good Beer as any Tom Fenn (who was the Plaintiff) Brews: By the ſpeaking of which

Words he was esteemed among his Customers and Neighbours, to brew and sell unwholsome Beer, and they after refused to buy Beer of him, and to have any Dealing with him in his said Trade; No Action lies for these Words, without shewing some particular Damage thereby, as that some particular Persons abstained from buying of Beer of him, or such like particular Loss, for these Words shall be taken to have been spoken in Merriment and Jest, for it is impossible to be true in the Understanding of any Man, and it may be intended that he brewed small Beer, and not unwholsome Beer. Mich. 15 Car. B. R. between (a) Fenn and Dixe adjudged, (*) per totam Curiam, in Arrest of Judgment after a Verdict for the Plaintiff. Intratur Trin. 15 Car. Rot. 838.

* Fol. 59.

(a) 1 Jon. 444. S. C. adjudged March. 59. S. C. adjornatur.

2. If A. brings an Action against B. and declares, that he was a Merchant, &c. and the Defendant to disgrace him in his Trade, said these Words of the Plaintiff, Thou art a deaf Dog, a dumb Dog, a beggarly Rascal, and thou art a cheating Merchant; tho' the last Words only Scilicet, thou art a cheating Merchant, are Actionable if any are, and these found but as familiar Words of Heat, (b) yet if the Defendant justifies, that whereas he had bought a Pipe of Canary Wine of the Plaintiff, and left it in the Possession of the Plaintiff, the Plaintiff secretly took out a certain Quantity thereof, and put in a like Quantity which was not so good, and therefore he spoke the Words, and this is found against him, this shews that he really intended a Cheat in his Trade, and therefore the Action lies, for it appears by all the Words themselves, that he spoke them in Anger, and to scandalize him. Trin. 17 Car. B. R. between Lambell and Hancock adjudged, this being moved in Arrest of Judgment.

(b) Drake and Corderoy, like Point. Cro. Car. 288. adjudged. 1 Jon. 307. adjudged. All. 7. cited and agreed per Curiam, and said to be affirm'd upon Error, but All. 7. like Point adjudged Con. and like Point cited Con. and a Diversity taken where the Declaration is defective in Substance, and where not.

3. (c) If a Man says of a Common Carrier, (who has a good reputation) that he is a (d) common Barretor; no Action lies, for this Scandal does not any way touch him in his Trade. Hob. Rep. 189. between (e) Thornton and Jobson. But if a Man says of a Justice of Peace, or publick Officer, or of an (f) Attorney, that he is a common Barretor; an Action lies, (g) Hob. Rep. 189.

(c) 1 Rol. Abr. 44. Pl. 7. S. P.

(d) Thou maintainest such a Suit; actionable. Cro. Eliz. 297. cited.—He is convicted of Barretry. Vide. Hetl. 141. Hut. 104.

(e) Hob. 140. S. C. adjudged. 1 Brownl. 11. S. C. adjudged.

(f) 1 Rol. Abr 54. Pl. 15. S. P.

(g) Hob. fol. 140. S. C. and S. P. agreed per Curiam. 1 Brownl. 11. and S. P. said.

4. If a Man says of a Weaver that used to Weave for divers Customers, He is a Rogue and a Villain, and he taketh the Goods of his Customers and Pawneth them, and he is not a Man to be trusted, an Action lies, for this Scandalizes him in his Trade. Hill. 1650. between De Laporte and Cooke adjudged, this being moved in Arrest of Judgment, where the Words were spoken in French, but this was the Interpretation in English. Intratur Hill. 1649. Rot. 1459.

(h) Hob. 76. S. P. per Hobart

(i) He is a base cozening Knave, he is a Cheater, and hath cozen'd his Master, (being spoke of a Deputy-Clerk to a Register that received his Master's Money, and was to render an Account) actionable. Cro. Car. 563. adjudged.

5. (h) In an Action upon the Case, If the Plaintiff declares that he was retained as the (i) Servant and Bayly to I. S. and lived in the House with him, and that the Defendant spoke these Words of him, You are a cozening Knave, and you did cozen your Master of a Bushel of Barly (innuendo, the Barly of I. S. to the Charge and Trust of the Plaintiff before given and committed) an Action lies for these Words. Mich. 13 Car. B. R. between (k) Sam and Bigg adjudged, this being moved in Arrest of Judgment.

(k) Cro. Car. 480. S. C. adjudged. 1 Jon. 395. S. C. adjudged.

6. In an Action upon the Case, If the Plaintiff declares that he used the Art of a Scrivener for 8 Years before, and received the Money of the King's Subjects, and that the Defendant spoke these Words of him, (l)

(l) He is gone and doth hide himself for Debt, and for ought I know is a Bankrupt; actionable, being spoke of a Pewterer. Stile 142. adjudged.—He is a Run-away and a base cheating Rogue, and he shall never think to bring J. S. where he is himself, and rather than so, I will spend 20 l. being spoke of a Lime-burner the Court was divided. Terry and Hooper. Raym. 86, 87. 1 Lev. 115.

He

He is a broken Run-away, and dares not ſhew his Face, an Action lies for theſe Words; for tho' it was objected, that before 21 Jac. of Bankrupts, a Scrivener was not within the Statute of Bankrupts, and here it does not appear by his Declaration, that he ſo received Money as to make him a Bankrupt within the Statute. But per Curiam adjudged that the Action lies, for tho' it is not within the Statute, (m) yet the Action lies at the Common Law, becauſe theſe Words diſgrace him in the Trade of a Scrivener. Mich. 13 Car. B. R. between Beſt and Loit, per Curiam. Intratur Trin. 13 Car. Rot. 690.

(m) Hut. 125. like Point, arguend'.

7. If A. keeps a Stable in London, and uſes to receive Horſes at Livery, and I. S. ſays to him, Thou buyeſt nothing but ſtinking rotten Hay to poiſon Mens Horſes, no Action lies by A. for theſe Words, becauſe he is no Inn-keeper, and ſo it is not any Trade allowed in Law (*) Paſch. 14 Car. B. R. between Jones and Joice, per Curiam, in Arreſt of Judgment ſtaid.

* Fol. 60.

8. If a Man ſays of A. to his Maſter, who is a Shoe-maker (A. being his Journyman and the Foreman of his Shop, and uſed to cut Leather to make Shoes, and to ſell Goods for his Maſter) It is no Matter who hath him, for I warrant whoſoever hath him he will cut him out of Doors; with an Averment, that in London, (where the Words were ſpoken) theſe Words tantamount as if he had ſaid, That he would undo his Maſter; an Action lies, for it is a Scandal to him in his Trade. Paſch. 15 Car. B. R. between (n) Ellis and Hunt adjudged, per Curiam, it being moved in Arreſt, that the Action did not lie; and there were other Words to which the Court gave no Regard. Intratur Hill. 14 Car. Rot. 1218.

(n) March 1, 2. S. C. adjudged, but there particular Damages was ſhewn, as it was agreed per Curiam, it ought to be. Vide 1 Rol. Abr. 86. Pl. 4.

9. In an Action upon the Caſe, If the Plaintiff declares, that whereas he was a Servant to I. S. and as a Journyman to him, ſold ſeveral Goods for his Maſter truly, and that he got his Living by his ſaid Service; and that the Defendant having a Diſcourſe of his Selling, ſaid to the Plaintiff, Thou haſt cozened me of 5 l. in a Piece of Stuff, and haſt cozened me of 600 l. or 700 l. more; thou haſt maintained thy ſelf and others with my Money, and thou didſt take 4 l. or 5 l. out of the Box; an Action lies upon this Declaration, for theſe Words tend to Diſgrace him in his Profeſſion. Mich. 15 Car. B. R. between Phillips and Ellaker, per Curiam adjudged, after a Motion in Arreſt of Judgment. But Quære how this diſgraces him in his Trade in as much as this is no Prejudice to the Maſter, if his Servant cozens another of a Piece of Stuff, and it appears not what Box he intended.

10. In an Action upon the Caſe, If the Plaintiff declares that he was a Merchant, &c. and the Defendant, to the Intent to defame him in his Trade, having a Diſcourſe of his Trade and of a Partnerſhip between the Plaintiff and I. S. before that Time had in a certain Ship called B. ſpoke theſe ſcandalous Words of the Plaintiff, He is a baſe cheating Knave, and he hath cheated J. S. (the ſaid J. S. innuendo) and I will prove it; for he received of C. in Partnerſhip 20 l. and gave an Account unto J. S. predictum J. S. innuendo) but of 5 l. received of the ſaid C. ubi revera, he gave a true Account of all Things between the Plaintiff and the ſaid J. S. concerning the ſaid Partnerſhip; the Action well lies upon this Declaration, for this diſgraces him in his Trade, for it diſgraces him in his (o) Partnerſhip (p) which is one Part of his Trade as a Merchant. Trin. 15 Car. B. R. between (q) Arundel and Maſy adjudged, per Curiam, this Matter being moved in Arreſt of Judgment.

(o) Stile 388. S. P. adjudged niſi.
(p) Put not your Son to him, for he will Starve him to Death; actionable, being ſpoke of a Merchant, for that it comes within the Compaſs of the Diſgrace of his Trade. Hetl. 71. per Helberton. (q) Cro. Car. 552. S. C. but S. P. does not appear. If the Caſe be ſo fully reported as it ought.

11. (r) In an Action upon the Caſe for ſcandalous Words, If the Plaintiff declares, that whereas for divers Years paſt fuit verus & fidelis emptor & venditor Marchandizarum & Mercimoniorum & diverſa Mercimonia

(r) 2 Bulſt. 267. S. P. adjudged.

Merchandizas & res per viam barganizationis & venditionis emerit & vendiderit & hujuſmodi emptione & venditione per totum tempus prædictum uſus fuit, **and thereby had maintained himſelf and Family; the Defendant ſaid theſe Words of him,** He is a broken Bankrupt and a declined Man, and not able to pay his Debts, and therefore is run the Country; (s) **tho' he does not alledge that he uſed any certain Trade,** videlicet, **of a Merchant or other certain Trade, yet the Action lies, for ſuch a Man, that uſes to buy and ſell, and live thereby, is within the Statute of Bankrupts, tho' he is of no certain Trade.** Paſch. 16 Car. B R. between Boyer and Shale **adjudged,** per Curiam, **tho' I moved in Arreſt of Judgment.** Intratur Hill. 15 Car. Rot. 109.

(s) Kill's Caſe like Point. Lat. 114. Con. N. Dier 72. MargineCon. and vide Godb. 40. 3 Mod. 112.

12. **If a Man ſays of a Tradeſman,** Thou art a baſe beggarly Fellow, (*) and had it not been for my Help, he had not had a Bit of Bread to put in his Head, and I have exactly caſt up his Eſtate, he is not able to pay above 2 s. and 6 d. in the Pound to his Creditors of their Debts; **an Action lies, for this diſcredits him in his Trade, without averring any particular Damage.** Paſch. 1651. **adjudged, between** (t) Smith and Rookes, **this being moved in Arreſt of Judgment.** Intratur Paſch. 1651. Rot. 311.

* Fol. 61.

(t) Stile 273. S. C. adjudged; the Words there being, Thou art a poor Fellow, and art not able to pay 2 s. in the Pound, and art not able to pay thy Debts.

13. (u) **If a Man ſays of a Grocer or other Tradeſman,** You are a baſe beggarly Knave, and you are not able to pay your Debts, **and aver that according to the Phraſe, and underſtanding of the Place where the Words were ſpoken, by theſe Words it is underſtood that he was a Bankrupt, an Action lies for theſe Words, it being found for the Plaintiff, by which the Averment is found true.** Paſch. 11 Car. B. R. **between** (w) Jackſon and Lewes **adjudged, this being moved in Arreſt.**

(u) 1 Rol. Abr. 86. Pl. 2. like Point.

(w) Cro. Car. 472. S. C. adjudged. Stile 217. S. C. cited.

14. (x) **If a Man ſays to an** (y) **Alehouſe-keeper,** Thou art a Bawd and doſt keep a Bawdy-houſe; **an Action lies for theſe Words, for by this Report he may loſe his Cuſtom and forfeit his Recognizance.** Hill. 4 Jac. B. R. **between** (z) Turnam and Thorn **adjudged.**

(x) Cro. Eliz. 582. S. P. per Curiam. Goulſ. 172. S. P. per Curiam.

(y) Go not to his Inn, for he is ſo Poor that you can have no good Entertainment; actionable. Hut. 125. arguend'. (z) Noy 117. S. C. and S. P. per Curiam. 1 Rol. Abr. 44. Pl. 8. S. C.

15. (a) **If a Man ſays to an** (b) **Inn-keeper** (c) Thou art rotted with the Pox, **an Action upon the Caſe lies, for this cannot be intended of the Natural Pox, for no Rottenneſs comes of that.** Hill. 41 Eliz. B. R. **between** (d) Davis and Taylor.

(a) 1 Rol. Abr. 67. Pl. 19. like Caſe, vide.

(b) An Action lies for Preſenting the Wife of an Inn-keeper for a Scold, per quod ſuch and ſuch Gueſts in particular left the Houſe. 1 Vent. 348. cited; Not ſo of a Stage-Coachman, &c. 1 Vent. 34. adjudged. (c) J. S. had the French Pox, and hath ſet it in the Houſe of J. N. and his Wife have it and all you; actionable (J. N. being an Inn-keeper) tho' it was objected, that it was impoſſible that the Houſe could have the Pox. Stile 112. adjudged. (d) Cro. Eliz. 648. S. C. adjudged per Fenner. 1 Rol. Abr. 67. Pl. 22. S. C.

16. **If a Man has been a Merchant, and uſed the Trade of a Merchant for ſeveral Years paſt, tho' he does not uſe it now, and another calls him** Bankrupt; an Action upon the Caſe lies, **for tho' he does not uſe it at the Time of the Speaking of the Words, yet he continues a Merchant, and may uſe the Trade at his Pleaſure.** Trin. 39 Eliz. B. R. **between** Gardner **and** Hopwood **adjudged, upon ſuch a Declaration.**

17. (e) J. S. **being a Merchant, if** J. D. **demands of** D. **whether** J. S. **owes him any Thing, to which** D. **anſwers yes, upon which** J. D. **ſays,** You were beſt to call for it in, and to take Heed how you Truſt him; **no Action lies for** J. S. **for theſe Words, for he gives the other but good and ſound Counſel.** Trin. 39 Eliz B. R. **between** (g) Vanſpicke **and** Clayton **adjudged.**

(e) Stile 142. like Point. Con. the Action being brought for other Words alſo, that implied a Bankruptcy in the Plaintiff. (f) Cro. Eliz. 541. S. C. adjudged.

18. (h) **If a Man ſays of a (i) Merchant, That he is a Bankrupt, an Action lies.** Mich. 7 Jac. B. **between Long and Long adjudged.**

(h) 1 Leon. 336. S. P. per Wray. 1 Rol. Abr. 47. Pl. 2. vide. (i) Otherways if no Merchant. 1 Rol. Abr. 44.—Pl. 6. of a Grazier; actionable. 1 Bulſt. 40. adjudged—of a Farmer, not actionable. Stil. 420. adjudged. 3 Mod. 112. Otherways if Special Damage laid. Stil. 126.—Of a Butcher and Grazier, Hern's Pleader 109.

19. **If a Man was a Merchant, and after leaves off Merchandizing for 2 or 3 Years, and another calls him** Bankrupt, **an Action lies, for he may exerciſe his Trade again when he pleaſes.** Mich. 7 Jac. B. **between** Long **and** Long. Paſch. 44 Eliz. B. R. **between** Gray **and** Weſton. Trin. 39 Eliz. B. R. **between** Gardner **and** Hopwood **adjudged.**

20. **If a Man ſays to** J. S. **of a Merchant of the Staple, who uſed to buy and ſell Wool,** Buy no more Wool for him, for he will never pay for it, he is not worth a Penny; **an Action lies for theſe Words.** Paſch. 11 Car. **in** Camera Scaccarii, **in a Writ of Error upon a Judgment in** B. R. **adjudged, and the firſt Judgment affirmed.** Intratur Paſch. 12 Car. B. R. Rot. 424.

21. **If a Man ſays to a Mercer,** Thou art a Cuckold and a Cuckoldy Raſcal, thou doſt owe more than thou art worth, and thou art not able to pay all thy Debts; **an Action lies for theſe Words,** (l) **alledging that he uſed before to buy ſeveral Commodities upon Truſt without ready Money, but that after by reaſon of theſe Words he could not buy without ready Money.** Paſch. 1650. **between** (m) Vicary **and** Barons **adjudged, it being moved in Arreſt of Judgment.**

(l) Hern's Pleader, 108. ſuch an Allegation, the Words there being, He is Broke, and his Shop-windows are ſhut up. (m) Stile 213, 217. S. C. adjudged by 2 Judges againſt 1.

22. **If a Man ſays of a Mercer,** He hath deceived me in a Reckoning, and (n) his Debt-Book which he keepeth in his Shop is a falſe Debt-Book, (*) and I will make him aſhamed of his Calling, **no Action lies for theſe Words, for the Words ſhall be taken in** mitiori ſenſu, **and then the Debt-Book may be kept by the Servant (as for the moſt Part it is) and the Maſter perhaps does not know of the Falſity.** Mich. 11 Jac. B. **between** (p) Brooks **and** Clark **adjudged.**

* Fol. 62.

(n) He is a falſe Man, and I will prove it, and he keepeth a falſe Debt-Book, for he charged me with a Piece of three-piled Velvet, which I never had; not actionable. Brooke's Caſe, Moor 409. Pl. 553. adjudged. Hut. 14. adjudged. Cro. Eliz. 403. adjudged; but ner Poph. if he had ſaid Deal not with him, he keepeth, &c. an Action would have lay. Palm. 65. cited accordingly. (p) Godb. 241. S. C. adjudged, Warberton dubitatur. 1 Brownl. 4. S. C. 2 Judges againſt 1.

23. **If A is Bailiff to two Men, and for three Years before the Action brought had uſed to ſell their Barly; and another ſays to** A. Thou art a cozening Knave, for thou haſt cozened me in falſe Meaſure in my Barly (innuendo certain Barly, &c.) the Country is bound to curſe thee for ſelling falſe Meaſure in my Barly, **no Action lies for theſe Words, becauſe it does not appear that he lived by the ſelling of Barly, ſo that this ſhould impair his Livelyhood.** Mich. 13 Jac. B. **between** (q) Bray **and** Hayns, per Curiam **adjudged.**

(q) 1 Brownl. 4. S. C. adjudged Con. Hob. 76. S. C. adjudged, March 116. like Point adjudged by 2 Judges Con. Winch. 40. S. C. cited.

24. **If a Man ſays of a Smith,** Thou art a Rogue and a cozening Rogue, and in one Tire of Wheels ſent **George Bell,** thou didſt cozen him a Noble, and that I will prove; **no Action lies for theſe Words, becauſe it may be intended that he** (r) **cozened him in the Price, which is no Slander to his Trade, for he does not ſay he made falſe Ware,** &c. Paſch. 16 Jac. B. **between** (s) Digner **and** Snelling.

(r) 1 Vent. 263. like Point arguend'.

25. **If one Man ſays of another who is a Tradeſman,** Scilicet, **that uſes the Trade of buying and ſelling of Crewel in a Shop that he keeps,** Thou art a cheating cozening Knave, and thou haſt cozened my Husband of 500 l. there being (t) no Diſcourſe of his Trade before; **no Action lies; for**

(s) 1 Rol. Abr. 55. Pl. 24.

(t) No Action lies for ſuch a general Charge of Cozenage, unleſs it touches a Man in his Profeſſion or Trade. Moor 261. Pl. 410. Cro. Eliz. 95. Hut. 14 Cro. Eliz. 603. Cro. Jac. 339. 3 Leon. 171. Owen 47. Godb. 88. 284. Cro. Jac. 427,

427, 619. Goulſ. 125. 1 Bulſ. 172. Hetl. 167. Stile 436. vide 422. 1 Sid. 48. Raym. 62, 75, 169. 2 Sand. 307. 1 Lev. 112, 115, 250. 2 Lev. 62. but vide Moor 61. Pl. 171. Raſt. Ent. 12 b. Pl. 1.

for this of it ſelf is not actionable, without an Averment of a Diſcourſe of his Trade, to be referr'd thereto. Mich. 11 Car. B. R. between (u) Needler and Symnel, per Curiam adjudged, in Arreſt of Judgment after a Verdict for the Plaintiff.

(u) Cro. Car. 417. S. C. adjudged, per totam Curiam niſi. 1 Jon. S. C. 366. 1 Rol. Abr. 68. Pl. 32. S. C.

26. If a Man ſays of the Wife of a Butcher of London, that uſed to ſell in the Shop of her Husband, She is a cozening Woman, ſhe did cozen one of her Neighbours (innuendo quendam D. D.) of 40 l. no Action lies for theſe Words, becauſe this does not diſgrace her in her Trade, in as much as there was no precedent Diſcourſe of her Trade, ſo that it may be intended that he ſpoke thereof. Mich. 13 Jac. B. between (w) Sammon and Ball adjudged.

(w) Hut. 14. S. C. adjudged.

27. If a Man ſays to a (x) Goldſmith, Thou art a cozening Knave, and ſoldeſt me a Chain of Copper for Gold, an Action lies for theſe Words. Hill. 32 Eliz. B. R. (y) Peck's Caſe adjudged, cited Mich. 13 Jac. B.

(x) Not ſo if to one that is not a Goldſmith. Cro. Eliz. 171. per 2 Judges. (y) Cro. Eliz. 171. S. C. and S. P. per 2 Judges.

28. In an Action upon the Caſe for Words, If the Plaintiff declares, that he had uſed the Trade of a Brewer for ſeveral Years, and had brewed wholſome Beer and ſold to his Cuſtomers, by which he had got great Profit to himſelf, and that the Defendant to the Intent to diſcredit him with his Cuſtomers, ſuper Colloquium de & Concernent' the ſaid Occupation and Art of the Plaintiff, maliciouſly ſpoke theſe falſe Words of him: (z) Lee's Beer is unwholſome (innuendo the Beer of the Plaintiff made for his Cuſtomers in his ſaid Trade,) by which he is diſcredited, and has received Damage in the Sale of his Beer in his Trade, as he ought before any Action lies for theſe Words, and upon this Declaration, tho' he does not charge him with any Deceit, for Beer may be unwholſome for want of good Brewing, or for other Neglect of his Servants; and tho' it does not appear that the Defendant ſpoke theſe Words of Beer that he ſold to his Cuſtomers, yet upon this Declaration (tho' the innuendo will not help it) it ſhall be intended ſuch Beer as he ſold to his Cuſtomers, having a Diſcourſe of his Trade, and Brewers are punishable for ſelling of unwholſome Beer by the Statute, and it is alledged, that by the ſpeaking of theſe Words he had Damage, and therefore this Action lies. Mich. 9 Car. B. R. between Lee and Stradwich adjudged, it (*) being moved in Arreſt of Judgment by my ſelf. Intratur Trin. 9 Car. Rot. 1097.

(z) He Brews naughty Beer; actionable, being ſpoke of a Common Brewer. March 59. cited per Roll.

* Fol. 63.

29. (a) If A. had uſed to keep at Board ſeveral Children, by which Means he got his Living, and another ſays to him, You have ſtarved Hoſpital Children, and you kept a Kinſman of your Wife's, and ſtarved him to Death (innuendo A. B. that he kept at Board) you kept one of J. S. his Children, and ſtarved it to Death (innuendo W. S. that he kept at Board) by reaſon of which Words ſeveral forbore to put their Children to him to Board, ſo that he loſt his Livelyhood; an Action lies for theſe Words upon this Declaration, becauſe he diſgraces him in his Trade of Living. Trin. 13 Car. B. R. between Harriſon and Eldrington adjudged, per Curiam, it being moved in Arreſt of Judgment.

(a) Put not your Son to him, for he will come away as very a Dunce as ever he went; actionable, being ſpoke of a Schoolmaſter. Hetl. 71. per Yelverton.

30. In an Action upon the Caſe, If the Plaintiff declares, that whereas he was a Leather-ſeller, and uſed to ſell Shamoys-skins to J. S. his Cuſtomer, and avers that Shamoys-skins were of a greater Price than Lamb-skins, and that the Defendant diſcourſing of the Plaintiff, ſaid to I. S. of the Plaintiff, He hath cozened you, and hath ſold you Lamb-skins inſtead of Shamoys-skins, do not you go to him for he will cozen you, the Action lies upon this Declaration, becauſe he ſlanders him in his Trade, and to his Cuſtomer. Mich. 10 Car. B. R. between Fairebank and Malſon adjudged, per Curiam upon a Demurrer. Intratur Trin. 10 Car. Rot. 1339.

31. (b)

31. (b) In an Action upon the Case, If the Plaintiff declares, that whereas he at several Times for 25 Years last past, had sowed Woad-seed, and had used to Weed and after to Grind it, & per totum idem tempus, had used to sell the said Woad to his Customers, and the Customers had used to take a Say of the said Woad before they bought it, and farther shews, that if any Man puts black Mould among the Woad, this makes the Woad of less Value, and that the Defendant was in Time past his Servant for 8 Years, and that the Defendant, to the Intent to disgrace him in his Trade, said of the Plaintiff, He did use to make me, when I dwelt with him, to take black Mould out of Hillocks, and to mix it among the Woad, and after sold it for Woad: The Action well lies for these Words upon this Declaration, with an Averment that by reason thereof he lost his Customers, and great Advantage thereby, tho' he does not shew in his Declaration that he had any Customers in particular by Name, for this is not necessary in as much as they may be many, and it is not like an Action for Loss of Marriage, but like an Action brought by a Counsellor for Words, by which he lost his Clients in general. Old Entries. 22 Pasch. 11 Car. B. R. between Jesson and Hayes adjudged, it being moved in Arrest of Judgment. Intratur Hill. 10 Car.

(b) Thou openedst my Pack, and didst put in wet Wooll; actionable, being spoke to a Woolldresser. New Dyer 72. b. Margine. —He put Pin-dust in his Fat; actionable, being said of a Silk-dyer. New Dyer 7. b. Margine. —He stops Holes made in Fulling with Flocks; actionable, being said of a Fuller. New Dyer 72. b. Margine. —An Action lies for scandalous Words spoke of a Lime-burner, or any Man of any Trade or Profession, be it never so mean, if they are spoke with Reference to his Profession. 1 Lev. 115. by 3 Judges.

32. If one Man says of another, He did Treason in the Low-Countries, and did run away from his Captain, an Action upon the Case lies for the first Words, Scilicet, he did Treason in the Low Countries; because he is triable here by the Statute of 35 H. 8. for a Treason committed beyond Sea, and so his Life is drawn in question. (c) Pasch. 15 Jac. B. R. adjudged, this Matter being spoke to in Arrest of Judgment.

(c) Cro. Jac. 424. S. C. adjudged.

33. If one Man says to another, Thou hast deserved to be Hanged as well as any Man in Worcestershire; for when thou wast retained to serve thy Prince thou didst run away from thy Captain, no Action lies for these Words, because it does not appear that he had said that he was prest to serve, and had received prest Money; for otherways it is not Felony. Hill. 38 Eliz. B. R. adjudged.

34. If upon Discourse about measuring of Land, one says to a Surveyor or Measurer of Land, Thou art a cozening and a shifting Knave, and a cheating Knave, an Action lies; for these Words touch him in his Means of Living, and this is such an Art of which the Law takes Notice. *Mich.* 16 *Jac.* between (a) *Blunden* and *Eustace*. *Cro. Jac.* 504. adjudged.

(a) London and Eastgate.

2 Rol. Rep. 72. S. C. adjudged; the Plaintiff declaring, That he was educat' in studio artis Mathematicæ, & per magnum tempus, had been employed in the Measuring and Surveying of Land, and that upon a Colloquium de Professione, arte & facultate sua, the Defendant dixit, Thou art a Cozener and cheating Knave, and that I can prove. But there agreed by the Judges, that if these Words had been spoke of a Shoemaker, Baker, &c. the Goodness or Deceit of whose Ware may be discerned by the Eye, no Action would have lay. Godb. 278. S. C. but no Judgment.

35. (b) If one says to a Merchant, Thou art a Rogue and a beggarly Fellow, and I shall prove thee a Bankrupt before the next Term, and at another Day says of him to *J. S.* Trust him not, for he will be thy Undoing; an Action lies as well for the last, as for the first Words, for in as much as he had called him Bankrupt before, and after says to another, Trust him not, *&c.* this tends to the same Sense. *Mich.* 7 *Car.* between *Jaxon* and *Tanner*. *Cro. Car.* 236. adjudged.

(b) Stile 142. like Point adjudged.

36. If one says of a Millener, Thou art in a (c) breaking and decayed Condition, and I will prove it, and if you question me I will prove it to your Disgrace; an Action will lie. *Mich.* 1654. between *Walkenden* and *Haycock*. *Stile* 425. adjudged.

(c) Thou art a broken Fellow, and halt cheated me of 200 l.

actionable. Stile 429. but note, there was an Averment that the Words signified he was a Bankrupt. —A. is broke, and I warrant you dares not be at his Trial at Guildhall, A. being a Vintner, and the Words being spoke upon a Colloquium of a Trial to be there had between A. and B. Johnson and Leman.

Cro. Jac. 562. the Court inclined for the Plaintiff, but adjornatur, and after ended by Reference. 2 Rol. Rep. 114. 1 Judge against 1. Dod' absente, ended by Reference. Palm. 63. Houghton Con. Mountague, but Haughton said, an Averment that the Words signified he was a Bankrupt, would have help'd it; and the great Doubt in these Books was, Whether Broken should not be intended in his Health or Body, &c. —He is a base broken Rascal, and hath broken twice already, and I will make him break the third Time. Hill's Case. Latch. 114. dubitatur, but for a Fault in the Declaration adjudged for the Defendant nisi. New Dyer. Margine 72. b. S. C. and S. P. appears; but Judgment staid for a Fault in the Declaration. Marshal and Allen. Noy 77. vide. & Q. If it be not the S. C. 3 Mod. 155. cited.

37. If one says of a Watchmaker, He is a (d) Bungler, and knows not how to make a good Piece of Work, whether actionable *dubitatur*. *Mich.* 21 *Car.* 2. between *Redman* and *Pyne*, no *Colloquium* being laid of his Trade. 1 *Mod.* 19. *adjornatur*.

(d) He is a Cobler; actionable, being said of a Shoemaker. 1 Mod. 19. cited per Twisden.

38. If one says of a Merchant, He is a beggarly Fellow and (e) not worth a Groat, and not able to pay his Debts, and rides abroad with his Men double Armed for fear of Bailiffs; an Action lies. *Mich.* 21 *Car.* 2. between (f) *Drake* and *Hill*, upon a Motion in Arrest of Judgment. *Raym.* 184. adjudged.

(e) You are a Beggar, and a bankruptly Fellow, and if every one had his own you are not worth a Groat; actionable, being spoke of a Farmer, per quod his Landlord gave him Warning to leave his Farm. Stile 496. adjudged nisi. (f) 1 Sid. 424. S. C. and S. P. appears. 1 Lev. 276. S. C. adjudged.

39. But if one says of a Merchant (g) He is not worth a Groat, no Action lies; for he may be able to pay his Debts, tho' perhaps not worth a Groat after. *Raym.* 184. *per Keeling* Chief Justice, to which *Twisden* seemed to assent, and it was there said that the Case of *Moon* and *Axe*, which was contrary, was reversed in *Camera Scaccarii*, which Case *vide* 1 Rol. Abr. 86. Pl. 3.

(g) Trust him not, for he owes me 100 l. and is not worth a Groat, actionable, being spoke of a Fuller. Hut. 124. adjudged.—He is not worth a Groat, he is 100 l. worse than naught; actionable, being spoke of a Merchant. Cro. Car. 265. adjudged.—She is a broken beggarly Jade, and she is not worth a Groat, nor the Cloaths she wears on her Back, being laid to be spoke of a Widow Walker, per quod her Landlady demanded her Rent, and per quod she lost her Customers. Hansard's Ent. 11, 12.

40. If one says of a Merchant, I believe all is not well with him, there are many Merchants that have lately failed, and I expect no otherways of him; an Action lies. *Mich.* 22 *Car.* 2. between *Vivian* and *Willet*. *Raym.* 207. adjudged.

41. If one says to a Merchant, You are a cheating Fellow, and keep a (h) false Book, and I will prove it; no Action lies without an Averment, that at the Time of the Speaking thereof there was a *Colloquium* of the Trade of the Plaintiff, for the Words being so general, can't otherways be applied thereto. *Hill.* 22 & 23 *Car.* 2. between (i) *Todd* and *Hastings*. 2 *Sand.* 307. adjudged, upon a Motion in Arrest of Judgment.

(h) He is a cheating Knave and keeps a false Debt-book, with which he cheats the Country; actionable. 1 Vent. 263. adjudged; but note, there was a Colloquium of his Trade.—She keeps a false Shop-Book, and the Country do complain against her for taking her Debts two Times over. Spoke of a Woman that exercised the Trade of a Woollen-draper. Hern's Pleader 212. Rob. Ent. 46. (i) 1 Vent. 117. S. C. adjudged Con.

42. The Plaintiff declared that he was a Carpenter, and that he got great Sums of Money by buying Timber and Materials, and building Houses, and that the Defendant having Discourse of him and his Trade, said he is broken, and run away, and will never return again, and whether these Words were actionable, because a Carpenter builds upon the Credit of other Men, and they touch him not in the Skill and Knowledge of his Profession. *Hill.* 3 *Jac.* 2. between *Chapman* and *Lamphire*. 3 *Mod.* 155. *dubitatur* the Court being divided in Opinion, and the Chief Justice said the Credit which the Defendant hath in the World, may be a Means to support his Skill; for he may not have an Opportunity to shew his Workmanship without those Materials for which he is intrusted.

(X) For Words.

In what Caſes it lies.

Fol. 64.

1. If a Man ſays, That Pierce ſaid that Lewis did a certain ſcandalous Thing, &c. Lewis ſhall have an Action for this againſt him with an Averment, that Pierce never ſaid ſo, for then he himſelf is the Author of the falſe News, and ſhall be charged for it, for this is according to the Law of News. Hill. 44 Jac. My Rep. between (a) Lewis & Walter adjudged, between Dame (b) Morriſon & Cade. Paſch. 5 Jac. B. R. adjudged.

(a) Cro. Jac. 406,413. S.C. adjudged.

3 Bulſ. 225. S. C. adjudged. 1 Rol. Rep. 444. S. C. adjudged. (b) Cro. Jac. 162. S. C. and S. P. appears, affirmed upon Error, 407. S. C. cited. 1 Rol. Rep. 444. S. C. cited 3 Bulſ. 225. S. C. cited, and ſaid to be affirm'd upon Error.

2. If I ſay to J. N. that J. S. ſaid to me, That the ſaid J. N. did ſuch a ſcandalous Thing as Witchery. As the Caſe was, which Matter is ſufficient to maintain an Action, J. N. may have an Action againſt me for the Words aforeſaid, (c) with an Averment that he never ſpoke the Words, nor that J. S. ever ſpoke the Words of him, for this is agreeable with the Law for telling of falſe News. Paſch. 15 Jac. B. R. between Lock & Lock adjudged, per Admittance, but this Matter was not moved.

(c) But tho' the Words are laid to be ſpoke falſo & malitioſe, and ſo found by the Jury; yet if there is no ſuch Averment, the Action does not lie. 1 Lev. 82. by Foſter, Windham, and Mallet contra Twiſden, who held, that being laid falſo & malitioſe, and ſo found, it is a Proof he did not ſay ſo; and vide 1 Lev. 297.

3. But if a Man ſays, that J. S. ſaid, that J. D. ſaid a certain ſcandalous Thing that will bear an Action of it ſelf, tho' this be falſe (d) yet if J. S. ſaid that J. D. ſaid the Words, no Action lies againſt him, for he has named his Author, Scilicet J. S. and therefore he muſt bring his Action againſt J. S. if he will have any Remedy. Paſch. 15 Jac. B. R. in Dame Morriſon & Cade's Caſe, per Tanfield.

(d) And the Defendant may plead it, and put the Pl. to bring his Action againſt I. S. 1 Lev. 82.

4. (e) If a Man ſays, A Woman told me, that ſhe heard one ſay, that Meggs his Wife had poiſoned Griffin her firſt Husband in a Meſs of Milk, Meggs and his Wife may have an Action for this againſt him, for elſe a Man might raiſe a Scandal of his own Head without any Puniſhment. Mich. 37, 38 Eliz. B. R. between (f) Meggs & Griffin adjudged.

(e) Cro. Eliz. 644. like Point, Judgment for the Plaintiff entered by Conſent. 12 Co. 134. like Point agreed. (f) Moor 408. Pl. 552. S. C. adjudged Con. but a Query is there made by the Reporter. Cro. Eliz. 400. S. C. adjudged, there being an Averment, that none ſaid ſo, Goulſ. 139. S. C. adjudged; and vide Moor 187. 12 Co. 13. 1 Lev. 82.

5. (g) If one Man ſays of another, He was arraigned at Warwick Aſſizes for ſtealing a Dozen of Hogs, and had he not made good Friends it had gone hard with him, an Action lies for theſe Words, with an Averment, that he never ſtole any Hogs, nor was ever arraigned for the Stealing of any Hogs, for this is a great Slander, the Arraignment implies an Indictment, and the making of Friends implies, that he was greatly ſuſpected at leaſt. Mich. 8 Car. B. R. between (Hawly & Stanton adjudged, this Matter being moved in Arreſt of Judgment. But in this Caſe Juſtice Croke cited a Caſe to have been adjudged. Paſch 34 Eliz. between Bailie & Calenton, that no Action lies for theſe Words, Thou waſt arraigned for two Bullocks, but did not ſay, that he was arraigned (i) for the Stealing of them, and it was not averred, that he was not arraigned, or that he did not ſteal any Bullocks.

(g) 1 Rol. Abr. 49. Pl. 2. like Caſe, which vide with the Notes thereupon.

(h) Cro. Car. 208. S. C. adjudged. 1 Jon. 299. S. C. adjudged per tot' Curiam.

(i) 1 Rol. Abr. 49. Pl. 2. Margine.

6. If one Man ſays of another, He was taken for ſtealing of two Horſes, and I have ſuſpected him this four Years, no Action lies for theſe Words, tho' he ſays, that he never was ſuſpected of any Felony, for an honeſt

(k) 1 Rol. Abr. 49. Pl. 3. S. C. with Notes thereupon.

Man may be taken for the Stealing of Horſes. Paſch. 10 Car. B. R. between (k) Curſon & Wood adjudged, no Action lay after a Verdict for the Plaintiff. But Quere if he had averred that he was never taken for the Stealing of Horſes.

7. If one ſays of *A.* I have an honeſt Man in *L.* who will prove that *A.* ſaid he had killed a Man in *Ireland*, and buried him in the Sands, *A.* may have an Action, with an Averment, that he never ſaid ſo, without an Averment, that he did not kill a Man in *Ireland*, or that there is no Man in *L.* who will prove the Plaintiff ſaid ſo; for the Words are not ſpoke *ex Relatione alterius*, but here is an Undertaking of the Defendant himſelf, that he hath a Man in *L.* that will prove the Plaintiff ſaid ſo. *Trin.* 36 *Car.* 2. between *Williams* and *Lewis*, 3 *Lev.* 171. adjudged.

(Y) For what Words it lies in the Reſpect of Uncertainty.

Fol. 65.

(a) You have made a falſe Record, and that I will make you anſwer where you dare not ſhew your Head, and you have ſought my Death; actionable. Chriſtian and Adams. 1 And. 121. cited. but vide 4 Leon. 54 S. C. adjudged pro quer', but no Notice taken of the firſt Words.—Thou art a Knave upon Record, a forgering Knave, being ſpoke of an Attorney. Latch. 21. no Judgment, becauſe the Parties agreed; but vide 1 Rol. Abr. Pl. 29. Margine, like Caſe.—Thou art a forging Knave; not actionable. Goulſ. 125. adjudged.—if ſpoke of an Attorney, actionable. 1 Brownl. 16. adjudged.—He hath forged and counterfeited a Certificate to a Commiſſion out of the Exchequer, and hath forged and counterfeited Mr. B's Hand the Commiſſioner, and hath put his Hand to it, by Reaſon whereof he got a Verdict in the Exchequer, whereas otherways he muſt needs have had the Foil; actionable, tho' not ſhewn what Commiſſion it was, nor in what Suit. Cro. Eliz. 72. adjudged.—He hath forged the late Queen's Writ; actionable. Yelv. 146. affirm'd upon Error. (b) 1 Rol. Abr. 76. Pl. 3. S. C.

1. (a) If A. ſays of B. I have found out B. now, I have found Records which he hath forged, and he ſhall dearly pay for it, I have catched the Forgerer, an Action lies for theſe Words, tho' it does not appear whether he intends Records of a Copy-hold Manor, or what other Record, for it ſhall be intended to be a true Record of a Court of Record, and if it be a true Record, the Forgery of which is not within the Statute of 5 Eliz. or 1 Hen. 5. yet is it a great Slander. Mich. 13 Car. B. R. between (b) Garbut & Bell adjudged, per Curiam, this being moved in Arreſt of Judgment.

(e) Thou haſt uſed juggling with me, but thy Juggling ſhall not ſerve thy Turn, and haſt forged a Writ of quare Impedit. Cro. Eliz. 171. the firſt Words are not actionable, but the laſt are; therefore adjudged for the Plaintiff.

2. If a Man ſays, There can be no Writ againſt me; we have ſought for the Writ but can find none; but if there be any it is forged by the Under-Sheriff, Mr. Edward Hole, as he hath forged two Writs; (c) in this Caſe Edward Hole ſhall have an Action upon the Caſe for theſe Words, without an Averment that he was Under-Sheriff at the Time; becauſe he is charged with the Forgery of a Writ, for tho' the Forgery of a Writ be not within the 5 Eliz. nor 1 Hen. 5. yet is this a great Slander and Defamation. Paſch. 16 Jac. B. R. between Hole & ad. judged, this Matter being moved in Arreſt of Judgment.

(d) Thou haſt made a falſe Bond; not actionable. Cro. Eliz. 607. per Curiam. — Thou haſt made a forged Bond, and I will prove it; actionable. Cro. Eliz. 554. adjudged. (e) Cro. Eliz. 607. S. C. adjudged.

3. If one Man ſays to another, (d) Thou haſt forged an Obligation, and I will prove it, tho' he does not ſhew between what Perſons this was, nor that the Obligation was ſealed and delivered, yet an Action lies for theſe Words, for it cannot be intended but that it was ſealed and delivered, for otherways it could not be an Obligation, but a Writing only. Paſch. 40 Eliz. B. R. between (e) Wade & Buſſard adjudged.

4. (f) If one Man ſays to another, He hath forged the Queen's Evidence, and I would not be in his Coat for 1000 l. no Action lies for theſe Words, for the Generality of them. Mich. 40, 41 Eliz. B. R. between Wright and Gayner dubitatur.

(f) Cro. Eliz. 99. like Point adjudged.

5. If A. exhibits an Information in the Exchequer againſt 2 Men, for the cutting of Wood, and after one of the Barons gives to him Licenſe by Writing, to compound with them; upon which C. ſays of B. The Licenſes which I had in the Exchequer were counterfeited, and B. did forge them, an Action lies for B. for theſe Words upon ſuch a Declaration, tho' he ſpoke of the Licenſes indefinitely, and tho' no Licenſe can be given by the 18 Eliz. before the Anſwer of the Defendant, which is not alledged, for to ſay that he forged ſuch Licenſes before Anſwer, is a great Slander. Mich. 11 Jac. B. R. between (g) Gregory and Wilks adjudged.

(g) 2 Bulſt. 137. S. C. adjudged.

6. In a Suit between A. and B. in the Chancery, if A. ſhews a Deed indented, by which he claims certain Lands, and after B. ſays to A. That Deed is a forged Deed, and you made it under a Hedge; A. ſhall have an Action for theſe Words, for he might make the Indenture, and another write and ſeal it, and ſo forge it; for if he made the Deed that was forged, he forged it. Mich. 11 Jac. B. R. between (h) Sir George Reynel and Sackfield adjudged.

(h) 2 Bulſt. 132. S. C. adjudged.

7. If one Man ſays of another, Mr. Carr hath put a Preſentment in to the Jury's Verdict againſt me of 3 s. and 4 d. for ſuing Peter W. (i) out of the Court contrary to a Pain, without the Conſent of the Jury; no Action lies for theſe Words, the ſaid Carr being no Officer of the Court, tho' this is a Deceit in him ſo to do, for every Deceit will not (k) maintain an Action. Mich. 4 Jac. B. R. between (l) Carr and Read adjudged.

(i) This Word out is wanting in the Original.

(k) Fol. 66.

(l) 1 Rol. Abr. 56. Pl. 28. S. C.

8. (m) If one Man ſays of another, (n) Thou haſt made forged Writings, and thou ſhouldeſt have loſt thy Ears for it; no Action lies for theſe Words (o) becauſe it is altogether uncertain what Writings he intends by the firſt Words, for perhaps he may intend ſome Writings, the Forgery of which will not deſerve the Loſs of his Ears, and then the laſt Words do not explain his Intention, in as much as it may be that this was but a bad Concluſion upon the Premiſſes. Mich. 14 Jac. B. R. between (p) Aier and Froſt.

(m) Winch. 90. like Point adjudged.

(n) Thou haſt made falſe Writings; not actionable, tho' ſpoke of an Attorney, for 'tis not his Buſineſs to make Writings. Winch 39. cited Con. but ſeems miſprinted, for Winch 40. Hob. ſaid, he agreed to that Caſe, becauſe no Scandal to him in his Profeſſion, vide.—Thou haſt forged Writings; not actionable. 3 Leon. 231. per 2 Judges. 1 Leon. 101. arguend'.—Thou haſt made falſe Writings thereby to get my Land from me; not actionable, tho' objected the laſt Words import they were Sealed. Cro. Eliz. 853. 2 Judges againſt 1. adjornatur.—Thou art a Forger; not actionable. 3 Leon. 231. adjudged; but Cro. Eliz. 296. per Curiam Con. and that it muſt be intended of ſuch Thing of which Forgery may be done. (o) Thou art a Forger, and art Sued in the Star-Chamber, for Forging by one S. actionable, and the laſt Words enforce the firſt. Cro. Eliz. 296. adjudged. (p) 3 Bulſt. 265. S. C. 3 Judges againſt 2; but it was ſaid there was no Judgment given, but that it was ended by Compoſition. 1 Rol. Rep. 431. S. C. 2 Judges againſt 2. adjornatur.

9. (q) If a Man ſays to J. S. Thou didſt forge an Acquittance, and I will prove it; an Action lies for theſe Words, for it is not material for what the Acquittance was made, for ſuch Forgery is within the Statute. Mich. 13 Car. B. R. between Onge and Spark, per Curiam adjudged in a Writ of Error, and the firſt Judgment affirmed accordingly. Intratur Trin. 13 Car. Rot. 722.

(q) 1 Sid. 451. S. P. per Twiſden, but denied by the reſt of the Judges, unleſs ſaid an Acquittance of ſome Perſon in certain.—Thou haſt forged a Deed to Cheat J. S. of his Land; actionable. 1 Sid. 16. adjudged.—Thou haſt forged falſe Letters, and haſt given me a falſe and forged Acquittance; not Actionable. 1 Sid. 155. adjudged.—You have falſly forged your Father's Hand, and thereby falſly have procured your Father's Tenants to pay their Rent to you, due to your Siſter; not actionable, becauſe not ſhewn what he forged, and perhaps he only counterfeited his Father s Hand to a Letter. Menard and Wootton. Cro. Eliz. 166. adjudged. Yelv. 146. cited. 3 Bulſt. 265. S. C. cited.

10. If a Man ſays to J. S. Thou haſt cauſed a Deed to be forged, and a dead Man's Hand to be put to it, and cheated and cozened my Husband of his Land; an Action lies for theſe Words, (r) tho' they expreſs not what manner

(r) Ow. 47. S. P. adjudged.

manner of Deed it was, Scilicet, whether it was such a Deed the Forgery of which is within the Statute of Forgery, for Forgery is an Offence at the Common Law, tho' not within the Statute, for which the Party may be indicted. Mich. 15 Car. B. R. between Pudsy and Pudsy and his Wife adjudged, this being moved in Arrest of Judgment. Intratur Hill. 14 Car. Rot. 902.

(s) A. being arrested by Virtue of a Warrant upon a Latitat, said this is a

11. (s) If A. says this is B. his Writing, and he hath forged this Warrant innuendo, &c. B. shall have no Action for these Words, because the Word Warrant is of an uncertain Sense, and the innuendo shall not Aid it. Hob. 3. between (t) Thomas and Axworth.

Counterfeit Warrant made by Mr. S. (who was an Attorney) actionable. Stone and Smalcomb. Cro. Jac. 648. adjudged. 2 Rol. Rep. 266. adjudged. (t) Hob. fol. 3. S. C. per Hob. and said to be cited as adjudged accordingly. 1 Brownl. 4. S. C. no Judgment. 1 Sid. 16. S. C. cited.

(u) So vice versa, as where the Words are, I will indict J. S. at the next Sessions, and he shall lose his Estate, and it shall go hard with him for his Life, but his Estate he shall certainly lose for Marking my Sheep; no Action will lie, for the last Words mitigate all. Raym. 12. per Windham, and Judgment staid nisi. (w) 1 Rol. Abr. 40. Pl. 8. 11. 41. Pl. 20, 39. Pl. 5. Margine. (x) Thou hast forged a Writing in such an one's Suit; actionable. 1 Sid. 16. cited per Twisden.

12. (u) Where (w) (x) Circumstances shew an apparent Intention of doubtful Words in themselves, that they are slanderous, the Action lies for them. My Reports, 14 Jac. Roote against Molyn.

(y) 1 Rol. Rep. 420. S. C. adjudged, Special Damage being alledged.

13. As if a Man says of a Woman, That she did lie with a Weaver of Colchester in a Ditch, and the Weaver's Breeches were down, and they were at it, an Action lies; for tho' she might lie with him in a Ditch without any Harm, yet the last Words shew, that he intended that he had carnal Knowledge of her. My Reports, 14 Jac. (y) Roote and Molyn adjudged.

(z) Thou art burnt, and hast the Pox; actionable. Cro. Eliz. 2. adjudged.—Thou art a burnt Whore. 2 Sid. 5. Q. per Glyn, Chief Justice. —Thou art a Whore, and a base burnt-arsed Whore; actionable. 2 Sid. 5. affirm'd upon Error. (a) 1 Rol. Rep. 420. S. P. per Dodr' accordingly.

14. If a Man says of a Woman, (z) That she is a lewd or common Woman of her Body, and has the Pox, an Action lies, for the last Words shew that he intends the French-Pox. (a) My Reports, 14 Jac. per Croke.

(b) Thou art a Pocky Knave, get thee home to thy Pocky Wife, her Nose is eaten with the Pox; actionable. Brook and Wise. Cro. Eliz. 878. adjudged. 2 Brownl. 276. cited.

15. So if he says, That such a one is (b) eaten —— out with the Pox, an Action lies. My Reports, 14 Jac. B. per Dod'.

(c) Palmer and Reeves, like Case. Godb. 340. cited. 2 Rol. Rep. 145. cited. 342. cited. Palm. 65. cited.

16. (c) So if one says of another, Mistress Milner is a Whore, and hath the Pox, and had Holes in her Face, that she might turn her Finger in them; J. King (who was a common Surgeon) gave her a Diet-drink: I wish you to take heed how you drink in a Cup with her, an Action lies, for all the Words being joined together, it plainly appears that he intends the Great-Pox, inasmuch as he says that she is a Whore, which is the Cause thereof, and says, that she had taken a Diet-drink of a Surgeon, which is the Remedy, and that she had holes in her Face, and advised others not to drink with her, which is the Effect thereof. Trin. 15 Jac B. R. between (d) Milner and his Wife, against Reeve adjudged.

(d) Cro. Jac. 430. S. C. adjudged, per totam Curiam. 1 Rol. Abr. 43. Pl. 3. S. C.

* Fol. 67.

17. If one Man says to another, Thou art a Rogue and a Pocky Rogue, and the Pox haunts thee twice a Year, an Action lies, for hereby it is apparent (*) that he intends the Great-Pox, because they use to trouble those that have them, bis per annum Scilicet in Spring and Autumn. Pasch. 8 Jac. B. Prekington's Case adjudged.

18. (e) So

18. (e) So if one Man ſays to another, Thou waſt laid of the Pox, an Action upon the Caſe lies, for this is a (f) proper Phraſe for the Cure of the Great Pox. Paſch. 8 Jac. B. Prekington's Caſe agreed, per Curiam, and there it was ſaid it had been ſo adjudged. Paſch. 40 Eliz. B. R. between (g) Dawes and Taylor adjudged in Point. 43 Eliz. B. R. (h) Backſter's Caſe adjudged in Point. Hill. 41 Eliz. B. R. agreed in Davie's Caſe.

(e) Cro. Jac. 144. S. P. per Curiam arguend'. Cro. Eliz. 214. S.P. ſaid by Fenner to have been adjudged. Cro. Eliz. 289. S. P. ſaid arguend'. 2 Brownl. 276. S. P. per Dod'. (f) Thou wert laid of the French Pox; actionable. Cro. Eliz. 215. adjudged. (g) Cro. Jac. 430. S. C. cited. (h) Cro. Jac. 430. S. C. cited.

19. (i) If one Man ſays of another, Thou art infected of the Pox, and thy Wife was laid of them, an Action upon the Caſe lies, for it appears that he intends the Great Pox; this was cited by G. Crooke. Paſch. 15 Jac. to have been one (k) Lever's Caſe adjudged.

(i) 1 Rol. Abr. 61. Pl. 15. like Caſe. (k) Cro. Eliz. 289. S. C. adjudged, the Plaintiff being an Inn-keeper; ſo that it was ſaid, Whether it ſhould be intended the Great or Small-Pox, the Action lies.

20. (l) If a Man ſays to a Woman, Thou art a pockey Whore, and the Pox have eaten out the Bottom of thy Belly, that thy Guts are ready to fall out, an Action lies, for the following Words ſhew that he intended the Great Pox. Mich. 7 Jac. B. between Miles and Bland adjudged, per Curiam.

(l) 2 Brownl. 276. S. P. per Dod'.

21. But if one Man ſays of another, Hang him, hang him, he is full of the Pox; I marvel you will Eat or Drink with him, no Action lies, becauſe it is uncertain what Pox he intends. Co. 4. 17. (m) James and Rutlech. Trin. 41 Eliz. B. R. Bonner's Caſe adjudged.

(m) Moor 572. Pl. 786. S. C. adjudged.

22. If one Man ſays of another, He is rotted with the Pox, an Action upon the Caſe lies, for this muſt be intended the Great Pox, becauſe Rottenneſs comes of them only. Hill. 41 Eliz. B. R. between (n) Davies and Taylor.

(n) 1 Rol. Abr. 61. Pl. 15. S. C. Cro. Eliz. 648. S. C. adjudged per Fenner.

23. (o) If one Man ſays to another, (p) Thou art a pocky Whore, go to John Hawkins the Leach for the Pox; no Action lies for theſe Words. Mich. 17 Jac. B. R. between and Farin, per Curiam, in Arreſt of Judgment the poſtea ſtaid.

(o) Away you Pick-pocket, thou art a Scurvy Pocky Whore; not actionable per Cro. Jac. 499. adjudged.—She is a Whore, and a Pocky-arſed Whore, actionable; for when the Words Whore and Pox are joined, the French Pox is plainly intended. 1 Sid. 50. adjudged, and affirm'd upon Error.—Thou art a Whore and a Pocky Whore; actionable. Car. 55. cited. (p) Thou art D's Hackney, thou art a Thieving Whore, a Pocky Whore, and I will prove thee a Pocky Whore; not actionable per Cullifoꝛd and his Wife againſt Knight. Cro. Jac. 514. adjudged. Godb. 278. adjudged per tot' Cur'.

24. (q) If one ſays to another, Thou art a baſe Fellow and hadſt the French Pox, no Action lies, for perhaps he had the Pox but is now cured thereof, and no Body will now avoid his Company for that. Paſch. 6 Jac. B. between (r) Allen and Smith adjudged.

(q) All. 31. S. P. per 2 Judges. Noy 151. S. P. adjudged. (r) 1 Rol. Abr. 48. Pl. 2. S. C. which vide with the Notes thereupon.

25. If one ſays to another, Thou art a Baſtard getting Rogue, and haſt a Baſtard at Oxford, and a pocky Rogue; and for ought I do know, thou haſt filled my Bed full of the French Pox, and no ſuch pockey Rogue ſhall lie in my Bed, an Action lies; for all being laid together, it appears that he intended the French Pox. Trin. 1650. between (s) Blage and Elliot adjudged, this being moved in Arreſt of Judgment. Intratur Hill. 1650. Rot. 613.

(s) Stile 283. S. C. adjudged niſi.

26. If a Man ſays, M. hath ſtolen Sheep, and Reynold Nichols by Compact and Agreement, hath taken a Meadow to help him to cloak and

escape from the Felony, R. Nichols **ſhall have an Action for theſe Words,** (t) **tho' he does not ſay that he had Notice of the Felony,** for the taking the Meadow to cloak the Felony, **implies as much.** Hill. 38 Eliz. B. R. **between** (u) Nichols **and** Badger **adjudged.**

(t) My Brother hath ſtolen a black Mare, and you were privy to it, and ſent her away to the Fenns to my Brother's Houſe; actionable; for tho' the Privity only will not make him Acceſſary, yet here (he being a Juſtice of Peace) is charged with Smothering of Felony, ergo, &c. Laſſels and Laſſels. Moor 401. Pl. 528. adjudged. Goulſ. 132. adjudged by two Judges againſt one. (u) Moor 428. Pl. 596. S. C. adjudged.

27. **If a Man ſays** J. S. was rob'd by Perſons unknown, and he hath received again 3 Pieces of his Cloath of the Thief, and beareth with the Thief, and if I receive any Hurt I will charge him with it; **no Action lies for** J. S. **for theſe Words, for a Man may receive his Goods taken from him by a Thief, without any Danger; as if a Man makes freſh Purſuit after a Thief; and for ſaying that a Man bears** (*) **with a Thief no Action lies.** Mich. 38, 39 Eliz. **between** (x) Haw **and** Hemneſly. Trin. 39 Eliz B. R. **adjudged.**

* Fol. 68.

(x) Cro. Eliz. 486. S. C. adjudged. Noy 57. S. C. adjudged. Goulſ. 119. S. C. adjudged.

28. (y) **If one Man ſays to another,** J. S. did rob me of a Cloak and a Groat, and J. D. was there preſent, and did carry home my Cloak and did compound the Robbery; **no Action lies for** J. D. **for theſe Words, for the Uncertainty.** Mich. 41, 42 Eliz. B. R. **between** Marſh **and** Dikes, dubitatur.

(y) There was never a Purſe cut within 20 Miles of W. but thou hadſt a Part in it; actionable. Ball and Roan. Cro. Eliz. 342. adjudged. 1 Bulſt. 147. cited.—Mrs. Maſter was rob'd of 40 l. and 100 Marks worth of Plate, and J. S. and J. N. had it, and for that they will be hanged; actionable; Long and King. Cro. Jac. 302. adjudged; but after revers'd in Cam' Scac'. 1 Bulſt. 747. adjudged by 4 Judges againſt 1. qui dubitavit. Palm. 65. S. C. cited Con.—Mr. R. was one of thoſe that were at B's Robbery, and 4 of them went to his Houſe the next Morning; not actionable, for perhaps he intended that R. was one of the Parties rob'd. Cro. Eliz. 644. Judgment enter'd by Conſent.—He was one of them that broke Mr. P's Houſe, and did take and carry away Part of the Money that was ſtolen; not actionable, for perhaps he might break the Houſe and bring the Money to another Place for ſome juſt Cauſe. Cro. Eliz. 672. adjudged.—I was rob'd and you were privy thereto, and had Part of my Money; actionable. Goulſ. 137. adjudged **per tot' Curiam.** 3 Bulſt. 249. vide.

29. (z) **If one Man ſays to another,** Thou art a Knave, thou haſt received ſtolen Goods, and thou didſt know them to be ſtolen; **no Action lies for theſe Words, for he is not Acceſſary by ſuch Receit, without an Aiding and Comforting of the Felon.** Trin. 44 Eliz. B. **between** (a) Dawes **and** Boughton **adjudged.**

(z) Creſwell and Mentris, like Point. All. 57. adjudged. Stile 91. adjudged niſi. Godb. 157. like Point adjudged. Dal. 40. like Point adjudged; But note, the Plaintiff was not there charged with the knowing them to be ſtolen.—His Boy hath cut my Purſe, and he knowing it hath receiv'd it; actionable. Cox and Humphreys. Cro. Eliz. 877. adjudged; but 889. being moved again, it was adjudged otherways, for perhaps the Purſe was not cut feloniouſly, and then the Receipt can be no Scandal. Poph. 210. cited, and there ſaid other Words in this Caſe were held actionable. (a) Cro. Eliz. 888. S. C. adjudged, and the principal Reaſon there given, becauſe he might receive them as Bailiff or Lord of a Manor that has Waifs and Felons Goods. Yelv. 4. S. C. adjudged, the Words being, Thou haſt bought, &c.—She cauſed Mr. L's Servant to Steal and Purloin 30. and received them and ſold them, which was the Cauſe why his Maſter broke; actionable. All. 5. adjudged and affirmed upon Error.—She was privy and conſenting to the Stealing of Goods; actionable. Cro. Car. 236. adjudged.

30. **If a Man ſays to another being a Feme Covert,** Hang thee Bawd, thou art worſe than a Bawd; and thou keepeſt a Houſe worſe than a Bawdy-Houſe, and keepeſt a Whore in thy Houſe to cut my Throat; **an Action lies for theſe Words, for it is a great Slander.** Mich. 9 Car. B. R. **between** (b) Benſon **and** Goodach **adjudged, this being moved in Arreſt of Judgment where the Baron and Feme brought the Action, and alledged, that the Baron kept an Alehouſe, being thereto legally Licenſed by divers Juſtices. But the Court had no Regard thereto, in as much as the Baron and Feme could not join in an Action for ſuch Loſs, but the Baron only ought to have the Action.**

(b) Cro. Car. 329. S. C. adjudged, the Judgment being given for the Plaintiffs upon the laſt Words, Thou keepeſt a Whore in thy Houſe, &c. but as to the Words, Thou keepeſt a Houſe worſe than a Bawdy-houſe, they have no plain Intendment what is meant thereby.

31. (c) If one Man ſays to another, Thou art a cozening and a Coney-catching Rogue, and haſt cozened me of 30 l. no Action lies, for it may be that he juggled with him. Mich. 9 Jac. B. per Curiam.

(c) 1 Rol. Abr. 62. Pl. 25. vide.

32. If a Man ſays of J. S. who is a Tradeſman, not having a Diſcourſe of his Trade, Thou art a cheating cozening Knave, and thou haſt cozened my Husband of 500 l. no Action lies; for this ſhall not be intended to have been ſpoken of him in his Trade. Mich. 11 Car. B. R. between (d) Needler and Symnel adjudged, in Arreſt of Judgment after a Verdict for the Plaintiff.

(d) Cro. Car. 417. S. C. adjudged, per tot' Curiam nisi. 1 Jon. 366. S. C. adjudged. 1 Rol. Abr. 62. Pl. 25. S. C. which vide with ſeveral Notes thereupon.

33. If a Man ſays to J. S. Thou haſt forged a privy Seal and a Commiſſion, and why doſt thou not break up this Commiſſion and ſerve it (innuendo the Commiſſion of the Plaintiff) an Action lies for theſe Words upon ſuch a Declaration, for it ſhall be intended the King's Privy-Seal, per excellentiam, and not the Fabrick of the Seal only, but alſo the putting thereof to ſome Writing, and alſo the King's Commiſſion, which was in ſome Matters relating to the Plaintiff, as the Words import in common Diſcourſe. Mich. 9 Car. B. R. between (e) Ball and Baggarly, dubitatur, and the Poſtea ſtaid in Arreſt of Judgment; but after Judgment was given for the Plaintiff, per Curiam.

(e) Cro. Car. 320. S. C. adjudged per tot' Curiam. Barkly agreeing with the reſt. 1 Jon. 325. S. C. adjudged per tot' Curiam. præter Barkly.

34. (f) If a Man ſays maliciouſly of J. D. He hath picked my Pocket of Silver and Gold. Et de ulteriori malitia ſua (as the Declaration was) At another Day ſays of him, I had 100 l. about me, and he picked my Pocket of 40 l. and I will indict thee at the Seſſions and make thee hold up thy Hand at the Bar, an Action lies for the firſt Words clearly, and alſo for the ſecond Words, they being aver'd to have been ſpoken, de ſua ulteriori malitia, and ſo but explanatory of the firſt Words. Mich. 9 Car. B. R. between (g) Penſon and Goodach adjudged, per Curiam, this being moved in Arreſt of Judgment, intire Damages being given for all the Words ſpoke at ſeveral Days.

(f) One ſaid of another, He hath picked my Pocket againſt my Will, and at the ſame Time de ulteriori malitia, He is a Pick-pocket; not actionable, for the Words carry no neceſſary Implication of a Felony. 1 Vent. 213. adjudged. 2 Lev. 51. adjudged, but varies a little in the Report, vide. (g) Cro. Car. 327. S. C. adjudged; but note, the laſt Words are there placed firſt, and by reaſon of theſe explanatory Words, I will Indict thee at the Seſſions, &c. are held without Queſtion actionable; ſo that the Doubt there aroſe upon theſe Words, He hath picked my Pocket of Silver and Gold; yet thoſe being alledged to be ſpoke ex ulteriori malitia, &c. were adjudged actionable.

35. If one Man ſaid to another, 10 Jac. That he ſaid there is no Prince in England; an Action upon the Caſe lies, for the Words have not ſuch an Intendment as if he had ſaid the Prince is not in England, but that the ſuppoſed Prince which is in England is no Prince. My Reports, 14 Jac. between (h) Lewes and Walter adjudged ſo.

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(h) Cro. Jac. 406. 413. S.C. adjudged, it being alledg'd, that he ſpoke them on Purpoſe to draw him in queſtion for his Life, and the Defendant was found Guilty. 3 Bulſt. 225. S. C. adjudged. 1 Rol. Rep. 444. S. C. adjudged.

36. So an Action lies in this Caſe, Tho' there are ſeveral Princes in England, as every Earl is a Prince, and ſo is a Duke and Marqueſs, for when there is a Diſcourſe of the Prince ſimply, it ſhall be intended the King's eldeſt Son per excellentiam. My Reports, 14 Jac. between (i) Lewes and Walter adjudged.

(i) Cro. Jac. 406. 413. S.C. and S. P. appears. 3 Bulſt. 225. S. C. and S. P. by 3 Judges againſt one. 1 Rol. Rep. 444. S. C. and S. P. by 3 Judges againſt one. 1 Rol. Abr. 75. Pl. 2. S. C. and S. P.

37. (k) If

37. (k) If one Man says to another, That he is a (l) Rebel, no Action upon the Case lies for this, (m) for perhaps a Proclamation of Rebellion was granted against him out of the Chancery or Star-chamber. Mich. 40, 41 Eliz. B. R. (n) Emerson's Case, per Curiam adjudged. Mich. 40, 41 Eliz. B. R. (o) Redston's Case, per Curiam.

(k) Fountain and Rogers. S. P. 1 Rol. Rep. 427. cited. 3 Bulst. 260. cited.

(l) Thou art a Rebel against the King; not actionable. 1 Sid. 132. adjudged. (m) Cro. Eliz. 171. like Point, per Curiam. (n) Cro. Eliz. 621. S. C. adjudged, the Words being, Thou art a Rebel and no true Subject. (o) Cro. Eliz. 638. S. C. and S. P. admit, per Fenner and Clench, ceteris absentibus.

38. But if one Man says to another, (p) Thou art a Rebel and all that keep thee Company, and (q) thou art not the Queen's Friend; an Action upon the Case lies for these Words, for he explains his Intention by the last Words. Mich. 40, 41 Eliz. B. R. (r) Redston's Case.

(p) Thou art a Knave Mungrel, half a Guisian and no true Englishman; Actionable.

The Duke of Guise being a common Enemy of this Kingdom. Dal. 63. per Curiam, —You are a Scurvy Fellow, I am no Traitor, I have seen you in Rebellion; actionable, for it can't be intended otherways than of a Traiterous Rebellion. 1 Lev. 251. adjudged. (q) 1 Rol. Abr. 43. Pl. 6. (r) Cro. Eliz. 638. S. C. per Fenner and Clench, ceteris absentibus adjornatur.

39. If T. the Parson of the Parish of D. warns the Parishioners to come to Church to give God Thanks for the Deliverance from the Gunpowder-Treason, and S. says to him, that he will not come to Church, upon which T. says to him, Thou art no true Subject to the King, no Action lies for these Words, for the Word true is uncertain, inasmuch as no Man is so true as he ought to be. Mich. 5 Jac. B. between (s) Smith and Turner, per Curiam.

(s) 1 Rol. Abr. 43. Pl. 6. S. C. which vide with Notes thereupon.

40. If one Man says to another, Thou didst keep Faulkner the Jesuit in thy House, knowing him to be a Jesuit. An Action lies for these Words, tho' it does not appear whether Faulkner was born within the King's Dominions, as the Statute of 27 Eliz. limits, nor that he receiv'd him after the making of the Statute, for it shall be so intended, the Words having a violent Presumption of Slander. Pasch. 1 Car. B. R. between (t) Sir Simon Clarke and Loggin adjudged, this being moved in Arrest of Judgment; and Hill. 9 Jac. B. R. Rot. 1439. between (u) Flint and Smith adjudged in Point, where it was said he receiv'd such a one who was a Seminary Priest, knowing him to be a Seminary Priest. Mich. 16 Jac. B. R. between Sir John Lenthal and Andrews adjudged. He did entertain and often harbour in his House, one St. John and others, knowing them to be Romish Priests, and Sir John Lenthal shall be indicted for it, and after the Defendant maliciously procured a Bill of Indictment to be drawn and ingross'd, and to be prefer'd to Justices of Gaol-Delivery containing this Matter, and published, that he would prefer it to them, tho' it was laid in the Declaration, that the Plaintiff was Marshal of the Marshalsea, of the King's Bench, and thereby might have the Custody of such Priests; yet because he said he should be indicted for it, he shew'd that he did not intend a lawful harbouring of them, and Judgment was given for the Plaintiff. Intratur Trin. 16 Car. Rot. 350.

(t) 1 Jon. 68. S. C. adjudged. Latch. 1. 89. S. C. adjudged. Palm. 410. S. C. adjudged.

(u) Cro. Jac. 300. S. C. adjudged, 1 Jon. 68. S. C. cited. Latch. 2. S. C. cited.

41. (w) If one Man says to another, Thou art a perjured Fellow, for thou wast forsworn before the Lord Bishop of Norwich, no Action lies for these Words, because he does not say this was in the Bishop's Court, and so uncertain whether it was Perjury, and it shall not be intended to have been in his Court. Mich. 15 Jac. B. R. between (x) Keble and Page adjudged in Arrest of Judgment.

(w) 1 Rol. Abr. 40. Pl. 9. Margine vide.

(x) Cro. Jac. 436. S. C. adjudged, the Words were not actionable, and yet they were there, Thou art perjured, for thou art forsworn in the Bishop of C's Court. But Cro. Eliz. 297. like Case adjudged, Con.

42. If one Man says to another, Thou wast forsworn in the Court of (*) Requests, an Action upon the Case lies, between (y) Brook and Doughty cited. Hill. 40, 41 Eliz. B. R.

*Fol. 70.

(y) 1 Rol. Abr. 40. Pl. 17. S. C. 1 Leon. 107. S. C. adjudged, there being also these farther Words, I will make thee stand upon a Stage for it. But Cro. Eliz. 135. S. C. adjudged, and said these last Words were not found by the Jury.

43. If

43. **If one Man ſays of another,** Thou art a forſworn Fellow, and I will prove thee one; for thou ſetteſt thy Hand to a Bond of mine, and ſwore nay, **no Action lies for the Uncertainty.** Mich. 15 Jac. B. R. **between** Serjeant **and** Clarke **adjudged.**

44. **If one Man ſays to another,** Thou waſt forſworn and perjured in two or three Articles, in a Suit between me and thy Daughter-in-law, and thou ſhouldeſt loſe thy Ears for it, and ſhouldſt come from **London** like a Pollard. **An Action upon the Caſe lies for theſe Words, for it appears that he intends a Perjury in a Court of Record, for which he ought to loſe his Ears.** Mich. 15 Jac. B. R. **between** Goddard **and** Hampton **adjudged as to the Words.**

45. (z) **If one Man ſays of another,** That he hath delivered falſe Evidence and Untruths in his Anſwer to a Bill of J. S. in the Chancery, **no Action lies for theſe Words for the Uncertainty, for many Things in a Bill are not material to the Matter in Variance, and therefore if the Party Anſwers not truly as to them, he is not puniſhable for Perjury, and perhaps he intends ſuch Matter.** Mich. 38 39 Eliz. B. R. **between** (a) Michel **and** Brown **adjudged in a Writ of Error, and the Judgment given in Banco to the contrary, reverſed accordingly.**

(z) Cro. Eliz. 374. S. P. adjudged, and ſeems to be the ſame Caſe.

(a) Cro. Eliz. 500. S. C. adjudged upon Noy 36. S.

Error, and ſaid the Judgment in B. was entered contrary to the Direction of the Court. C. adjudged. 1 Rol. Abr. 41. Pl. 25. Margine. S. C. with further Notes thereupon.

46. (b) **If one Man ſays to another,** Thou art a forſworn Man, (c) I will teach thee the Price of an Oath, and I will ſet thee on the Pillory. **An Action upon the Caſe lies for theſe Words, for this ſhall be intended ſuch a Forſwearing for which he ſhall ſtand in the Pillory, and not any voluntary Oath.** Hill. 41 Eliz. B. R.

(b) 1 Rol. Abr. 40. Pl. 11. S. P. 39. Pl. 6. vide Margine.

(c) He hath forſworn himſelf, and I will teach him the Price of an Oath, for I will have his Ears cropt; actionable, for the Circumſtances ſhew his Meaning. Hetl. 63. adjudged.—Thou perjur'd Beaſt, I will make thee ſtand upon a Scaffold in the Star-Chamber; actionable, for the laſt Words ſhew his Intent. Cro. Jac. 613 adjudged.—Thou art a forſworn Fellow, for by thy falſe Oath thou haſt hanged as true a Man as thy ſelf; actionable; for this muſt be intended of an Oath judicially taken. Cro. Eliz. 572. adjudged. Godb. 340. cited.

47. **If one Man ſays to another,** Thou haſt ſtolen my (*) Wood, and I will have an Action of Felony againſt thee, **an Action lies.** Trin. 11 Jac. B. R. **between** Liford **and** Stamp, per Curiam.

(*) Thou haſt ſtole my Timber; actionable, for it can't be intended of Trees growing. Noy 114. per totam Curiam. Yelv. 152. vide.—Thou art a Thieviſh Knave, and haſt ſtole my Wood; not actionable, per Robins and Hildredon. Cro. Jac. 65. per 3 Judges againſt 2. adjudged. Godb. 340. cited. 2 Rol. Rep. 343. cited. (d) 2 Bulſt. 81. S. C. but S. P. not agreed, Judgment being given againſt the Plaintiff for a Fault in the Declaration. 1 Rol. Abr. 80. Pl. 4. S. C.

48. (e) **If one Man ſays to another,** Thou haſt ſtolen my Wood, **an** Action upon the Caſe **lies, becauſe it cannot** (f) **be intended growing,** for arbor dum Creſcit, &c. My Reports, 11 Jac. Liford **and** Stamp, per Curiam. Trin. 5 Jac. B. R. **between** (g) Litchfield **and** Sanders.

(e) March 211. like Point adjornatur. 2 Rol. Rep. 381. vide. Raym. 33. vide.

(f) Thou haſt feloniouſly taken my Wood; actionable, for it cannot be intended otherways than in the worſt Senſe, becauſe of the Word feloniouſly. Cro. Eliz. 471. adjudged by 2 Judges againſt 1. (g) Loe and Sanders. Cro. Jac. 166. S. C. adjudged, Child and Sanders. Cro. Jac. 674. S. C. cited.

49. (h) **If one Man ſays to another,** Thou art a Thief, for thou haſt ſtolen a (i) Load of Turfs, **an Action lies, for they are not called Turfs till they are cut from the Earth and dried.** Mich 9 Car. B. R. **between** Dolman **and** Young **adjudged, this being moved in Arreſt of Judgment.**

(h) 1 Rol. Abr. 52. Pl. 6. like Caſe, which vide, with the Notes thereupon.

(i) Thou haſt ſtole a Load of Hop-poles; actionable, for they muſt be cut, elſe they were not Hop-poles. Cro. Eliz. 225. adjudged. —He is a Thief, and I will prove him to be a Thief, for he hath ſtole my Corn; actionable. 2 Rol. Rep. 440. per 2 Judges adjudged. Latch. 176.—Thou art a Thief, thou haſt ſtole my Sheaf of Corn; actionable. 1 Bulſt. 173. adjudged. —Thou art a Corn-ſtealer; actionable, for this muſt be intended of ſuch Corn as may be ſtole. Cro. Eliz. 563. adjudged.—Thou haſt ſtole as much Corn out of my Fields as is worth 9 or 10 s. Cro. Jac. 457. adjornatur. Thou haſt ſtole as much

Wood and Timber as is worth 20 s. off my Landlord's Ground; actionable, for it could not be Timber if growing. Yelv. 152. adjudged.

50. **If one Man ſays to another,** Thou art a Corn-ſtealer, and haſt ſtolen my Corn off my Land, **no Action lies, for perhaps he intends Corn growing.** Hill. 5 Jac. B. per Curiam.

51. **If one Man ſays to another,** Thou art a Thief, for thou ſtoleſt half an Acre of my Corn, **no Action lies for theſe Words; for it may be that he intended Corn growing.** (l) Mich. 37 and 38 Eliz. B. R. **adjudged.**

(l) Caſtleman and Hobs, S. C. Moor 396. Pl. 516. adjudged. Ow. 57. S. C. adjudged. Cro. Eliz. 428. S. C. adjudged. 2 Bulſt. 82. S. C. cited.

52. (m) **If one Man ſays to another,** Thou haſt felonioufly ſtolen my Corn, an Action upon the Caſe **lies, tho' he does not ſay that he ſtole it out of his Barn.** Mich. 8 Jac. B. per 2 **Juſtices.**

(m) Thou haſt ſtole my Oats; actionable. Hern's Pleader 111. and Hern. 112. vide.—Thou haſt ſtole my Corn out of my Barn; actionable. **May** and **Ket.** Poph. 129. adjudged. Hetl. 172. adjudged. 1 Rol. Abr. 43. Pl. 2.

53. **If one Man ſays of another,** He ſtole Corn from Maſter **Keys,** an **Action lies for theſe Words.** Mich. 21 Jac. B. R. **between** (n) Smith and Ward **adjudged; this being moved in Arreſt of Judgment.**

(n) Cro. Jac. 673. S. C. adjudged, the Words being, He is a Thief, for he hath ſtolen, &c.—Thou haſt ſtolen my Corn and carried it to Market; actionable, for he can't be ſuppoſed to carry it from the Field, to, &c. Cro. Jac. 442.—Thou haſt ſtole my Corn; not actionable. Poph. 129. ſaid, Latch. 176. per Jones arguend'.

54. **If one Man ſays to another,** Thou haſt ſtolen my Furſe, **no Action lies, for it may be well intended that he means Furſe growing.** Mich. 9 Car. B. R. **ſaid to be adjudged in** (o) Gilbert's **Caſe in the** Common Pleas.

(o) 1 Rol. Abr. 52. Pl. 6. S. C. Poph. 152. ſeems to be the S. C. and S. P. admit, per **Curiam.**

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55. **If one Man ſays of another,** He is a Thief, and ſtole a Pye out of **John Barham's** Houſe; **no Action lies for theſe Words, becauſe it is uncertain what manner of Pye he means, for perhaps he intends a Bird ſo called.** Mich. 15 Jac. B. R. **between** Stabback **and** Weſton, per Curiam, **in Arreſt of Judgment, and the** Poſtea **ſtaid accordingly.**

56. **If one Man ſays to another,** Thou art drunk, and I ſhall never hold up my Hand at the Bar, as thou haſt done; **no Action lies,** for it **may be that he held up his Hand at the Bar for Drink, and not for Felony.** Mich. 7 Jac. B. **between** (p) Simpſon **and** Walters **adjudged.**

(p) 2 Brownl. 272. S. C per Foſter Juſt'.

57. **If one Man ſays to another,** Thou art a Knave, and didſt conſent to the Taking of a 20 s. Piece out of J. S's Pocket; **no Action lies for theſe Words, becauſe it does not appear that he intended a felonious Taking thereof.** Paſch. 11 Car. B. R. **between** Deeks **and** Bagly, per Curiam, **in Arreſt of Judgment.**

58. **If a Man ſays of a Phyſician,** He hath killed J. S. in the **Old-Jury** with Phyſick, which Phyſick was a Pill, and Doctor **Atkins** and Doctor **Paby** found the Vomit in his Mouth; **no Action lies for theſe Words,** (q) **for if a Phyſician gives Medicines or Drugs to his Patient, to the Intent to recover him from his Sickneſs, yet tho' the Patient dies after the Receipt thereof, the Phyſician is not puniſhable, in as much as it does not appear that he knew the Medicines to be contrary to the Nature of the Diſeaſe, and ſo he did it not maliciouſly.** Mich. 40, 41 Eliz. B. R. **between** (r) Poe **and** Mumford **adjudged.**

(q) Thou didſt kill J. S. thou didſt kill him, actionable, being ſpoke to a Chirurgeon that had him in Cure, &c. Hetl. 69, 70, 71. per 3 Judges. Gaudy abſente.

(r) Cro. Eliz. 620. S. C. without Argument, adjudged by 2 Judges againſt 1.

But it had been otherways, if he had ſaid, That he had adminiſtred Medicines (s) that he knew to be contrary to the Diſeaſe, &c. **for an Action lies for theſe Words.** 40, 41 Eliz. B. R. **between** (t) Poe **and** Mumford, per Cur'.

(s) 1 And. 269. vide.

(t) Cro. Eliz. 620. S. C. and S. P. per Curiam, and that ſuch Words would touch him in his Profeſſion.

59. If one Man says to another, Thou hast committed Burglary in breaking his House and stealing his Goods; no Action lies, for it is not known whose House or Goods he intends, there being no Discourse of any. Trin. 44 Eliz. B. R. between (u) Browne and St. John adjudged.

(u) Cro. Eliz. 889. adjudged. 1 Rol. Abr. 78. Pl. 8. S. C.

60. If one Man says to another, Thou wouldst have stole a Piece of Cloth, or else thou wouldest have delivered it to my Wife's Daughter, and thou art a Thief, and an arrant Thief, and I will prove it; an Action will lie, for the last Words are absolute, and shall not be referr'd to the first. *Trin.* 29 *Eliz. Norman's* Case, *Goulf.* 56. adjudged by 3 Judges, *Anderson absente*, but *per Rhodes*, if the Words had been, and therefore thou art a Thief, it had been otherways.

61. (a) If one Man says of another, He is a perjured old Knave, and that is to be proved by a Stake parting the Lands of *J. S.* and *J. N.* No Action will lie; for all the Words being taken together, the last do extenuate the Force of the first, and shew that he intended no judicial Perjury; and it is impossible that a Stake should prove any Man perjured, and therefore the Words are insensible. *Mich.* 44 and 45 *Eliz.* (b) *Brittridge's* Case. 4 *Co.* 18. b. adjudged; but it was there said the Action would have lay, if it had been shewn in the Declaration (as the Truth of the Fact was) how that in an Action between *J. S.* and *J. N.* the Point in Controversy was, Whether a Stake stood upon the Land of the one or the other, or as an indifferent Boundary, and that in this Action the Plaintiff was Sworn and gave Evidence; and therein, according to the Pretence of the Defendant, had perjured himself.

(a) Yelv. 54. like Case adjudged.

(b) Breechly and Atkins. Yelv. 10. S. C. 2 Judges against 2. Bridge and Atkins. Moor 666. Pl. 912. S. C. adjudged. 1 Brownl. 7. S. C. cited to be adjudged by 2 Judges against 1.

62. If one Man says to another, (c) Thou art a thievish Rogue, and hast stole Bars of Iron out of other Mens Windows, No Action lies, for it cannot be presumed to be Bars only lying there. *Hill.* 5 *Jac.* between *Powell* and *Hutchings*. *Cro. Jac.* 204. adjudged.

(c) Thou hast stole as much Lead out of my Master's House, as is as big as an House; actionable. 1 Lev. 156. adjudged, and that it should not be intended Lead fixed to the Freehold, tho' it was said per Curiam, it might be so intended if the Words had been, Stole off my Master's House.

63. If *A.* says *B.* is a Felon, and thereupon *C.* says, Take heed what you say; whereupon *A.* says, Is not he a Felon that knew of a Murder and concealed it? He knew of the Murder of *A. L.* and did not reveal it till long after it was openly known; *B.* may have an Action for these Words, for tho' to conceal a Felony is not Felony, but an Offence finable; yet the last Words not being said *Continuata voce*, nor voluntarily proceeding from *A.* but as it were forced out by a Stranger, do no way qualify the first *Pasch.* 7 *Jac.* between *Newlyn* and *Fossett*, *Yelv.* 154. *per totam Curiam præter Yelverton* adjudged.

64. If one Man says of another, He is a Traitor, for he rob'd a Man by the Highway side; No Action lies, because the Reason given does not agree with the precedent Words *per Yelverton*, but *Fleming* Chief Justice *contra*, for tho' the Reason given confirms not the precedent Charge, yet charging him with 2 distinct Matters that deserve Death, the Malice shall be taken to be the greater. *Yelv.* 154. in the Case of *Newlyn* and *Fossett*, which last Opinion seems to be good Law, *quod nota*, as 'tis said by the Reporter at the latter End of the principal Case.

65. If *A* says to *B.* Thou wast in *L.* Gaol for Coining, and *B.* answers, If I was there, I answer'd it well enough; and thereupon *A.* replies, Yea, you were burnt in the Hand for it. *B.* may have an Action for these Words, for tho' a Man shall not be burnt in the Hand for Coining false Money, yet since his Intent appears to charge *B.* with being in Prison for Coining, the subsequent Words shall not diminish, but aggravate the first. *Trin.* 17 *Jac.* between (d) *Gainford* and *Tuke*. *Cro. Jac.* 536. adjudged.

(d) Kamelford and Tuke, 2 Rol. Rep. 104. S. C. and there Mountague Chief Justice said, to a common Intent the Words imported Slander. Haughton,

Haughton, That the Action lay for the laſt Words, and not for the firſt. Dod' contra in omnibus, yet Judgment for the Plaintiff by the 2 Judges againſt 1. niſi Crook when he came to Court, ſhould be againſt it.

(e) She did ſteal my Wood and I will ſend her to Bridewell; the firſt Words were held actionable; but whether the Force thereof was not reſtrained by the laſt, was doubted. Whitacre and Hillwell, Stil. 25, 27. 1 Judge againſt 1. adjornatur. All. 11. 1 Judge againſt 1. adjornatur. (f) 1 Jon. 43. S. C. adjudged per Curiam præter Hobart, Hut. 65. S. C. by 2 Judges againſt the Opinion (as 'tis there ſaid) of Serjeant Hobart, but no Judgment appears there to have been given. Stile 25. S. C. cited.

66. (e) If one ſays of another, He is a Thief, he ſtole my Corn and never made me any Satisfaction; an Action will lie, and the laſt Words ſhall not reſtrain the Force of the firſt. *Mich.* 21 *Jac.* between (f) *Ayrye* and *Higgens*, 1 *Rol. Rep.* 380. adjudged *per Curiam præter Hobart* Chief Juſtice, who held the laſt Words implied that no Felony was done, becauſe no Satisfaction could be made for that.

(g) Lerome and Hockly. 1 Lev. 205. S. C. adjudged, and by 2 Judges, ſo it would have been if the Words had been, He hath got it of a Yellow-hair'd Woman.

67. If one Man ſays of another, He hath got the Pox by a Yellow-hair'd Wench in *Moor-fields*, and 'twill coſt him 10 *l.* if he eſcapes with his Life, an Action lies, for to ſay a Man has got the Pox by ſuch a Woman, will be intended the *French* Pox *à fortiori*, when ſaid he has got the Pox by a Wench, and *Twiſden* ſaid, got, *&c.* imported the *French* Pox; for in Caſe of the Small-Pox Men uſe to ſay—hath caught the Pox. *Paſch.* 29 *Car.* 2. between (g) *Lyn* and *Hockly*. 1 *Sid.* 324. adjudged.

68. If one Man ſays to another, Thou art a Clipper, and ſhalt be hanged for it, theſe Words are Actionable, for it cannot be intended a Clipper of Cloath, *&c.* but of ſuch Things for which he ought to be hanged, and that is of Money only. *Mich.* 35 *Car.* 2. between *Walter* and *Beaver*. 3 *Lev.* 166. adjudged.

(h) 3 Lev. 395. S. C. cited.

69. So if one Man ſays to another, Thou art a Clipper, and thy Neck ſhall pay for it. *Mich.* 35 *Car.* 2. between (h) *Noden* and *Micock*. 3 *Lev.* 166. adjudged.

(Z) For Words.

In what Caſes it lies, where the Words *in mitiori ſenſu* are not Actionable.

1. **Where the Words are dubious, and may receive a double Interpretation, the one Way that they ſhall be actionable, and the other Way not; they ſhall be taken** in mitiori ſenſu, **ſo that they ſhall not be actionable.** Mich. 15 Jac. B. R. **in** (a) Gardener **and** Spurdance's **Caſe.**

(a) Cro. Jac. 438. S. C. adjudged; but this general Rule is not there laid down.

2. **But where the Words are not doubtful, nor in common Acceptance can receive a double Conſtruction, there they ſhall be taken according to the common Acceptance, and ſo if in common Acceptance they ſound in Slander, they ſhall be actionable, and ſhall not be ſtrained to any foreign Conſtruction, to make them actionable.** Mich. 15 Jac. B. R. **between** (b) Gardiner **and** Spurdance, per Curiam.

(b) Cro. Jac. 438. S. C. adjudged; but this general Rule is not there mentioned.

3. As if a Man ſays to a Woman, Thou didſt poiſon thy Husband, and I will juſtify it to thy Face; the ſaid Woman ſhall have an Action upon the Caſe, averring that her Husband was dead before the Words ſpoken, tho' he does not ſay that ſhe poiſoned him to Death, nor voluntarily, and ſhe might poiſon him againſt her Will, by an ill Herb put into his Pottage, or with a Potion in which Poiſon was mix'd, or ſhe might deliver to him Poiſon prepared by another, when ſhe her ſelf knew nothing of it, or ſhe might poiſon him and he might recover again, and die after the Year and Day, for theſe are (*) foreign Intendments; but the Words in common Acceptance imply that ſhe had voluntarily and knowingly poiſoned him to Death. Mich. 15 Jac. B. R. between (d) Gardiner and Spurdance, per Curiam adjudged. Mich. 37, 38 Eliz. B. R. between (e) Meggs and Griffin adjudged, for ſaying that ſhe had poiſoned her firſt Husband in a Meſs of Milk. Trin. 39 Eliz. B. R. between (f) Webb and Poore adjudged. Paſch. 7 Jac. B. Binford's Caſe adjudged.

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(d) Cro. Jac. 438. S. C. adjudged.
(e) Cro. Eliz. 400. S. C. adjudged.

Goulſ. 138. S. C. adjudged. Moor 408. Pl. 552. S. C. adjudged Con. and yet the Words there went further, viz. that he died of that Poiſon, but a Quære is made by the Reporter. (f) 1 Rol. Abr. 50. Pl. 8. S. C. Cro. Eliz. 569. S. C. and S. P. appears. Noy 63. S. C. and S. P. appears. 1 Rol. Abr. 77. Pl. 8. S. C.

4. (g) If one Man ſays to another, Thou haſt killed J. S. an Action lies, tho' it might be taken that he killed him as his Executioner by Law, for in common Parlance it is taken for a felonious Killing. Mich. 15 Jac. B. R. in Gardiner and Spurdance's Caſe, per Curiam.

(g) Godb. 181. S. P. adjudged for the ſame Reaſon. Cro. Jac. 306. S. P. adjudged Con. Note, The Plaintiff was a Woman. Cro. Jac. 423. S. P. appears Con.—Thou haſt killed my Wife; actionable. Cro. Eliz. 8. 3. adjudged.—Thou art a Rogue and a Raſcal, and haſt killed thy Wife; actionable. Cro. Car. 489. adjudged.— A. was Murthered, and the Plaintiff knock'd him of the Head; actionable. Moor 428. cited.—Thou Murtherer; actionable. Owen 33. per 2 Judges. Moor 29. ſaid.

5. If A. was murdered by B. and after C. ſays to E. Thou art one of thoſe that did help to murder A. an Action lies for theſe Words, tho' it might be that he help'd to murder him without his Knowledge, for the Murder implies Malice, and if it was otherways it ought to be aver'd by the Defendant. Mich. 11 Jac. B. R. between (h) Foxcroft and Lacy adjudged.

(h) 1 Rol. Abr. 75. Pl. 4. S. C. 82. Pl. 17. S. C. Hob. 89. S. C. and S. P. appears.

6. In an Action upon the Caſe, If the Plaintiff declares, that the Defendant ſaid of the Plaintiff, That Rogue Davies the Apothecary, hath poiſoned my Uncle (innuendo J. S. then dead) I will have him digged up again to hang him; tho' he did not name his Uncle, nor could it appear that he intended J. S. yet it appears by the Words themſelves after, that he would have him dug up, and he ſhews that he was dead, and tho' he does not ſhew that he poiſoned him to Death, or voluntarily, yet the Words of themſelves import as much, and therefore the Action lies. Hill. 1650. between (i) Davies and Okeham. Intratur Mich. 1650. Rot. 557.

(i) Stile 245. S. C. adjudged.

7. If a Man ſays of a Woman, That J S. hath had the Uſe of her Body; by which ſhe loſes her Marriage, an Action upon the Caſe lies, for Uſe of her Body in common Senſe is unlawfully and diſhoneſtly, and not as a Phyſician to Phyſick her, as was objected. Paſch. 5 Jac. B. R. between Dame Moriſon and Cade adjudged.

8. If a Man ſays of J. S. As ſoon as Buſhe had killed Smith, he came to J. S. and told him how he had killed Smith, and J. S. gave Buſhe Money to ſhift him away. No Action lies for theſe Words, with an Averment that Buſhe had killed Smith, becauſe this Word (kill) is too general, for a Man may kill another lawfully, as upon an Aſſault to rob him, or as an Officer, &c. Paſch. 7 Jac. B. between Parram and Roe adjudged.

9. (k) If

9. (k) **If one Man ſays to another,** (l) Thou muſt needs be richer than I, for thou didſt Coin thirty new Shillings in a Day; thou art a Coiner of Money; **no Action lies for theſe Words,** (m) **for perhaps he was a Coiner of Money in the Mint, and earned Money thereby.** Paſch. 8 Jac. B. **between** (n) Ward **and** Poole **adjudged.**

(k) Godb. 375. S. P. adjudged. 2 Rol. Rep. 104. like Point per Haught.

(l) Thou art a Coiner of falſe Money, and I have Money to ſhew which thou Coinedſt; actionable. Cro. Eliz. 629. adjudged.—He makes Half-Crowns, and did carry a Cloak-bag full of Clippings; not actionable, and it is uncertain of what the Clippings were. Godb. 391. adjudged.—He is a Clipper and Coiner; actionable, for it muſt be intended for Money. 2 Ven. 172. adjudged. (m) But thou art a Clipper, and ſhalt be hang'd for it; actionable. 3 Lev. 166. adjudged.—So, thou art a Clipper, and thy Neck ſhall pay for it. 3 Lev. 166. adjudged. (n) Godb. 167. S. C. adjudged.

10. (o) **If one Man puts his Hand upon the Shoulder of another, and ſays,** Bear witneſs my Maſters, I arreſt him of Felony; **an Action lies, for this Arreſt is as much as if he had ſaid, I charge him with Felony.** Hill. 17 Jac. B. R. **between** (p) Searl **and** Maunder **adjudged,** per Curiam.

(o) 1 Rol. Abr. 49. Pl. 6. like Caſe, Dzury and Fitch, S. P. Hut. 16. per Curiam. Hob. 219. appears. 1 Rol. Abr. 43. Pl. 3. like Caſe.

(p) Poph. 150. S. C. adjudged. 2 Rol. Rep. 141. S. C. adjudged.

11. **If one Man ſays of another,** He hath ſtolen my Piece (**innuendo quoddam fœmentum,** &c.) and I charge him with flat Felony; **no Action lies for theſe Words, for the firſt Words are meerly uncertain, becauſe it cannot be known what Piece he intended, whether of Wood or,** &c. **and the other Words,** (q) I charge him with Felony, are **but an Accuſation of Felony.** Trin. 21 Jac. B. R. **between** (r) Wheeler **and** Popleſton **adjudged.**

(q) 1 Rol. Abr. 43. Pl. 3. S. P. 73. Pl. 21. S. P.

(r) Godb. 339. S. C. adjudged **per tot' Curiam.** 2 Rol. Rep. 342. S. C. adjudged. Poph. 187. S. C. cited.

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12. **If one Man ſays of another,** He hath ſtolen by the High-way-ſide, **no Action lies, becauſe it may be a Stick or an Apple from a Tree.** Paſch. 38 Eliz. B. R. **between** (s) Denyſon **and** Burke **adjudged.**

(s) Cro. Eliz. 73. S. C. adjudged. 1 Bulſt. 112. S. C. cited. Goulſ. 143. S. C. per 2 Judges.—She is as very a Thief as (or, She is a worſe Thief than) robbeth by the Highway ſide; actionable. Cro. Eliz. 224. per Curiam.

13. **If one Man ſays of another,** He was produced for a Witneſs at the Aſſizes, and ſworn, and was reproved in his Oath of J. S. **no Action lies for theſe Words, for he might be reproved in his Oath, and yet not be forſworn; for if he was reproved in any Circumſtance of his Oath, yet is he not forſworn, if the very Subſtance for which he was produced be true.** Paſch. 38 Eliz. B. R. **between** (t) Browne **and** Brinly **adjudged.**

(t) Moor 407. Pl. 547. S. C. adjudged, but the Words much different. Owen 58. S. C. adjudged, the Words much differing.

14. **If one Man ſays of another,** (u) Thou art a prigging pilfering Merchant, and haſt pilfered away my Corn and my Goods from my Wife and my Servants, and this I will prove, **no Action lies, becauſe** (as it ſeems) **it does not appear that he intended that he took theſe Goods feloniouſly, and therefore they ſhall be taken in** mitiori ſenſu. Mich. 37, 38 Eliz. B. R. **adjudged, but there another Reaſon is given between** (w) Carter **and** Hunt.

(u) He is a progging pilfering Merchant, and hath pilfred away my Corn from my Wife and Servants, and this I will ſtand too; not actionable. Moor 409. Pl. 556. adjudged upon Error, and the firſt Judgment reverſed accordingly. (w) Moor 409. Pl. 556. S. C. adjudged upon Error, and the firſt Judgment being given for the Plaintiff in an inferior Court, was reverſed accordingly. Owen 56. S. C. adjudged upon Error. Cro. Eliz 424. S. C. adjudged upon Error. Hut. 14. adjudged.

15. **If one Man ſays to another,** Thou art a filching Fellow, and didſt filch from J. S. 4 l. **no Action lies for the Uncertainty of the Words, and the Senſe thereof, and the Word ex vi termini, is no more than if he had**

had ſaid pilfering or cheating. Mich. 17 Jac. B. between (x) Bradſhawe and Walker, per Curiam, vide the ſame Caſe. Hob. Rep. Caſe 323. (x) 1 Palm. 29. S. C. adjudged, the Words being, you are a filching, &c. for you ſtole. 1 Brownl. 13. S. C. adjudged. Hut. 34. S. C. adjudged. Hob. 249. S. C. adjudged.

16. If a Man ſays to a Miller that keeps a Mill, Thou haſt ſtolen 3 pecks of Meal, an Action lies, for tho' the Corn was delivered to him to grind, yet if he ſteals the Meal this is Felony, being taken from the reſt. Hill. 8 Car. B. R. between Langly and Bradſhaw adjudged in a Writ of Error upon a Judgment in Canterbury Court, and the firſt Judgment affirmed.

17. If one Man ſays to another, Thou art a Thief, and (y) didſt break open my Cheſt and ſteal my Deed; an Action lies, for this is Felony to break a Cheſt and ſteal Deeds. Trin. 16 Car. B. R. between Blumly and Roſe, per Curiam adjudged, this being moved in Arreſt of Judgment. (y) Thou art as arrant a Thief as any in England, for thou haſt broken up J. S's Cheſt, and taken away 40 l. there being no Averment there was any Thief, &c. not actionable. Cro. Jac. 68. adjudged. Hut. 72. Winch 70, 89. vide.——Thou art a cheating Knave, and haſt ſtole 2 Bonds from me. 1 Sid. 35. vide.—He hath broke my Houſe, and I will hang him for it; actionable. Cro. Eliz. 834. per Popham.—You rob'd me and took away my Evidence, and a Subpœna; not actionable. Godb. 89. cited.——He hath broken my Shop and taken away my Goods; not actionable. George and Parker. Cro. Eliz. 192. cited. Noy 57. cited.——Thou art a Thief and haſt broke my Cheſt; actionable. Stil. 115. adjudged.

18. If one Man ſays of another, He did burn my Barn, and none but he; no Action lies, for it ſhall be taken in mitiori ſenſu that it was not a Barn with Corn, nor near to any Dwelling Houſe. Co. 4. 20. (*) Barham's Caſe adjudged. (*) Yelv. 21. S. C. adjudged by two Judges ceteris abſentibus. Noy 155. S. C. adjudged, there being theſe further Words alſo, and he doth uſe to ſet fire of Barns about Bachelmas, when they are full of Corn. 1 Rol. Abr. 82. Pl. 2. S. C.

19. So if one Man ſays of another, He hath burnt my Barn, and if my Lord had done him Juſtice he ſhould have been hanged for it; no Action lies. Trin. 43 Eliz. B. R. between (z) Levett and Hawthorn, per Curiam. (z) Cro. Eliz. 834. S. C. per tot' Curiam præter Fenner, who thought, whether there was Corn in it or not, the Scandal was great and therefore actionable, yet adjornatur. 1 Rol. Abr. 83. Pl. 3. S. C.

20. (a) If one ſaid of A. He was a (b) Pickpocket, and had (c) picked my Pocket, and took 12 s. of Money out of my Pocket, no Action lies for theſe Words, becauſe it may be done as a Treſpaſs or in Jeſt, and not feloniouſly. Mich. 15 Car. B. R. between Haſel and Auman adjudged in Arreſt of Judgment, per Curiam. Intratur Trin. 15 Car. (a) Yelv. 136. like Point adjudged Con. and that picking a Pocket muſt be taken per jocoſi ſenſu. Godb. 287. like Point cited. (b) 1 Rol. Abr. 68. Pl. 34. (c) Thou art a Pick-pocket Rogue, and haſt pick'd thy Maſter's Pocket and his Money-box, and I will prove it; not actionable, for the Words are too general. Stile 127. adjudged niſi.

21. If an Infant brings his Action by Guardian, and declares that the Defendant ſaid to him (d) I charge you with Felony, tho' it may be the Infant was of ſuch an Age that he could not commit Felony, yet becauſe this is collateral, it ſhall not be intended without ſhewing of the other ſide. Mich. 5 Jac. B. R. between (e) Baſy and Child adjudged. Hill. 2 Car. between Wood and Merrick in B. R. it was adjudged in Arreſt of Judgment, that no Action lies for the ſaid Words, being ſpoke to a Man of full Age, becauſe it is not any Affirmative that he was a Felon, for he might be charged upon a Suſpicion. Hob.'s Reports, Caſe 381. between (f) Pollard and Maſon accordingly, where the Words were, (g) I charge him with Felony, for taking Money out of the Pocket of J. S. (d) 1 Rol. Abr. 72. Pl. 11. S. P. (e) 1 Rol. Abr. 43. Pl 3. S. C. which vide with Notes thereupon. Noy 124. S. C. adjudged.

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(f) Hob. fol. 205, 326. S. C. adjudged. 1 Brownl. 18. S. C. the Court divided. Maſon and Thompſon, Hut. 38. ſeems to be the ſame Caſe adjudged per Curiam, Warburton hæſitante. (g) 1 Rol. Abr. Pl. 3. vide.

22. If

22. If A. ſays of B. He did violently ſet upon me in the King's Highway, and took away my Purſe with 4 s. in it, from me; and after he had my Purſe, did threaten to cut me off in the Middle, and I was glad to fly for my Life. (h) **Tho' he does not ſay that he rob'd him, or that he did this feloniouſly, yet this is tantamount, and in common Underſtanding is but a Deſcription of a Robbery.** Mich. 8 Car. B. R. between (i) Lawrence and Woodard **adjudged, this being moved in Arreſt of Judgment. But in this Caſe Juſtice Croke cited 2 Caſes,** 10 Jac. B. R. **between** (k) Holland **and** Stoner, Thou art a lewd Fellow, thou didſt ſet upon me in the Highway, and tookeſt away my Purſe, **adjudged in B. R. that the Action lies for theſe Words, but it was after reverſed upon a Writ of Error in Camera Scaccarii, becauſe it might be that he took it in Jeſt, or as a Treſpaſſer. But** 10 Jac. B. R. **between** (l) Leveſton **and** Cawdry, (m) Thou art a lewd Fellow, thou didſt ſet upon me in the Highway, and tookeſt away my Purſe, and if thou wilt go with me before a Juſtice of Peace, I will charge thee with Felony, **and adjudged in the King's-Bench, that the Action lies for theſe Words, and this was affirmed in a Writ of Error, becauſe the laſt Words ſhew his Intention to have been to charge him with Robbery.**

(h) He hath beaten me and taken away my Purſe and 20 s. in Money; not actionable, for he might take it as a Treſpaſſer. per Cro. Eliz. 351. adjudged.

(i) Cro. Car. 277. S. C. adjudged. Croke hæſitante. 1 Jon. 302. S. C. adjudged.

(k) Cro. Car. 277. S. C. cited accordingly. 1 Bulſt. 112. S. C. adjudged, and does not appear to have been after reverſed. Cro. Jac. 315. S. C. revers'd upon Error.—Thou art a Cut-purſe; not actionable. Godb. 181. ſaid, I did meet A. B. and C. at Cheſſam Town's-End, in the Evening, as I was going home, and there they bid me Deliver my Purſe; and I being afraid, put my Hand into my Pocket and took out 2 s. and 6 d. and gave it over my Shoulders to one of them, I knew not which; A. may have an Action; for theſe Words in Natural Conſtruction imply a Robbery. Yelv. 145. adjudged per Curiam præter Yelverton.—Thou haſt cut my Purſe, and therefore I charge thee with Felony; not actionable, per Cro. Eliz. 890. adjudged. (l) Cro. Jac. 312. S. C. adjudged and affirm'd upon Error. (m) Godb. 202. like Point per Coke, Chief Juſtice.

23. (a) If one Man ſays of another, He maintained, victualed, and helpt to let go certain Pirates, contrary to the Law of the Realm and the Proclamations made, an Action will lie, for when it is ſaid he maintained them againſt the Law and Proclamations, it muſt be intended in the worſt Senſe, and that he knew thereof, and that he maintained them in their Piracy. *Hill.* 29 *Eliz.* between (b) *Moryan* and *Kiffe*. *Cro. Eliz.* 52. adjudged.

(a) Thou maintaineſt Pirates who rob upon the Seas. Cro. Jac. 629. cited.—He came into Cornwal with a Blew Coat on his Back, but has now gotten together a great Quantity of Wealth by Trading with Pirates, cozening in the Tale of Pilchers; not actionable, tho' ſpoke of a Merchant, for he might Trade with them and not know them to be ſuch. 2 Bulſt. 216. adjudged.—Thou doſt harbour and maintain Rebels and Traitors; actionable. Goulſ. 48. adjudged per 3 Judges (Anderſon abſente) and Penyam ſaid, the Word Maintain was ſtronger than the Word Keep; and that it implied a Thing prohibited. (b) Godb. 89. S. C. adjudged, the Words there being, He hath aided Pirates contrary to the Laws of the Realm, and againſt a Proclamation in that Behalf. 1 Rol. Rep. 427. S. C. cited. 3 Bulſt. 260. S. C. cited.

24. If one Man ſays to another, Thou haſt procured falſe Witneſſes to ſwear in ſuch an Action, an Action will lie for theſe Words, for it cannot be intended otherways than in the worſt Senſe, and that he knew they would ſwear falſly, for the Word Procure implies as much. *Paſch.* 30 *Eliz.* between (c) *Prouſe* and *Cary*. *Cro. Eliz.* 93. adjudged, but there ſaid, if the Words had been, You brought in falſe Witneſſes, it had been otherways.

(c) 1 Leon. 101. S. C. adjudged, the Words there being, He did ſuborn, procure, and bring in, &c. but as to the Word Suborn, the Defendant was found Not guilty.

25. If one ſays to a Woman (d) Thou haſt ſought the Death of thy Huſband, and waſt his Death, for if thou hadſt been an honeſt Woman he had been alive, an Action will lie, for the Words cannot be taken otherways than in the worſt Senſe. *Trin.* 33 *Eliz.* between *Gaſtrel* and *Townſend*. *Cro. Eliz.* 239. adjudged. But Note, there was an Averment in *Facto* that the Husband was killed.

(d) He was the Cauſe of the Death of D's Child, not actionable. 2 Bulſt. 10. adjudged.—Thou waſt the Cauſe that J. S. did hang himſelf, and that J. N. did cut his own Throat, and thou beginneſt with no Man but thou undoeſt him; not actionable. Dal. 89. adjudged.—Thou art a Rogue and a Raſcal, and haſt killed thy Wife; actionable. Cro. Car. 489. adjudged.—Thy Husband was the Death of J. P. and had it not been for thee and thy Husband, he had been alive unto this Day; not actionable, for he might be the Occaſion, as by putting him upon a Journey, &c. and not the Cauſe. 2 Sid. 71. per Glyn, Ch. Juſtice.

26. If

26. If one ſays of *J. S.* My Lord Preſident of, *&c.* ſhewed *J. S.* his Hand ſet to a Book, whereby he had (e) conſented to the late Rebels in the *North*, but by Means of *J. N.* my Lord Preſident was appeaſed, and the Matter ſuppreſſed: An Action will lie; for his Hand cannot be intended to have been wrote by another, for then is it not his Hand, and when it is ſaid that he conſented to the Rebels, it cannot be intended but that he conſented to them in their Rebellion. *Mich.* 33 and 34 *Eliz.* between *Stapleton* and *Frier. Cro. Eliz.* 251. adjudged, but *per Curiam*, if he had ſaid he conſented to (f) *A.* and *B.* who were Rebels, no Action would have lain, for he might conſent to them in ſome other Matter.

(e) You was partaker with the Rebels in the North; not actionable. per 1 Bulſt. 109. cited.

(f) He was Confederate with Campian the Jeſuit; not actionable. Cro. Eliz. 251. cited.

27. (g) If one Man ſays of another, He is a Maintainer of Thieves, and keepeth none but Thieves in his Houſe, and I will prove it, &c. an Action will not lie, for he might have and maintain Thieves in his Houſe and not know them to be ſuch. *Hill.* 42 *Eliz.* between *Ball* and *Bridges. Cro. Eliz.* 746. upon a Writ of Error in *Camera Scaccarii* adjudged, by all the Juſtices and Barons, and the Judgment below reverſed accordingly.

(g) Cro Eliz. 297. like Point, two Judges againſt one. Godb. 90. like Point cited. Ley and Peniſton like Point. Cro. Eliz. 52. cited. 1 Rol. Rep. 427. cited. 3 Bulſt. 262. cited. Cro. Jac. 268. cited. 4 Co. 13. a. vide.—Thou art a Maintainer of Thieves to ſteal my Maſter's Goods; actionable. Bennet and Tabram, Cro. Jac. 629. adjudged. Palm. 278. adjudged; the Words there being, Thou maintaineſt Thieves to rob my Maſter. And note, that in this Caſe in both Reports it appears there was an Averment that the Maſter had been rob'd.—He keeps a Company of Thieves and Traitors to do Miſchief; not actionable. Sir John Hollis and Briſcow. Cro. Jac. 58. adjudged by 3 Judges againſt 2 (theſe Words being ſpoke together with others that were held clearly not actionable.) Yelv. 64. adjudged, per totam Curiam.

28. (h) If one ſays of another certain ſcandalous *Welch* Words, in the Preſence of others, underſtanding the Language, and thereupon an Action is brought, and the Defendant found guilty, and upon Examination of Witneſſes, as to the Signification of the Words, ſome of them affirm, They are commonly taken for Stealing, which others deny; but all agree the proper Signification of the Words are, bearing away; the Plaintiff ſhall not have his Judgment. *Trin.* 15 *Jac.* between (i) *Gibbs* and *Jenkins. Hob.* 191. adjudged.

(h) Palm. 64. like Point arguend' in Caſe of Corniſh Words; but perhaps the Counſel might mean this Caſe.

(i) Hetl. 175. S. C. adjudged. Hut. 8. S. C. adjudged; becauſe it muſt be taken in mitiori ſenſu. Noy 19. S. C. adjudged, the Welch Words being, D'y Deyy D Congeſt.

29. (k) If one ſays of an Inn-keeper, He did harbour and lodge Cut-purſes and Rogues, and did receive ſtolen Goods, and there are yet ſome in his Houſe, no Action will lie, tho' the Plaintiff declares generally, that by reaſon of theſe Words he loſt his Gueſts, for he might lodge Cut-purſes and have ſtolen Goods in his Houſe, and yet know nothing thereof, and the rather being an Inn-keeper, whoſe Houſe is common to all Paſſengers. *Mich.* 17 *Jac. Clark*'s Caſe. 2 *Rol. Rep.* 136. adjudged; but *Mountague* Chief Juſtice ſaid, That if the Words had been, He doth uſe to harbour Cut-purſes, it had been otherways.

(k) Thou haſt hoiſtered (i. e. houſed) Thieves and ſtolen Goods. and the Thieves and the Goods were found in your Houſe, and the Thieves were had before a Juſtice, and committed by him to Priſon, and hanged, and if the Juſtice had not been your Friend you had been hanged; actionable. 1 Bulſt. 109. adjudged.——There is a Neſt of Thieves, and J. S. is Maſter of them, and he is a Thief himſelf; actionable. Dal. 9, 10. adjudged.

30. (l) If one ſays of a Woman, She hath married the Husband of another Woman, no Action will lie, for the firſt Wife might be dead, or beyond the Seas by the Space of 7 Years, and ſo the Caſe out of the Statute of 7 *Jac. Cap.* 11. and the Averment in the Declaration, that the Husband (being one of the Plaintiffs) had no other Wife, is immaterial, (m) for the Words muſt be conſidered as they were ſpoke before the Auditors. *Hill.* 23 *Car.* between *Eels* and his Wife againſt *Smith. All.* 37. adjudged. *Vide* the Caſe.

(l) 1 Rol. Abr. 76. Pl. 1. like Caſe.

(m) Winch 40. like Point, per Hobart.

31. If one Man ſays to another, You and your Crew brought the late King to his Death (*innuendo Car.* 1.) an Action does lie, for the Words

found in Scandal, and cannot be intended *in mitiori ſenſu*, viz. that he only attended the King to his Death. *Mich.* 13 *Car.* 2. between *Lewes* and *Roberts*. *Hard.* 203. adjudged.

32. If one Man ſays to another, Thou haſt ſtolen our Bees, they are under the old Woman's Hemp-Sack, and thou art a Thief; an Action will lie, and they ſhall be intended ſuch Bees in the Taking of which Felony may be committed. *Mich.* 13 *Car.* 2. between *Tibbs* and *Smith*. *Raym.* 33. adjudged *niſi* upon a Motion in Arreſt of Judgment after a Verdict for the Plaintiff.

(n) You execute falſe Warrants, not actionable, tho' ſpoke of a Bailiff, for he might not know them to be ſuch. Kinzy's Caſe. Cro. Eliz. 192. cited. 1 Leon. 336. cited.

33. If one Man ſays of another, (n) You are a Publiſher of Forgery, and Sue upon falſe Bonds, no Action will lie, for perhaps he might not know of the Forgery. *Mich.* 20 *Car.* 2. between *Twiſleton* and *Hobs.* 1 *Ven.* 3. adjudged, the Words laid in the Declaration being, You are a Forger of Bonds, and a Publiſher, *&c.* but as to the Word Forger, the Defendant was found Not Guilty.

34. If one Man ſays of another, He hath broke 3 or 4 of his Father's Ribs, of which he ſhortly after died, and I will complain to a Juſtice of Peace of him, he may be hanged for the Murther, altho' it was done 20 Years ſince, an Action will lie, for taking all the Words together, it cannot be otherways intended than of murderous Killing. *Paſch.* 23 *Car.* 2. between *Phillips* and *Kingſton*. 1 *Vent.* 117. adjudged.

(A) For Words.

In what Caſes it lies for the Words for a Collateral reſpect. In what Caſes where the Words are not Underſtood.

(a) Moor 182. Pl. 325. S. P. ſeems to have been adjudged.

1. (a) **If a Man ſpeaks ſcandalous Words of another, in a Language that the Auditors do not underſtand; no Action lies for them, becauſe they can be no Diſcredit to him when they are not underſtood.** Trin. 39 Eliz. B. R. **between** (b) Jones **and** Dawkes **agreed and adjudged.**

(b) Cro. Eliz. 496. S. C. adjudged. 1 Rol. Abr. 81. Pl. 14. S. C. but S. P. does not appear.

2. **As if a Man ſpeaks certain ſcandalous Words of me in Latin, in the Preſence of Men that do not underſtand Latin, no Action** upon the Caſe **lies, becauſe it is no Diſcredit to me.** Trin. 39 Eliz. B. R. be**tween** (c) Jones **and** Dawkes **agreed and adjudged,** (d) **tho' it was aver'd that the Auditors underſtood** Linguam Romanam, **for this might be Italian Which is now the Roman Language.**

(c) Cro. Eliz. 496. S. C. adjudged. 1 Rol. Abr. 81. Pl. 14. S. C. but S. P. does not appear. (d) It muſt be averred they underſtood Latin. 3 Mod. 71.

(e) Cro. Eliz. 865. S. P. adjudged.

3. (e) **So if one Man in Welch calls another Thief in the Preſence of ſuch who do not underſtand what is intended thereby** in Scaccario **adjudged, cited** (f) Trin. 39 Eliz. B. R. Hob. Rep. **Caſe** 351.

(f) Cro. Eliz. 496. cited accordingly.

(B) In what Cases it lies where the Words are Repugnant.

(*) Thou art a Thief, and haſt ſtole the Town Beam, innuendo the Town of W. actionable. 1 Brownl. 3. per Hut. Serjeant.—— Thou wert forſworn in Carpenters-Hall, and didſt rob the Hall, &c. actionable, for tho' properly ſpeaking, an Hall can't be rob'd; yet it is well known in common Parlance what is intended thereby. Cro. Eliz. 788. adjudged. (a) Stamp and White and his Wife, S. P. con. Cro. Jac. 600. adjudged. Palm. 358. adjudged. Cro. Eliz. 279. S. P. adjudged con. Cro. Car. 52. S. P. adjudged con. and affirm'd upon Error in Cam' Scacc' for her Meaning is apparent. 1 Rol. Abr. 111. Pl. 4. like Point con. 35. Pl. 10. like Point.

1. (a) **If a Feme covert ſays to another,** Thou haſt ſtolen my Goods, **upon which he to whom they are ſpoken, demands what Goods, and the Woman anſwers,** my Plow-ſtuff. **And in the Declaration the Plaintiff avers** innuendo **the Plow-ſtuff of the Husband of the Wife; no Action lies, for a Feme covert cannot have Goods.** Paſch. 11 Jac. B. R.

(b) 1 Jon. 141. S.P. per Jones. Poph. 187. like Point, per Jones. Snag and Gee. S. P. 4 Co. 16 a. adjudged. 3 Bulſt. 167. cited. Litl. Rep. 310. S. P. per Cur'.

2. (b) **If one Man ſays to another,** Thou haſt murdered J. S. **no Action lies, if it be aver'd that** J. S. **is yet in full Life.** Hill. 11 Jac. B. R. Pett's **Caſe adjudged.**

(c) Cro. Jac. 101, 102 vide a Caſe where the Words were held to be falſe Engliſh, and yet actionable. (d) 1 Rol. Rep. 286. S. C. adjudged.

3. **If one Man ſays to another,** Thou haſt ſtolen (c) me (**innuendo Defendant'**) an Hundred of Slate; **no Action lies, becauſe the** Innuendo **makes the Words repugnant, for he could not ſteal the Defendant, as it muſt be taken by the Words.** Hill. 13 Jac. B. R. **between** (d) White **and** Brough **adjudged.**

Fol. 75.

4. **If a Man in an** Action upon the Caſe, **declares that the Defendant ſaid of him,** He is a baſe Gentleman, and had three or four Children by A. S. his Maid Servant (**innuendo quandam A. D.** at the ſpeaking of the Words, the Wife of J. D.) and after killed them, or cauſed them to be killed. Ubi revera **he was never guilty of any Incontinency with the ſaid** A. S. **nor with any other, nor of any ſuch Felony or Murder; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that in as much as he had aver'd that he was never guilty of any Incontinency with** A. S. **this is all one as if he had aver'd that he never had any Child by** A. S. **and** (e) **if it had been ſo aver'd no Action would lie; for then it would appear to the Court, that there was no ſuch in** rerum natura **as is ſuppoſed to have been killed, as if one Man ſays to another, that he killed** J. S. **and avers that there never was any ſuch as** J. S. **no Action lies. But it was adjudged for the Plaintiff, becauſe the Averment is not Special that he had not any Child by** A. S. **but generally that he was not Incontinent with her.** Mich. 2 Car. Regis **between** (f) Kemer **and** Hallet **adjudged, this being moved in Arreſt of Judgment.**

(e) If J. S. will juſtify his Anſwer which he made to a Bill preferr'd by J.N. I will prove him perjured; actionable, and there needs no Averment that he did juſtify his Anſwer, for if ſo, then was he not perjur'd. Latch. 219. adjudged. 1 Rol. Abr. 78. Pl. 2. (f) 1 Jon. 141. S. C. adjudged. Poph. 187. S. C. adjudged. Latch 159. S. C. adjudged, but S. P. does not appear. Cart. 55. S. C. cited, but S. P. does not appear, but vide Cart. 55. like Point; but there Judgment againſt the Plaintiff, becauſe the Words were not actionable.

(a) Stile 424, 425. vide.

5. (a) If one ſays of a Widow, having Children living, that ſhe had by her Husband, She is a Whore, and her Children (*innuendo* the ſaid Children are *J. S*'s Baſtards, *per quod* ſhe loſes her Marriage with *J. N.* an Action will lie, for tho' being born in Wedlock (b) they cannot be Baſtards properly ſpeaking, yet in Reputation they may be ſo. *Mich.* 9 *Car.* between *Dorothy Brian* and *Cookman.* *Cro Car.* 322. adjudged.

(b) He forged my Father's Will; not actionable, becauſe if forged 'tis not his Will, per Winch 39. cited, and Winch 40. agreed per Hob. Palm. 441. S. P. cited & dubitatur.

(e) In

(C) In what Caſes it lies, in reſpect of the Uncertainty of the Perſon of whom they were ſpoken.

1. If a Man ſays to the Servant of J. S. I am a true Subject, and thou ſerveſt no true Subject, J. S. may have an Action between Sir (a) William Walgrave and Ayer adjudged.

(a) 1 Rol. Abr. 43. Pl. 6. S. C. Margine. 1 Leon. 335. 6. S. C. and S. P. appears. Cro. Eliz. 191. S. C. adjudged. 1 Rol. Rep. 444. S. C. cited. Palm. 69. S. C. cited.

2. If one Man ſays to another, That he ſaid there is no Prince in England, an Action lies, tho' there are ſeveral Princes in England, as Earls, Marqueſſes and Dukes; for when a Diſcourſe is of a Prince ſimply, this is intended the King's eldeſt Son. My Reports, 14 Jac. between (b) Lewes and Walter adjudged.

(b) Cro. Jac. 406. 413. S.C. and S. P. appears. 3 Bulſt. 225. S. C. and S. P. by 3 Judges againſt 1. 1 Rol. Rep. 444. S. C. and S. P. by 3 Judges againſt 1. 1 Rol. Abr. 69. Pl. 36.

3. If one Man ſays of another, My Maſter Mr. Browne, hath rob'd me of all my Goods; an Action lies for Browne his Maſter, for his Perſon is plainly deſcribed by his Sir-name, and by the Name of Maſter, which is a Relative. Mich. 15 Jac. B. R. between (c) Browne and Load adjudged, this being moved in Arreſt of Judgment.

(c) Cro. Jac. 443. S. C. adjudged. 1 Rol. Abr. 79. Pl. 2. S. C.

4. If A. ſays to B. one of us two is perjured, and B. ſays to A. it is not I, and A. ſays again, I am ſure it is not I, B. ſhall have an Action for theſe Words, for the ſubſequent Words apparently ſhew that he intended him. Dubitatur Paſch. 42 Eliz. B. R. between Coe and Chambers.

5. If there be a Bill exhibited in Camera Scaccarii againſt ſix for a Conſpiracy, and upon a Diſcourſe thereof J. S. ſaid, (d) Theſe Defendants are thoſe that help'd to Murder W. N. every one of theſe ſix Defendants may have an Action upon the Caſe as well as if they had been ſpecially named. Hobart's Reports, between (e) Foxcroft and Lacy adjudged.

(d) The Defendant diſcourſing of J. Simmes, and W. Simmes, ſaid, The Simmes's make Half-Crowns, &c. admit the Words actionable, the Perſon is uncertain, per Godb. 391. adjudged, vide 1 Rol. Abr. 80. Pl. 9. (e) 1 Rol. Abr. 75. Pl. 4. S. C. 82. Pl. 17. S. C. Hob. 89. S. C. adjudged.

Fol. 76.

(D) For what Words it lies, in reſpect of the Uncertainty of the Thing.

1. If one Man ſays to another, Thou haſt two Wives, and I will hang thee, or do the beſt I can to hang thee; an Action lies for theſe Words, tho' perhaps he might have two Wives before the Statute, which makes this Felony, or otherways perhaps one of might have two Wives, and yet it is not Felony within the Statute, as not knowing of the firſt Wife's Life, yet becauſe he ſaid he would hang him for it, and the Words were ſpoken falſly and maliciouſly, it ſhall be interpreted that he intends this to be Felony within the Statute, and the Words altogether import as much, and ſo found in Slander. Mich. 10 Car. B. R. between Williams and Tedbury adjudged,

judged, per Curiam, after a Verdict for the Plaintiff, because the Words were ſpoken in Anger. Intratur Hill. 9 Car. Rot. 1160.

2. (a) In an Action upon the Caſe, If the Plaintiff declares that he was a Dr. of Divinity and Parſon of B. and there being a Diſcourſe of the Plaintiff, the Defendant ſaid theſe Words of the Plaintiff, He is yonder in the Church, and is robbing the Church, & ad tunc & ibidem, ſaid of the Plaintiff theſe other Words, Dr. Sibthorp (innuendo the Plaintiff) hath rob'd the Church (innuendo the Church of B. aforeſaid) After a Verdict for the Plaintiff upon Not guilty pleaded, the Plaintiff ſhall have Judgment, tho' it was objected that the Word Church had a double Signification, Scilicet, the Church Material and the Church Catholick; (b) and it is uſual for Divines to ſay that Men rob the Church, who pay not their Dues to the Pariſh, or that keep Appropriations in their Hands, and it may be that he intends that he keeps ſome Things, Goods or Land that belongs to the Church, yet the Action lies, for the Words cannot carry any ſuch Senſe, in as much as he ſays he is ponder in the Church, by which it appears that he intends the Material Church, and the Statute of 23 H. 8. that takes away Clergy from them that rob Churches, has the ſame Words that are here, without any Deſcription what Church is intended. Mich. 11 Car. B. R. between (c) Dr. Sibthorp and Robinſon adjudged, per Curiam, this being moved in Arreſt of Judgment. Intratur Trin. 10 Car. Rot. 1398.

(a) Cro. Jac. 153, 4. like Point adjudged.

(b) Thou art a Sacrilegious Perſon, and committeſt Sacrilege every Day; not actionable, for it ſhall not be intended of robbing of Churches, but rather of a Detention of Tithes, and a Man ſhall not be preſumed to commit Felony every Day. Gaudy and Smith. 1 Sid. 376. adjudged. 1 Lev. 250. adjudged.

(c) Cro. Car. 417. S. C. adjudged. 1 Jon. 366. S. C. adjudged.

3. If A. ſays of B. I have found out B. now, I have found Records which he hath forged, and he ſhall dearly pay for it; I have catched the Forgerer. An Action lies for theſe Words, tho' it does not appear that he intends a Record in a Court of Record, but it may be that he intends a Copyhold Record, or other Thing which is not a true Record, but only a Record in Appellation, for it ſhall be intended according to the Words a true Record. Mich. 13 Car. B. R. between (d) Garbut and Bell adjudged, per Curiam, this being moved in Arreſt of Judgment.

(d) 1 Rol. Abr. 65. Pl. 1.

4. If A. ſays theſe Words, That perjured Rogue and Villain Potter, without more Words preceding or following; yet, Jo. Potter ſhall have an Action for theſe Words, alledging a Diſcourſe of him at the ſpeaking of the Words. Hill. 11 Car. B. between (e) Potter and Loveday adjudged, this being moved in Arreſt. But a Writ of Error was brought.

(e) 1 Rol. Abr. 84. Pl. 3. S. C.

5. (f) If one Man ſays to another, Thou art as cozening a Fellow as any is in the Country, the laſt Time thou was Under-Sheriff, as now thou art, thou didſt ſerve an Execution for a Neighbour of mine, and didſt keep the Money in thy Hands, no Action lies, for it is uncertain for what Time he kept the Money; and perhaps he kept it only till the Return of the Writ, or by the Conſent of the Plaintiff. *Mich.* 43 *Eliz.* between *Geeve* and *Copſhil.* *Cro. Eliz.* 854. adjudged.

(f) A Writ is delivered to A. to deliver to the Sheriff of N. to be executed, which A. neglecting to deliver, B. the late Sheriff of N. ſends his Man for it, and orders him to deliver it; and thereupon A. ſays, Your Maſter muſt not think to have ſuch huddling and ſhuffling of Matters this Year as he had the laſt Year; not actionable. Cro. Eliz. 848. adjudged.

Fol. 77.

(E) For what Words it lies without any Averment.

1. If one Man ſays to another, Waterman, and thou didſt kill thy Maſter's Cook (innuendo J. S. Servant to J. D.) and thou waſt never tried for it, and I will bring thee to Trial for thy Life; an Action lies for theſe Words, tho' there was no Diſcourſe before of any Man that was killed, and without alledging that he was his Maſter, or that he had any Cook that was killed, becauſe it is a great Slander to ſay that he killed his Maſter's Cook, tho' he has not ſhewn who was his Maſter's Cook, for he intends thereby, that he had killed a certain Man, and it ſhall be intended that he had a Maſter, and that his Maſter had a Cook, and that he was killed; till it is found or ſhewn to the contrary by the Defendant, in as much as he by the Words has affirmed it. Paſch. 15 Jac. B. R. between (a) Cooper and Smith adjudged: But Houghton was againſt it, becauſe it ſeemed to him that the Innuendo had not made it ill, becauſe this is innuendo J. S. the Servant of J. D. where the Words were of a Cook, and he has aver'd him to be his Servant which is another Perſon, as if a Man ſaid that he killed J. S. and the Plaintiff in the Action ſays innuendo J. N. this deſtroys the Action. Note, that Cook and Servant may ſtand inſimul, and ſo the Court ſaid.

(a) Poph. 128. S. C. adjudged. Cro. Jac. 423. S. C. adjudged. Bridg. 60. S. C. adjudged.

2. If a Man ſays to another, That he has killed the Wife of J. S. or one of the Sons of J. S. or that he has ſtole his Horſe; an Action lies without any Averment, that J. S. had any Wife (b) or Son, or that (c) he had any Horſe; for this ſhall be intended till the contrary is ſhewn. Paſch. 15 Jac. B. R. in (d) Cooper and Smith's Caſe agreed, per Curiam.

(b) Thou art a Thief, and haſt rob'd my Son; actionable, tho' no Averment that he had a Son, for perhaps the Auditors knew not whether he had or no. Noy 55. adjudged. —Thou haſt ſtole my Maſter's Tobacco; not actionable, without any Averment that he had Tobacco, per Litl. Rep. 166. cited.—He has no more Law than C's Bull; actionable, tho' not aver'd that C. had any Bull. 1 Sid. 327. adjudged. (c) Bridg. 60. S. C. and S. P. ſaid. (d) Poph. 128. S. C. but S. P. does not appear. Cro. Jac. 423. S. C. but S. P. does not appear.

3. If one Man ſays to another, Thou haſt killed a Man; an Action lies, tho' he did not deſign any particular Man, for this is a great Slander. Paſch. 15 Jac. B. R. in (e) Cooper and Smith's Caſe agreed, per Curiam.

(e) Poph. 128. S. C. but S. P. does not appear. Bridg. 60. S. C. but S. P. does not appear. Cro. Jac. 423. S. C. but S. P. does not appear.

4. If a Man ſays of J. S. He hath killed his Cook; and the ſaid J. S. or others for him did give 12 Quarts of Wine to Sheldon's Wife, that ſhe ſhould not certify her Knowledge therein; J. S. ſhall have an Action without any Averment that he had any Cook, (f) or that the Cook died, in as much as his Life does not appear within the Record. Paſch. 5 Jac. B. R. between Sir Thomas Holt and Taylor adjudged.

(f) Cro. Eliz. 824. S. P. adjudged. Cro. Jac. 331. S. P. adjudged; but for want of ſuch Averment revers'd in Cam' Scacc'. Stil. 66. S. C. cited.

5. (g) If one Man ſays to another, Thou didſt kneel upon the Body of J. S. ſo as the Blood guſhed out of divers Parts of his Body, whereby he died; an Action lies, without any Averment of the Death of J. S. in as much as the Defendant himſelf has ſaid he is dead. Mich. 10 Jac. B. R. between (h) Ellis and Knight adjudged.

(g) 1 Vent. 117. like Caſe, and S. P. adjudged, and there Twiſden ſaid the latter Opinions have all been, that ſuch Averment is not neceſſary, and that the Action lies, unleſs it appears upon the Record that the Party is alive. Sid. 53. S. P. per Twiſden, who there ſaid the latter Opinions had been accordingly. (h) Billing and Knight. 2 Bulſt. 42. S. C. adjudged.

6. (i) If

6. (i) **If one Man says to another,** Thou hast poisoned **Smith,** and it shall cost me 100 l. but I will hang thee; **no Action lies for these Words without an Averment of the Death** of Smith. Pasch. 11 Jac. **between** (k) Jacob **and** Miles **adjudged. The same Case,** Hobart's Reports 8. **and Case** 351.

(i) 1 Sid. 227. S. P. per 2 Judges Con. (k) Hob. 6. S. C. adjudged upon Error, and the first Judgment revers'd for want thereof. Cro. Jac. 343. S. C. adjudged upon Error, and the first Judgment revers'd. 1 Rol. Abr. 83. Pl. 4. S. C.

7. **If one Man says of another,** I will call him in question for poisoning his own Aunt, and I make no question but to prove he hath poisoned his Aunt; **an** Action upon the Case lies, **without an Averment of the Death of his Aunt, at the Time of the Speaking of the Words, for it shall be intended that she is dead, till it be shewn to the contrary, in as much as her Life does not appear Within the Record.** Trin. 39 Eliz. B. **between** (l) Web **and** Poor **adjudged.** (m) **But there it is said by** (n) Fenner, **that the** (o) **Poisoning without Death gives a Cause of Action.**

(l) Noy 63. S. C. adjudged. Cro. Eliz. 569. S. C. adjudged, and the Exception there was, because it was not averr'd that his Aunt was poisoned, **sed non allocat'** for his Credit was impeached, tho' the Fact was not done. 1 Rol. Abr. 49. Pl. 8. S. C. 71. Pl. 3. S. C. (m) 2 Bulst. 42. S. P. per **Flemming,** Chief Justice. (n) Noy 63. S. P. per **Curiam,** seems to be admitted. (o) He hath bewitched my Child and was the Death of my Child; actionable, tho' no Averment the Child was dead, for the Bewitching is Felony, tho' the Child is not dead. Stile 65, 66. adjudged.

8. **If one Man says to another,** Thou hast committed Burglary in breaking his House and stealing his Goods; **no Action lies, because it does not appear Whose House and Goods he means.** Trin. 44 Eliz. B. R. **between** (p) Brown **and** St. John **adjudged.**

Fol. 78.

(p) 1 Rol. Abr. 71. Pl. 59. S. C. Cro. Eliz. 889. S. C. adjudged.

9. **If a Man says of the Gaoler of a Country Prison,** He doth let go Prisoners, and is a Partaker with them; and he had never a Sheet on his Bed until he let Prisoners go out of the Gaol to steal them; **no Action lies for these Words, without an Averment that he had** (q) **some Sheets upon his Bed.** Mich. 42, 43 Eliz. B. R. (r) **Heath's Case adjudged.**

(q) My little Boy in my House is A. D's Bastard; I wonder you will keep Company with her per quod, &c. not actionable without an Averment that there was a little Boy, &c. per Litl. Rep. 166. adjudged.—He is a Thief, and hath stole more Goods than I am worth; actionable, without any Averment what he is worth, for the first Words of themselves are actionable. 2 Bulst. 141, 142. adjudged. (r) Cro. Eliz. 783. S. C. adjudged. 2 Bulst. 141. S. C. cited.

10. **If a Man says** of J. S. He did murder **Hodg Horwood** (**quendam Rogerum Horwood innuendo**) the Blood was tract to his Gate, and laid him upon his Hen-roost; **an Action lies for these Words, tho' he names him** Hodg Horwood, **and tho' no Communication is laid to have been of him, and** (s) **tho' no Averment is made of the Death** of Hodg Horwood, **and tho' he says** (quendam Rogerum Horwood innuendo) **which implies in a manner that he is living; for the Words strongly imply that he is dead.** Pasch. 11 Car. B. R. **between** Willet **and** Sands **adjudged,** per Curiam, **this being moved in Arrest of Judgment.**

(s) Co. Ent. 23. n. 21. like Point.

11. (a) If one Man says of another, He is as very a Thief as any in *Warwick* Gaol, no Action lies for these Words, without an Averment that there was a Thief there. *Hill.* 33 *Eliz.* between (b) *Lacy* and *Reynolds. Cro. Eliz.* 214. *per Curiam.*

(a) Noy 116. like Point cited. (b) Yelv. 90. S. C. cited.

12. (c) If one Man says of another, There was never a Robbery committed within 40 Miles of *Wellingborough,* but thou hadst thy Part in it, no Action will lie without an Averment, that there was a Robbery committed within 40 Miles, *&c. Mich.* 35, & 36 *Eliz.* between (d) *Ball* and *Roane. Cro. Eliz.* 308. adjudged.

Hut. 72. S. C. cited. (c) **If ever Man was perjured, W. was;** not actionable, without an Averment that a Man was perjured, for the Law will not presume such Wickedness, Noy 116. per Tanfield cæteris absentibus. (d) Cro. Eliz. 342. S. C. adjudged, the Words there being, There was never a Cut-purse within 20 Miles of W. &c. 2 Rol. Rep. 92. S. C. cited.

13. (e) If

13. (e) If one Man ſays of another, Thou waſt indicted for Felony at a Seſſions holden at no Action will lie (f) without an Averment that he was not indicted. *Paſch.* 16 *Jac.* (g) *Bland*'s Caſe. *Hob. fol.* 219. adjudged upon a Motion in Arreſt of Judgment after a Verdict for the Plaintiff.

(e) 1 Sid. 227. like Point the Court divided, and no Judgment.

(f) The Plaintiff declares that a tempore nativitatis hucuſq; he had lived abſq; aliquo crimine doli furti, &c. and that the Defendant ſaid of him, hæc falſa, &c. verba, viz. Thou didſt ſteal a Gown, but does not expreſly aver he did not ſteal a Gown. Co. Ent. 22. n. 20.—Thou art the diſhoneſteſt Attorney in England, &c. and no Averment that there were any, &c. Cro. Car. 40. no Judgment for the Parties agreed. (g) Brownl. 13. S. C. adjudged. Hut. 18. S. C. adjudged, and S. P. appears.

14. If one Man ſays of another, Thou art as arrant a Thief as any in *England*, for thou haſt broken up *J. S*'s Cheſt, and taken 40 l. away, no Action will lie, without an Averment that there is a Thief in *England*, and the breaking the Cheſt and taking the Money, might be a Treſpaſs only. *Trin.* 22 *Jac.* between (h) *Hoſter* and *Browning*. *Cro. Jac.* 687. adjudged.

(h) Potter and Brown. Hut. 72. S. C. adjudged, the Words there being, He is as arrant, &c. and he broke the Plummer's Cheſt with other Mens Tools which ſtood in my Lord S's Houſe, and took Money out of it. Winch. 70. S. C. held upon the firſt Motion contra by 3 Judges; and that this Caſe differ'd from thoſe where the Words refer'd to a particular Place or Felony; but Winch 89. adjudged per 3 Judges. Cro. Car. 40. S. C. cited and ſaid that no Judgment was therein given.

15. If the Plaintiff declares, that upon a Rumour that a Baſtard Child was drowned, the Defendant ſaid he verily believed it to be the Plaintiff's (admitting the Words actionable) there needs no Averment that a Baſtard Child was drowned, for that is agreed by the Conference. *Trin.* 1650. between *Winter* and *Barnard*. *Stile* 221. adjudged. Note, this Caſe was adjudged during the Act againſt Adultery, *&c.* at what Time ſuch Words were held actionable.

16. If one Man ſays of another, As ſure as God governs the World, and the King this Kingdom, ſo ſure hath *J. S.* committed Treaſon, *&c.* an Action lies without any Averment, that God governs, *&c.* for it is apparent and therefore wants no Averment. *Mich.* 13 *Car.* 2. In the Caſe of *Day* and *Clinch*. 1 *Sid.* 53. cited *per Twiſden* to have been adjudged.

(F) For what Words it lies, in reſpect of the Uncertainty of the Thing without an Averment.

1. If a Man ſays to J. S. Thou uſeſt me now as thy Wife did when ſhe did ſteal my Cuſhion; no Action lies for J. S. and his Wife, for the Slander to the Wife without an Averment; for it is not directly ſaid that the Wife had ſtole his Cuſhion. Mich. 10 Jac. B. R. between (a) Ratcliff and Michel adjudged, econtra (Scilicet that the Action lies,) but this was reverſed, per Curiam in a Writ of Error in Camera Scaccarii for the ſame Cauſe.

(a) Cro. Jac. 331. S. C. reverſed, becauſe not averr'd that any Cuſhion was ſtole. Godb. 239. S. C. cited, and there only ſaid the Words were not actionable. Godb. 242. S. C. cited, and only ſaid the Words were adjudged not actionable. All. 61. ſeems to be S. C. cited, and ſaid the Words were adjudged actionable.

2. If a Man ſays of J. S. having a Diſcourſe of his Anſwer in Chancery, If he will juſtify his Anſwer in Chancery to be true, I will prove him perjured; an Action lies without any Averment, that he juſtified his Anſwer to be true, for this ſhall be intended, and the Slander is apparent. Mich. 3 Car. B. R. between (b) Frier and Corbolt adjudged, per Curiam, the which Intratur Hill. 2 Car. Rot. But there the Plaintiff ſhewed how he juſtified his Anſwer in a ſecond Anſwer in Chancery; but this was before the Speaking of the Words which was not ſufficient, and ſo taken as no Averment.

(b) Latch 219. S. C. adjudged. 1 Rol. Abr. 75. Pl. 4. Margine.

3. In

3. In an Action upon the Case by A. against B. If the Plaintiff declares, that one J. S. prefer'd a Bill in Chancery against him, shewing the Effect of the Bill, to which he made a true Answer upon his Oath according to the Course of the Court; and that after he himself and one C. discoursed insimul, and then came into the same Place the said B. and one D. upon which the Plaintiff said to C. I will not talk any more with you now, your two Affidavit Men are come; upon which, B. the Defendant said of the Plaintiff, A. need not say so, for he was absolutely forsworn in his Answer to J. Stiles's Bill, innuendo the said Bill and Answer; tho' there was no Discourse of the Plaintiff before, yet the Action lies, for it shall be intended this Bill in Chancery, if it be not shewn of the other Part, that there was another Bill in any other Court prefer'd by the said J. S. Mich. 9 Car. B. R. between Sir (c) Richard Strode and Strode Allen adjudged, this being moved in Arrest of Judgment. (c) 1 Rol. Abr. 41. Pl. 25. S. C. Cro. Car. 321. S. C. adjudged.

(G) For what Words it lies, in respect of the Uncertainty of the Thing with an Averment.

Fol. 79.

1. If a Man says to a Feme covert, Thou bold Callobine, Bastard-bearing Whore, thou didst throw thy Bastard into the Dock at White-chapel; no Action lies for these Words, with an Averment, that before the Speaking thereof a Child was found dead in the Dock of J. S. at White-chapel, for it does not appear that he intended this Child. Hill. 10 Car. B. R. between (a) Collobine and his Wife Plaintiffs, against Vinor adjudged, this being moved in Arrest of Judgment. (a) 1 Jon. 358. S. C. adjudged. 1 Rol. Abr. 36. Pl. 11. S. C.

2. (b) In an Action upon the Case, If the Plaintiff declares, that whereas there was a Discourse of the Plaintiff touching a Suit in Chancery, in which the now Plaintiff was Defendant, and J. S. Plaintiff, and that Carlton and Pett were examined in the said Suit, the Defendant said these Words of the Plaintiff, He hath suborned Carlton and Pett to forswear themselves, and I will have them in the Star-chamber for it, and make them to spend 100 l. yet no Action lies upon this Declaration, (c) because it is not aver'd that Carlton and Pett were examined upon their Oath in the said Cause, nor whether they were examined upon any Matter then in Issue between them. Mich. 11 Car. B. R. between Bull and Knowles, per Curiam, in Arrest of Judgment staid. (b) 1 Rol. Abr. 51. Pl. 9. like Case. (c) March 7. like Point, per Curiam.

3. In an Action upon the Case, If the Plaintiff declares, that the Defendant was Plaintiff in an Action against S. in the Court of Bathe in the Guild-Hall there, and that the Defendant there pleaded to Issue, and it was there tried, and the now Plaintiff at the Trial of the said Plea was produced as a Witness on the Part of the said S. and he there in the said Court before the Judges and Jurors for the Trial thereof, in due Form of Law impanelled and sworn (being examined upon Oath) did depose the Truth according to his Knowledge of and concerning the said Issue, yet the Defendant having a Communication with A. S. concerning the said Plea and Trial, said these Words of the Plaintiff, Your Brother Delamor took a false Oath (innuendo the said Oath) against me, I would not have taken such an Oath for all the World. This is no good Averment to make the Words actionable, because it is not aver'd that the Issue was joined, nor that there was any Trial, but only he says, that at the Trial he was sworn, &c. which is not sufficient. Hill. 11 Car. B. R. between (d) Delamor and Heskins adjudged, for this Cause among others that the Action does not lie. Trin. 11 Car. Rot. 900. (d) 1 Rol. Abr. 84. Pl. 2. S. C.

(H) Where the Words are Uncertain of whom they were ſpoke, what ſhall be a good Averment that they were ſpoke of him.

1. Where the Words in themſelves are certain, ſo that it may be intended, that the Speaker intended a Perſon certain, there they may be made actionable by an Averment. Mich. 3 Jac. B. R. in (a) Wiſeman's Caſe by Tanfield.

(a) Cro. Jac. 107. S.C. and S.P. ſaid by Tanfield accordingly.

2. If one Man ſays to another, My Maſter Mr. Browne hath rob'd me of all my Goods, Browne may have an Action againſt him, averring that he ſpoke the Words of him, (b) without averring that he was his Maſter, (c) for the Averment that he ſpoke them of him, implies as much (and peradventure (*) it ſhall not be intended there are more Brownes). Mich. 15 Jac. B. R. between (d) Browne and Lane adjudged, this being moved in Arreſt of Judgment.

* Fol. 80.

(b) 1 Brownl. 10. like Caſe adjudged Con. But note, it does not there appear whether there was an Averment that the Words were ſpoke of the Plaintiff. (c) 1 Sid. 52. like Point adjudged. (d) 1 Rol. Abr. 75. Pl. 3. S. C. Cro. Jac. 443. S. C. adjudged.

3. (e) If a Man ſays to J. S. Go tell thy (f) Landlord Hendy he is a Thief, for he ſtole John Dier's Purſe; an Action lies for Hendy againſt him, averring that the Words were ſpoke of him to the ſaid J. S. without averring that he is Landlord to J. S. for he is certainly enough deſcribed by the Word Landlord, and he avers that they were ſpoken of him. Mich. 10 Jac. B. R. between (g) Hendy and adjudged.

(e) 1 Rol. Abr. 84. Pl. 1. like Point Con.

(f) But Q. If there is not a Diverſity where one ſays, Your Landlord (without a Sirname) is, &c. and where your Landlord L. is, &c. yet in the firſt Caſe an Action will lie, if the Plaintiff avers that he to whom the Words were ſpoke has no other Landlord. All. 32. (g) 2 Bulſt. 82. S. C. cited. All. 32. S. C. cited.

4. (h) If a Man ſays to A. Thy Husband and his Maſter have ſtolen my Wood; the Maſter ſhall not have an Action, averring only that he ſaid the Words of him, without an Averment that he was the Maſter of the Husband of A. Trin. 11 Jac. B. R. between (i) Liford and Stamp, per Curiam.

(h) My Maſter was not content, &c. and the Plaintiff declares, That the Defendant ſpoke theſe Words to defame him, and does not alledge that the Words were ſpoke of him, or that he was his Maſter. Bray and Andrews, Moor 63. Pl. 174. adjudged for the Defendant, per totam Curiam. Dal. 66. adjudged, per tot' Curiam, vide. (i) 1 Bulſt. 81. S. C. adjudged. 1 Rol. Abr. 70. Pl. 48. S. C. but S. P. does not appear.

5. If a Man ſays where is this Baker, He hath perjured himſelf, &c. J. S. who is a Baker may have an Action againſt him, averring only that he ſaid the Words of him, naming himſelf Baker in the Declaration, tho' he does not alledge that there was any Diſcourſe of him before, for his Perſon is ſufficiently deſcribed. Trin. 13 Jac. B. R. (k) Scory's Caſe.

(k) 1 Rol. Rep. 227. S. C. adjudged per 2 Judges.

6. If a Man ſays, My Brother is perjured, J. S. the Brother of him that ſpoke the Words, ſhall have an Action againſt him, averring that he ſpoke the Words of him being his natural Brother, without any Averment that he had not more Brothers, for it may be well intended that they were ſpoken of a Perſon certain. Mich. 3 Jac. B. R. between (l) Wiſeman and Wiſeman adjudged, this being moved in Arreſt of Judgment.

(l) Cro. Jac. 107. S. C. adjudged.

7. (m) If a Man ſays of J. S. He, &c. and after J. S. brings an Action for theſe Words, and the Declaration is, that the Defendant, dixit de Querente he, &c. this is ſufficient without an Allegation, that there was any Diſcourſe of him before. Paſch. 11 Jac. B. between

(m) Cro. Eliz. 861. S. P. adjudged per tot' Curiam. Cro. Jac. 240. S. P. adjudged and affirmed upon Error. 231. S. P. adjudged. Winch 102. S. P. dubitatur. Hern's Pleader 212. and Rob. Ent. ſuch a Declaration.

Jacob and Sterling, per Curiam. Mich. 21 Jac. B. R. between (a) Smith and Ward adjudged, and ſo the ſame Term it was there adjudged, between Furnſal and Cotterel after a Verdict for the Plaintiff.

(a) Cro. Jac. 673. S. C. adjudged. Raym. 86, 7. S. C. cited, and there ſaid by Jones, that the Judgments ſince have been accordingly Sid. 52. S. C. cited.

8. (b) In an Action upon the Caſe, If the Plaintiff declares, that the Defendant ſaid cuidam Mar' P. Matri querentis your Son is a Thief, the Plaintiff ſhall have an Action without (c) alledging any Communication of the Plaintiff, (d) with an (e) Averment that the ſaid Mar' P. had no more Sons, (f) for this is a ſufficient Averment that he was the Son of the ſaid Mar' P. and a Plurality of Sons ſhall not be intended. (g) Mich. 23 Car. B. R. adjudged after a Verdict for the Plaintiff. Intratur Trin. 23 Car. Rot. 1052.

(b) Stile 150. S. P. adjudged, but the Colloquium there laid was given as the Reaſon per Curiam. (c) This Word is wanting in the Original. (d) Q. If this ought not to be without, &c. for ſo it appears. All. 32. (e) Diverſity where ſaid, Thy Son is, &c. and where thy Father or thy Husband is, &c. for in the laſt Caſe there can be but one, and therefore ſuch a Declaration is well enough. Cro. Jac. 444. agreed per Curiam 635. agreed per Curiam, 2 Bulſt. 249. per Dod', and Judgment accordingly. Palm. 283. arguend' and Judgment according. (f) Cro. Eliz. 343. like Point adjudged. (g) Pierſon and Dawſon, All. 32. S. C. adjudged. Stile 46. S. C. adjudged; the Words being, Your Son William ſtole, &c.

9. If a Man ſays, The (*) Boxes are Traitors, for they have clipped Money; and it is no Matter if they be rob'd, for they can get it again with Clipping; and who ſhould do it but Edward Boxe; no Action lies for John Boxe and Edward Boxe, for theſe Words, with an Averment that the Words were ſpoke of them; (h) for without a Communication precedent, it cannot appear that he intends them, for there may be ſeveral Boxes beſides them, and the laſt Words are but by way of Interrogation. Paſch. 44 Eliz. B. R. adjudged.

(*) That murderous Knave S. lay in wait to Murder me, and one T. S. brought an Action and alledged the Words to be ſpoke of him, and had Judgment. Cro. Jac. 108. cited Hern's Pleader 110 vide. H. 222. vide. (h) Godb. 391. like Caſe where there was a precedent Communication, and yet adjudged no Action lay. 1 Rol. Abr. 75. Pl. 5. vide Margine.

10. If a Man ſays, He that goeth before there is Perjured, and upon this J. S. brings an Action upon the Caſe, alledging that there Was a Diſcourſe of the Plaintiff, between the Defendant and one J. N. and upon this the Defendant ſaid theſe Words, and does not alledge that he ſaid the Words of the Plaintiff, nor avers that the Plaintiff Was then going before. Mich. 8 Car. B. R. between Aiſh and Geriſh, per Curiam, this being moved in Arreſt of (*) Judgment, and the Poſtea accordingly ſtaid, and after the ſame Term Judgment Was given againſt the Plaintiff.

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But (h) in the ſaid Caſe if the Plaintiff declares, Quod Defendens colloquium habens cum J. N. de & concermente quærentem adtunc & ibidem preſentem & ante præfatum J. N. ſolum ad tunc euntem Anglicem (i) before the ſaid J. N. then only going, ſaid theſe Words of the Plaintiff, He (querentem innuendo) that goeth before thee (prædictum J. N.) innuendo is perjured; the Action lies upon this Declaration, becauſe it is ſaid that there was a Diſcourſe of the Plaintiff, and that he only was going before J. N. and that the Defendant ſpoke theſe Words of the Plaintiff. Mich. 9 Car. B. R. between Mercer Alias Aiſh Plaintiff, and Geriſh Defendant adjudged upon Demurrer, they being the ſame Parties between whom the firſt Action Was ſtaid. Intratur Trin. 9 Car. Rot. 523.

(h) This is Printed in the Original as here, and ſeems to have been deſigned for a diſtinct Placitum; but is there as here, without any Number.

(i) In the Original, here ſeems to be the Word going too much; and therefore it is here omitted.

11. If there be a Communication between A. and B. concerning Green the Plaintiff, and upon this B. ſays to A. Where is that Long-lockt, Shag-haired Murdering Rogue, upon which C. demands of him who he means thereby, and he anſwers Green of Forſet, innuendo the Plaintiff, this is a good Averment, that the Words were ſpoke of the Plaintiff, without other Averment that he ſpoke the Words of him in as much as it was alledged, there Was a Communication of the Plaintiff, and it ſhall not be intended that there were other Greens

(k) Cro. Car. 318. S. C. adudged, but S. P. does not appear. 1 Jon. 326. S. C. adjudged; but S. P. does not appear. 1 Rol. Abr. 47. Pl. 6. S. C.

Greens beſides the Plaintiff. Mich. 9 Car. B. R. between (k) Green and Lincoln adjudged, this being moved in Arreſt of Judgment. Intratur Hill. 8 Car. Rot. 1252.

(l) Cro. Jac. 107. S.C. and S.P. per Tanfield accordingly.

12. Where the Words in themſelves are uncertain, ſo that it cannot be intended that they were ſpoke of any Perſon certain, there they cannot be made actionable by any Averment. (l) Mich. 3 Jac. B. R. by Tanfield, As if a Man ſays one of my Brothers is, &c. no Action lies by an Averment. Mich. 3 Jac. B. R. per Tanfield.

(m) Cro. Eliz. 497. S. C. cited per Poph.

13. In an Action between A. and B. if three Men ſeverally before the Juſtices of Aſſize give Evidence to a Jury againſt A. and upon this A. ſays to them: There is one of you that is perjured in the giving of this Evidence, without naming any of them; no one of them can have an Action with an Averment that the Words were ſpoke of him between and (m) Sir J. Borne adjudged. Cited Trin. 39 Eliz. B. R.

(n) Cro. Eliz. 496. S. C. adjudged. 1 Rol. Abr. 74. Pl. 1, 2. S. C. but S. P. does not appear.

14. If a Man ſays my Enemy, &c. charging him with ſcandalous Matters, that will maintain an Action, yet no Action lies by any with an Averment that the Words were ſpoke of him, and by an innuendo, &c. becauſe the Words in themſelves are altogether uncertain. Trin. 39 Eliz. B. R. between (n) Jones and Dawkes adjudged; So in this Caſe the Action does not lie with an Averment alſo, that at the Time of the ſpeaking of the Words he himſelf was the Defendant's Enemy, and that then the Defendant had no other Enemy but the Plaintiff, for this is uncertain, and it cannot be known whether he hath another Enemy beſides the Plaintiff. Quære Trin. 39 Eliz. B. R.

15. In an Action upon the Caſe for Words againſt A. and Eliz. his Wife, if the Plaintiff declares that there was a Diſcourſe between Eliz. B. the Wife of the Plaintiff, and the ſaid Eliz. C. the Wife of the Defendant concerning the Plaintiff, upon which the ſaid Eliz. C. ſaid eidem Eliz. C. of the Plaintiff, Thy Husband keepeth Keys of Houſes in the Day time, and ſtealeth Hay out of them in the Night; this is a good Averment (*) that the Wife of the Defendant ſpoke the ſaid Words of the Plaintiff, tho' it is aver'd that the ſaid Eliz. C. ſpoke the Words eidem Eliz. C. and ſhe could not ſpeak them to her ſelf, but eidem ſhall be intended to Eliz. the Wife of the Plaintiff, and it is aver'd alſo, that ſhe ſpoke them of the Plaintiff, and therefore it is good. Hill. 9 Car. B. R. between Nichols and Brampton and Eliz. his Wife adjudged in a Writ of Error, this being moved for Error. Intratur Mich. 7 Car. Rot. 181.

* Fol. 82.

16. In an Action upon the Caſe by Ireland againſt B. if the Plaintiff declares, that there was a Colloquium between C. and the Defendant concerning a Robbery of the Defendant, and that the Defendant then ſaid to C. that he was rob'd of 100 l. by J. S. who was in Newgate; tho' he confeſſed that G. Ireland (innuendo the Plaintiff) was Party in the ſaid Felony with him, and then the Defendant ſaid of the Plaintiff to the ſaid C. Where is young Ireland? C. anſwer'd, in Gray's-Inn-Lane with his Father; to which the Defendant anſwered, He is as arrant a Thief as J. S. (prædictum J. S. innuendo) and to this Declaration the Defendant juſtified the Speaking of other Words, abſque hoc, that he ſpoke of the Plaintiff the ſaid Words, which is found for the Plaintiff. Upon this Declaration the Plaintiff ſhall have Judgment, becauſe here was a Diſcourſe of the Plaintiff before; and here conſtat de perſona in as much as the Defendant has juſtified the Speaking of other Words, and traverſed thoſe, and the Plaintiff has aver'd that he ſpoke the Words of the Plaintiff; which is alſo found. Trin. 11 Jac. B. R. between Ireland and Gardener adjudged.

17. In an Action upon the Caſe by J. againſt L. if the Plaintiff declares, that he and 20 others were Defendants in a Bill in Camera Stellata, at the Suit of J. S. which J. S. was after murdered by J. D. and that after, the Defendant having a Diſcourſe of the ſaid Bill and Murder, the Defendant ſaid theſe Words of the Plaintiff, Theſe

are they that did help to murder J. S. and avers, That he himself was one of the Defendants to the said Bill; an Action lies upon this Declaration, tho' it does not appear that the Plaintiff and the other were present at the Speaking of the Words. Mich. 11 Jac. B. R. between (a) Foxcroft & Lacy adjudged.

(a) 1 Rol. Abr. 72. Pl. 5. S.C. 75. Pl. 4. S.C. Hob. 89. S. C. adjudged, and S. P. appears.

18. If there be a Discourse between B. and C. of M. F. and C. says to B. Master Deceiver hath deceived and cozened the King, and I have him in Question for it, and I doubt not but to prove it against him; M F. shall have an Action for these Words, averring that at the Time of the Speaking thereof he was the King's Receiver of his Court of Wards, and that the Defendant said these Words of him. Hill. 7. Jac. B. R. between (b) Sir Miles Fleetwood and Auditor Curle adjudged in a Writ of Error upon a Judgment in Banco where it was so adjudged, also per Curiam, vide, the same Case adjudged. Trin. 17. Jac. B. and Hobart's Reports, C. 351.

(b) Cro. Jac. 557. S. C. affirmed upon Error. Hob. 267. S. C. adjudged upon Error.

ed. Palm. 69. S.C. affirmed upon Error. March 82. S.C. cited and said to be affirmed Godb. 341. S. C. cited. 1. Rol. Abr. 57. Pl. 36. S. C.

For Words.

Innuendo.

1. (a.) If one Man says of another, He hath forsworn himself (innuendo before the Justices of Assize, &c. this Innuendo shall not make the Words actionable, because it cannot be Collected by the Words that he intends what by the Innuendo is supposed. (b) Pasch. 40. Eliz. B. R. the last Case adjudged.

(a) 1 Brownl. 7. like Point adjudged. Cro. Eliz. 297. like Point per Curiam.

2. (c) If one Man says of another, He did burn my Barn (innuendo a Barn with Corn) with his own Hands, and none but he; this Innuendo will not make the Words actionable. (d) Co. 4. Barham 20. adjudged.

(b) Cro. Eliz. 609. S. C. adjudged. (c) Castlemain and Hobs, like Point. Moor 396. Pl. 516. adjudged. Owen 57. adjudged. Cro. Eliz. 428. adjudged. (d) 1 Rol. Abr. 73. Pl. 18. S. C. Yelv. 21. S. C. adjudged per 2 Judges, the rest being absent. Noy 155. S. C. adjudged, but S. P. does not appear.

3. So if one Man says of another, He hath burnt my Barn (innuendo a Barn with Corn, and adjoyning to a Dwelling-house) and if my Lord had done him Justice, he should have been hanged for it: This Innuendo will not make the Words actionable. Trin. 43. Eliz. B. R. between (e) Levett & Hawthorne, per Curiam.

Fol. 83.

(e) Cro. Eliz. 834. S. C. and

S. P. per Curiam 1 Rol. Abr. 73. Pl. 19. Co. Ent. 24. n. 22. S. C.

4. In an Action upon the Case, If the Plaintiff declares that the Defendant said to him these Words, Thou hast poisoned Smith (quendam Samuelem Smith, innuendo ad (f) tunc defunctum) and it shall cost me 100 l. but I will hang thee: This is not a sufficient Averment of the Death of Smith, being only in the Innuendo, and (g) without this the Action will not lie. Pasch. 11 Jac. B. between (h) Jacob & Miles adjudged, the same Case, Hobart's Reports 8.

(f) Innuendo J. S. modo defunct, &c. extends to the Time of the Action only. Cro. Jac. 215.

—Quandam Eliz. nuper uxor' quer' innuend', &c. Held a good Averment that the Wife was dead when the Words were spoken, Cro. Car. 489. adjudged. (g) But for this vide. 1 Rol. Abr. 77. Pl. 6. and the Notes there. (h) 1 Rol Abr. 77. Pl. 6. S. C. Hob. 6. S. C. adjudged upon Error, and the Judgment reversed accordingly. Cro. Jac. 343. S. C. adjudged upon Error, and there said that ad tunc referr'd to the Time of the Declaration. Co. Ent. 25. n. 23. S. C.

5. In an Action upon the Case by Doctor Everard, If he declares that he was instituted and induced into a Benefice called Welby in

Northamptonſhire, and that the Defendant to the Intent to ſlander his Title thereto, ſaid theſe Words, The Parſonage of Welby is none of the Doctor's (Querentem innuendo): This is not a ſufficient Averment that the Words were ſpoke of the Plaintiff, there being no Diſcourſe of him before. Mich. 12 Jac. B. R. between Doctor Everard & Ball adjudged in Arreſt of Judgment.

6. In an Action upon the Caſe for theſe Words, Thou at a Traitor and an Arch-traitor, and I will hang thee, or hang for thee; if the Defendant pleads that the Plaintiff ſaid theſe traiterous Words of the King, viz. the King (regem Jacobum innuendo) is a Scurvy King, by reaſon of which Words he ſpoke the Words in the Declaration, this is no good Juſtification. Paſch. 16 Jac. B. R. between Whitbrooke & Smith adjudged.

7. In an Action upon the Caſe, If the Plaintiff declares that the Defendant ſaid theſe Words, Thou art a Thief and ſtoleſt a Mare (innuendo the Plaintiff) without an Averment that the Words were ſpoke eidem Querenti vel de eodem Querente, as the Uſe is; this is not good, becauſe it does not appear of whom they were ſpoken, and the Innuendo will not help it. Paſch. 11 Car. B. R. between (i) Burgeſs & Reeves adjudged, in a Writ of Error upon a Judgment in the Common Pleas, and this reverſed accordingly. Intratur Hill. 10 Car. Rot. 674. tho in the Writ it was well ſcilicet dixit eidem Querenti. Trin. 1650. between (k) Smith & Andrews adjudged in a Writ of Error upon a Judgment in Banco. Intratur Trin. 1649. Rot. 1649. and yet there was laid a Colloquium of the Plaintiff.

(i) 1 Rol. Abr. 85. Pl. 7. S. C.

(k) 1 Rol. Abr. 85. Pl. 7. S. C.

8. (l) In an Action upon the Caſe, If the Plaintiff declares that whereas J. S. had made to him a Bill of Debt of 40 l. and had ſealed and delivered it, the Defendant ſpoke theſe Words of him; That he had ſhewed him a Bill of 40 l. (meaning that Bill) (m) unſealed, and after ſhewed it him ſealed, and that he had forged the ſaid Seal to the Writing; the Action does not lie upon this Declaration, for the Innuendo is not a ſufficient Averment that the Words refer to the ſaid Bill of 40 l. without alledging a Diſcourſe thereof before, Hobart's Report 63. between (n) Harvey & Duckin. Paſch. 13 Jac. B. adjudged, for the Words of themſelves are uncertain.

(l) Hern's Pleader 211. vide.

(m) In the Original this Word is releaſed, and ſo appears plainly miſprinted.

(n) Hob. fol. 45. S. C. adjudged.

9. In an Action upon the Caſe, for ſaying the Plaintiff was perjured in his Anſwer in the Star-chamber, innuendo in a certain Bill of Complaint exhibited there by the now Plaintiff againſt the now Defendant, whereas all know the Plaintiff there is not ſworn to his Bill: Yet becauſe the Words of themſelves are actionable, tho' the Innuendo is repugnant thereto, the Action is maintainable. Paſch. 40 Eliz. B. R. between (o) Corbet & Hill adjudged.

1 Brownl. 9. S. C. adjudged.

(o) Cro. Eliz. 639. S. C. adjudged. 1 Rol. Abr. 40. Pl. 15, S. C.

Fol. 84.

10. In an Action upon the Caſe, for ſaying of the Plaintiff, You and your Wife are Witches, and have bewitched my Mare (innuendo the Mare of (p) the Plaintiff, this is a repugnant and void Innuendo, and the Action lies for the Words without any Innuendo. Mich. 14 Car. B. R. between (q) Smith & Coker adjudged, this being moved in Arreſt of Judgment. Intratur Trin. 14 Car. Rot. 1499.

(p.) This in the Original is Defendant, and ſo appears plainly to be miſprinted.

(q) Cro. Car. 512. S. C. adjudged. 1 Jon. 409. S. C. adjudged; but S. P. does not appear. 1 Rol. Abr. 46. Pl. 28. S. C.

11. (a) An *Innuendo* in effect is no more than a Predict', and cannot make the Perſon or Scandal certain that was uncertain before. 4 Co. 17. *b.*

(a) 2 Brownl. 123. like point, per Coke, Moor 396. Pl. 516. like point adjudged, 401. Pl. 530. like point, dubitatur 407. Pl. 547. like point adjudged.

12. If the Plaintiff declares, That the Defendant *hæc falſa & ſcandaloſa verba ſequentia dixit & publicavit, viz.* Mr. *Pine*, You do my Lord *B.* Wrong that you do not apprehend, *J. J.* (*innuendo* the Plaintiff) for a Felon, and ſeiſe his Goods, for he (*innuendo* the Plaintiff) hath ſtolen a Sheep from *J. S.* theſe Words are laid too generally, for they are not alledged to be ſpoke of the Plaintiff, and the *Innuendo* in this Caſe without alledging the Words to be ſpoke of the Plaintiff is not ſufficient. *Trin.* 4. *Jac.* between *Johnſon* and *Aylmer*. Cro. *Jac.* 126. adjudged.

13. If

13. If the Plaintiff declares that there was a Diſcourſe between the Defendant and *J.* S. concerning *A.* and *B.* the Plaintiff, and that thereupon the Defendant ſpoke theſe Words of the ſaid *A.* and *B.* the Plaintiff, *viz.* *A.* hath ſtolen away ſuch Goods, and ſhe *innuendo* the Plaintiff was privy and conſenting thereto, this is well enough, and the laſt Words cannot in Senſe refer to *A.* but *reddendo ſingula ſingulis* muſt refer to *B.* So that the *Innuendo* only points out that Perſon, who by the Words themſelves was ſufficiently certain before. *Mich.* 7 *Car.* *Mot* and his Wife againſt *Butler.* *Cro. Car.* 236. adjudged.

14. If the Plaintiff declares that the Defendant ſaid to him, Thou art a forſworn Man, and didſt take a falſe Oath againſt me before Juſtice *Scawen*, (*innuendo Scawen*, a Juſtice of Peace) this Action does not lie, for it does not appear that *Scawen* was a Juſtice of Peace, otherways than by the *Innuendo*, and there may be a Man Whoſe Name is *Juſtice Scawen.* *Mich.* 35. *Car.* 2. between *Gurneth* and *Derry.* 3 *Lev.* 166. adjudged.

(K) Where the Words are uncertain of whom they were Spoke.

What ſhall be a good Averment that they were Spoke of him.

1. (a) **In an Action upon the Caſe, If the Plaintiff declares that there was a Diſcourſe of the Plaintiff between the Defendant and J. S. and the Defendant ſaid theſe Words of the Plaintiff,** Go tell my Landlord (**innuendo** the Plaintiff) I ſay he is a Thief, and ſtole two Shuts for a Window, and I will hang him if any Law will do it; and if I cannot do it, the Bryliff ſhall do it: **This is not a ſufficient Averment that the Words were ſpoke of the Plaintiff, there being no Averment that he was the Landlord of the Defendant.** Mich. 11 Car. B. R. between (b) Spencer & Mudburne, **the Court being divided thereupon in Arreſt of Judgment. But after Hill. 11 Car. Judgment was given againſt the Plaintiff,** quod nill capiat per billam.

(a) 1 Rol. Abr. 80. Pl. 3. like point, with Notes thereupon.

(b) Cro. Car. 420. S. C. the Court divided, and no Judgment, and ſaid the Plaintiff relinquiſhed his Action by Conſent, and brought another. 1 Jon. 376. S. C. per Curiam.

2. **In an Action upon the Caſe, If the Plaintiff being** Delamore, **declares that there was a Suit in** Bathe **between the Defendant and one S. and that the Defendant pleaded to Iſſue, and at a Trial in** Bathe **the Plaintiff was ſworn as a Witneſs, and ſhews his Oath, and that afterwards the Defendant having a Diſcourſe with the Wife of S. of the ſaid Trial and Oath, ſaid theſe Words of the Plaintiff,** Your Brother **Delamore** (innuendo the Plaintiff exiſtentem fratrem of the Wife) took a falſe Oath againſt me in the Hall (innuendo, &c.) I would not take ſuch an Oath for all the World: **After not guilty pleaded, and a Verdict for the Plaintiff, yet the Declaration is not good, becauſe it is not aver'd that the Plaintiff was Brother to the ſaid Wife of** S. **to whom the Words were ſpoken.** Hill. 11 Car. B. R. **between** (c) Delamore & Heskins, per Curiam, **and tho' the Judgment given in** Bathe **was reverſed for Error in the Judgment, yet it was adjudged for the Defendant accordingly.** Trin. 11 Car. Rot. 900. **for the Court ſaid that the Averment in the** Innuendo **is not ſufficient, and without an Averment it is not good by ſaying that he ſpoke it of the Plaintiff, tho' the Jury has found for him.** Quære rationem; **for there was another good Cauſe of the Judgment,** Scilicet, **becauſe it was not aver'd that the Iſſue was joyned in any Trial, but only that at a Trial he ſwore,** &c.

(c) 1 Rol. Abr. 79. Pl. 3. S. C.

3. **If A. having a Diſcourſe of** Jo. Potter, **ſays theſe Words,** That perjured Rogue and Villain **Potter, without ſaying any more Words,**

Jo.

Jo. Potter ſhall have an Action for theſe Words, alledging a Diſcourſe of him, and that the Defendant ſaid theſe Words of him without any other Averment. Hill. 11 Car. B adjudged, between (d) Potter & Loveday, this being moved in Arreſt, but after a Writ of Error was brought.

(d) 1 Rol. 76. Pl. 4. S. C.

4. Jo. Johnſon, Jun. brings an Action upon the Caſe for theſe Words, averring that the Defendant ſaid theſe Words of him to one John Johnſon Sen. I will take my Oath that your Son ſtole my Hens: Tho' the Plaintiff is the Son of him to whom the Words were ſpoken, and the Plaintiff avers that the Defendant ſaid theſe Words of him, per the Action does not lie without an Averment, that he is the Son of the ſaid John Johnſon Sen. to whom the Words were ſpoken. Mich. 15 Car. B. R. between (e) Johnſon & Dier, per Curiam, in Arreſt of Judgment, and this ſtaid accordingly.

(e) March 62. S. C. adjudged. per Curiam, Croke abſente.

Fol. 85.

5. If Robert Nelſon brings an Action upon the Caſe, and declares that the Defendant having a Diſcourſe with certain of the King's Liege People of the Plaintiff, ſpoke of the Plaintiff theſe Words, Captain Nelſon (innuendo the Plaintiff) is a Rogue and a Thief, and hath ſtolen away my Goods, and I will prove him a Thief: This is a good Declaration to maintain the Action without any Averment, that he was a Captain, or known by this Name, inaſmuch as there was a Communication of the Plaintiff, and it is aver'd that the Words were ſpoke of the Plaintiff, and a Plurality of Nelſons ſhall not be intended. Trin. 22 Car. B. R. between Nelſon & Smith adjudged. this being moved in Arreſt of Judgment. Intratur Paſch. 22 Car. Rot.

6. And the like Caſe. Mich. 22 Car. B. R. between (f) Osborn & Brookes, the Caſe being that the Defendant having a Diſcourſe with J. S. of the Plaintiff ſaid of him, Captain Osborn is forſworn, and his Oath is upon Record. Intratur Trin. 22 Car. Rot. 767. per Curiam, but not adjudged as I believe.

(f) All. 7. S. C. and S.P. appears.

7. In an Action upon the Caſe, If the Plaintiff declares that the Defendant ſpoke certain ſcandalous Words, viz. Thou ſtoleſt my Mare, &c. or ſuch like, without an Averment that they were ſpoke eidem Querenti, or de eodem Querente as the Uſe is: (g) This Declaration is not good, becauſe otherways it cannot appear to the Court that they were ſpoke to the Plaintiff, or of him. Paſch. 11 Car. B. R. between (h) Burges & Reeves adjudged upon a Writ of Error upon a Judgment in Banco, and this accordingly reverſed (i) tho' it was innuendo the Plaintiff. Intratur Hill. 10 Car. Rot. 674. tho' the Writ was good, Scilicet dixit eidem Querenti. Trin. 1650. between (k) Smith & Andrews adjudged, in a Writ of Error upon a Judgment in Banco. Intratur Trin. 1649. Rot. 1649. and yet a Diſcourſe of the Plaintiff was laid, and that the Defendant ſaid the Words, He, &c.

(g) The Words, viz. This Declaration is not good; are wanting in the Original, but ſeem neceſſary to make good the Senſe.

(h) 1 Rol. Abr. 83. Pl. 7. S. C. (i) Cro. Jac. 126. like point adjudged. (k) 1 Rol. Abr. 83. Pl. 7. S. C.

8. (l) In an Action upon the Caſe, If the Plaintiff declares, that the Defendant habens Colloquium cum Querente, the Defendant in Preſence, and Hearing of ſeveral other Perſons, ſaid theſe Words, Thou innuendo the Plaintiff) art a Thief, &c. but does not alledge they were ſpoke of, or to the Plaintiff, according to the uſual Courſe, yet is this good, for it ſhall be intended they were ſpoke to the Plaintiff, for in as much as the Colloquium was between the Plaintiff and Defendant, it cannot be intended but that the Words were ſpoke to him with whom the Colloquium was, being alledged to be ſpoke upon the Colloquium. Mich. 1651. between (m) Biſhop & Fitzherbert, per Curiam. Intratur Trin. 1651. Rot. 1301.

(l) Stile 435. like Point adjudged.

(m) Stiles 298. S. C. adjudged.

9. (n) In an Action upon the Caſe for Words, If the Plaintiff declares, that the Defendant having a Diſcourſe of the Plaintiff with

(n) Badcock and Atkins, S. P. Goulſ. 187. adjudged; but note, it did not there appear that there was any Colloquium of the Plaintiff. Cro. Eliz. 416. adjudged, but no Colloquium appears, or that dixit de Querente, &c. Hetl. 174. cited. Cro. Eliz. 429. S. C. cited Cro. Car. 92. S. P. adjudged, per tot' Curiam, and yet it is laid quod dixit de, &c. Cro. Car. 177. S. P. the Court divided & adjornatur, being laid quod dixit de, &c.—The Plaintiff declares that the Defendant in the Preſence of J. S. dixit de querente, Thy Brother is, &c. and well enough, tho' no Averment that he is J. S's Brother, for being laid to be ſpoke in the Preſence of J. S. only, it cannot but be ſo intended, otherways where laid to be ſpoken in the Preſence of divers others. Cro. Eliz. 429. adjudged; But vide the Caſe.

laid

ſeveral Perſons ſaid theſe Words of the Plaintiff, viz. Your Father (meaning the Plaintiff) hath ſtruck and killed Nicholas Ruſſel, after a Verdict for the Plaintiff, he ſhall not have Judgment upon this Declaration, becauſe it is not aver'd that he was Father to him to whom the Words were ſpoken, nor that he had any Son there at the Time of the Speaking the Words, ſo that it is uncertain of whom the Words were ſpoken, and without ſuch an Affirmative it is not ſufficient to ſay that he ſpoke them of the Plaintiff. Hill. 1652. between Burrowes and Uſher adjudged, contra querentem per Curiam, after a Verdict for the Plaintiff. Intratur Trin. 1652. Rot. 1037.

(L) How it ſhall be brought for Words not well known to the Judges without an Averment, and where an Averment ſhall help it.

1. If an Action is brought for Words of Slander according to the Phraſe of the Country where they are ſpoken; tho' the Court does not know what they ſignify, (a) yet an Action lies without an Averment of the Signification, for the Judges of themſelves ought to take Notice of Engliſh Words ſpoke in any Country. Mich. 14 Jac. B. adjudged, (b) Hob. Rep. 169. cited, 6 Jac. in Banco. An Action lies for theſe Words, Thou art a Healer of Felons, (c) without an Averment how the Words are taken, being informed that in ſome Countries they are taken for a Furtherer of Felons.

Fol. 86.

(a) Thou art a Sheep-thief; actionable, being ſpoke in Weſtmorland. 2 Bulſt. 145, 146. adjudg'd. —Thou art a Mare actionable. Cro. Eliz. 250. adjudged. Moor 419. cited. (b) Hob. fol. 126. S. C. Pridham and Tucker. Yelv. 153. S. C. adjudged; the Words there being, Thou art an Healer of Felony, and haſt ſhew'd ſuch Favour to a Horſe-ſtealer in the Time of thy Conſtableſhip, that thereby both the Horſe and the Thief were conveyed away, and it lieth in my Power to hang thee. Noy 133. S. C. adjudged. (c) Palm. 65. like Point dubitatur per Houghton.

2. (d) If B. ſays of A. a Merchant (having a Diſcourſe with him concerning ſeveral Reckonings and Accounts between them for ſeveral Sums of Money to the ſaid A. by B. then due) Thou art a baſe Knave, a cheating Knave, thou haſt cozened me of 400 l. or 500 l. thou art a beggarly Knave, and I will make thee fly England. Tho' no Action lies for theſe Words of themſelves, yet if there be an Averment that theſe Words (Thou art a beggarly Knave, and I will make thee fly England) in London where theſe Words were ſpoken, have the ſame Senſe as if he had called him Bankrupt, in this Caſe, if the Defendant demurs upon this Declaration, or if it be found by Verdict, the Action lies for theſe Words. Trin. 13 Car. B. R. between Duncan and Knot adjudged upon a Demurrer; and ſo in ſuch a Caſe in Effect, adjudged upon a Verdict the ſame Term.

(b) 1 Rol. Abr. 61. Pl. 13. like Point.

3. If a Man ſays to A. who is a Dyer by his Trade, Thou art not worth a Groat; no Action lies for theſe Words, tho' it be aver'd that in Exeter where theſe Words were ſpoken it is tantamount, as if he had ſaid, Thou art a Bankrupt; for theſe Words are well known to the Judges, and there needs no Averment, (e) and the Averment does not enforce them contrary to the true Senſe of the Words, which is well known to the Judges, and if he is not worth a Groat, yet his Credit may be good, as is the Caſe of many Tradeſmen. Paſch 15 Car. B. R. between (f) Moon and Axe adjudged, per Curiam, in a Writ of Error upon a Judgment in Exeter, and the Judgment reverſed accordingly. Intratur Mich. 14 Car. Rot. 213.

(e) You are no Thief; actionable with an Averment that the Words implied an Affirmative, March 8. cited per Barkly Juſtice. (f) Mead and Ax, March 15. S. C. adjudged upon a Writ of Error. Raym. 184. S. C. cited.

4. If a Man ſaid of A. to his Maſter (who was a Shoemaker, and A. his Journeyman and the Foreman of his Shop, and uſed to cut

Leather to make Shoes, and to ſell Goods for his Maſter) It is no Matter who hath him, for I warrant whoſoever hath him he will cut him out of Doors: These Words (g) will bear an Action, with an Averment, that in London where they were ſpoken they amount to as much as if he had ſaid that he would undo his Maſter, which ſcandalizes him in his Trade, there were other Words alſo, ſcilicet, he went to J. S. to receive for me 20 l. and cozened me of 20 s. before he came home, but the Court relied not upon theſe, but gave Judgment for the other Words that the Action lies. Paſch. 15 Car. B. R. between (h) Ellis and Hunt adjudged, per Curiam, this being moved in Arreſt of Judgment, that the Action did not lie. Intratur Hill. 14 Car. Rot. 1218.

(g) Theſe Words, viz. Will bear an Action; are wanting in the Original, but ſeem neceſſary to make good the Senſe.

(h) 1 Rol. Abr. 60. Pl. 8. S. C. March 1, 2. S. C. and S. P. appears.

5. If a Man brings an Action upon the Caſe againſt another, for ſpeaking of him certain ſcandalous Welch Words, (i) tho' he does not put the Engliſh of them in the Declaration, yet the Declaration is good, (k) for the Court ought to take Information by Welch-men what the Words ſignify. Hob. Rep. 169. Anonymus Caſe adjudged, and there cited. Trin. 43 Eliz. 3024. between (*) William Verch Howel and Evan George adjudged, B. R. and alſo Paſch. 44 Eliz. Rot. 8034. adjudged.

(i) But if the Plaintiff ſhews the Engliſh falſly, as if the Welch Words ſignify Thou art perjured, and the Plaintiff Engliſh it forſworn, the Action lies not. Stil. 263. adjudged. (k) After a Verdict for the Plaintiff, Interpreters ſworn as to the Signification of the Welch Words, Gibs and Jenkins. Hob. 191. Hut. 8. Hetl. 175. and there ſaid the Witneſſes depoſed to the Jury as to the Signification; but by the Report of the Caſe in the other Books, that ſeems to be a Miſtake.

* Fol. 87.

(M) For Words.

(a) Juſtification.

(a) Where a Man may confeſs the Words and avoid the Scandal, by ſhewing the Occaſion of Speaking them vide, What ſhall be a Confeſſion and Avoidance. Title Pleading.

1. (b) In an Action upon the Caſe for Words, it is a good Juſtification (tho' the Words were falſe) that he was a Counſellor at Law retained in an Iſſue between the Plaintiff and J. S. and he ſaid theſe Words upon the Evidence for his Client, if they were directly material to the Point in Iſſue. Mich. 3 Jac. B. R. between (c) Brooke and Mountague, per Curiam.

(b) Moor 428. like Point agreed. 1 Rol. Abr. 53. Pl. 2. vide. (c) Cro. Jac. 90. S. C. and S. P. per Curiam, 432. S. C. cited.

(d) Hob. 328. like Point, per Curiam.

2. (d) So the Matter ſhall be a good Juſtification, tho' the Words were not preciſely pertinent to the Iſſue, but by a Conſequence, and for Mitigation of Damages. Mich. 3 Jac. B. R. between (e) Brooke and Mountague reſolved, per Curiam.

(e) Cro. Jac. 90, 91. S. C. and S. P. per Curiam.

(f) Stile 462. like Point, per Glyn, Ch. Juſt. and that the Words ſhall be intended to be ſpoke according to his Client's Inſtruction.

3. As in falſe Impriſonment, if the Defendant pleads in Bar that he was Mayor of London, and impriſoned the Plaintiff till he found Sureties for his good Behaviour, being a Man of ill Fame and Manners, to which the Plaintiff replied, de injuria ſua propria abſq; tali cauſa, and a Counſellor of Law being retained for the Defendant (f) upon the Information of his Client ſaid upon the Evidence, that the Plaintiff was of an ill Behaviour, and that he had committed Felony: In an Action upon the Caſe, by the Plaintiff againſt him for theſe Words, he may well juſtify the Speaking of them for the Matter aforeſaid (tho' they are falſe) tho' they tend not preciſely in Proof of the Iſſue, for they tend to excuſe a Magiſtrate in the Courſe of Juſtice, and are material to mitigate Damages, and were ſpoke without Malice. Mich. 3 Jac. B. R. between (g) Brooke and Mountague adjudged upon a Demurrer.

(g) Cro. Jac. 90. S. C. adjudged. Cro. Jac. 432. cited

4. In

4. In an Action upon the Case by A. against B. If the Plaintiff declares that he took his Oath in the Court of King's-Bench of certain Matters, to have B. bound to his good Behaviour, and upon this B. then said falsly and maliciously, intending to scandalize him in the Hearing of the Judges and Officers of the Court, and others there being, There is not a Word true in that Affidavit, and I will prove it by 40 Witnesses: Yet this Action is not maintainable, for the Answer that B. made to the said Affidavit was a Justification in Law, and spoke only in Defence of himself, and that in a legal and judicial Way, in as much as he says he will prove it by 40 Witnesses. Pasch. 15 Car. B. R. between (h) Moulton and Clapham, per Curiam, adjudged in Arrest of Judgment after a Verdict for the Plaintiff. Intratur Hill. 14 Car. Rot. 459.

(h) 1 Rol. Abr. 33. Pl. 3. S. C.

5. In Fox's Book of Martyrs, there is a Relation of one Greenwood of Suffolk, who is there reported to have perjured himself before the Bishop of Norwich, in testifying against a Martyr in the Time of Queen Mary, and that after he returned to his House, and by the Judgment of God, his Bowels rotted out of his Belly, in exemplary punishment of his Perjury; and one Pit being lately made Parson of the Parish where this Greenwood lived, and not knowing his Parishioners, and Preaching against Perjury, cited this Story, and it so happened that Greenwood was living and then in the Church, and after brought his Action upon the Case against the Parson, and adjudged not maintainable, by Anderson at the Assizes, because not spoke (i) maliciously. Vide this cited. (k) Mich. 3 Jac. B. R. per Coke.

(i) An Action was brought for falsly & malitiose, saying, he heard the Plaintiff was hang'd for Stealing an Horse; and upon Evidence it appeared the Words were spoke in Grief and Sorrow for the News, and Hob. (before whom it was tried) caused the Plaintiff to be Nonsuited, because it was not malitiose. 1 Lev. 82. cited and agreed by all the Court to be done according to Law. (k) Cro. Car. 91. S. C. cited per Coke, and agreed per Poph. and said to have been ruled by Wray, Chief Justice.

6. (l) In an Action upon the Case for calling the Plaintiff Thief, if the Defendant justifies it, because the Plaintiff had stole a certain Thing, and the Plaintiff replies that after the Felony committed, and before (m) the Speaking of the Words he was pardoned by a General Pardon, this shall avoid the Justification; for by the Pardon the Felony was extinct. Hob. Reports, 92. B. Case 112. between (n) Cuddington and Wilkins adjudged.

(l) Cro. Jac. 622. S. P. arguend' Con.

(m) Fol. 88. Raym. 23. like Point appears, but adjudged against the Plaintiff for another Reason. New Dier 236 a. Margine. S. P. Rob. Ent. 70, 71. S. P.—If a Man is perjured, a Pardon restores not his Credit. 1 Sid. 51, 52. adjudged—Note, the Pardon in this Case was a general one; but Hob. 12. it is said it was held that there was no great Difference tho' it had been a Special one, and not known to the Defendant, for he ought at his Peril to take Care that he does no Man harm. (n) Moor 863. Pl. 1187. S. C. adjudged. 872. Pl. 1213. S. C. adjudged, but Nichols, Justice, there said, that if he had been convicted and pardoned afterwards, it had been otherways. Hob. fol. 67, 81. S. C. adjudged. 1 Brownl. 16. S. C. adjudged. Owen 150. S. C. adjudged. 1 Sid. 52. S. C. cited.

7. (a) If in an (b) Action for calling the Plaintiff Thief, the Defendant pleads that there was a Robbery done, *&c.* and that *communis vox & fama patriæ fuit* that the Defendant was guilty thereof, and so justifies, this is no good Justification, otherways if in False Imprisonment, *&c.* and that he thereupon had arrested the Plaintiff, *&c. Hill. 7 Eliz. Anonymus* (c) *Dyer* 236. *a. per Curiam.*

(a) 1 Brownl. 3. S. P. said. Hob. 67. S. P. said 82. S. P. said.

(b) In such Action, &c. the Defendant pleads that the common Fame being the Plaintiff was guilty, he by way of Information to a Justice of Peace, he said, &c. Quæ est eadem, &c. Scarlet and Stiles. Hob. 192. no Judgment. 1 Brownl. 2. no Judgment; but 3 Leon. 101. per Curiam, there is a Diversity where he charges him expressly, and where he only acquaints the Justice, and prays the Matter may be examined. (c) Bridgeman 162. S. C. cited.

Actions.

For (c) Slander of Title.

(c) The Action lies, tho' the Words were ſpoke to a Stranger, and not to him with whom in Treaty for the Land. Williams and Linford, 2 Leon. 111. 3 Leon. 177. and I take Cro. Eliz. 346, 347. to the Contrary not to be Law. 34, 35. S. C. (d) Co. Ent. 30. the Entry of the Caſe. Moor 144. Pl. 287. S. C. adjudged. Cro. Eliz. adjudged and affirmed upon Error.

1. If *A.* ſays, The Land of *B.* is lawfully aſſured to *C.* for 1000 Years, by which *B.* hath Special Damage, an Action lies notwithſtanding *C. de facto* hath a void Limitation thereof, which might induce *A.* to ſay ſo, for he takes upon himſelf the Knowledge of the Law, and meddles with a Matter that does not concern him. Between (d) *Mildmay* and *Standiſh.* 1 *Co. Rep.* 177. adjudged and affirmed upon a Writ of Error.

(e) For this, vide Moor 172. 1 Rol. Rep. 409. (f) But it ſeems otherways if he certainly knew the Title falſe, and did it maliciouſly. Hob. 205. at the Bottom. Stil. 169.—And it is found by Verdict to be done falſo & malitioſe, 1 Lev. 53. 1 Sid. 79, 80. 1 Keb. 309.—But if upon Evidence any probable Cauſe of Claim appears, it ought not to be found done malitioſe. 1 Keb. 309. 3 Keb. 141. Stil. 414. (g) Cro. Eliz. 197. S. C. and S. P. per Curiam.

2. If *A.* ſays, *B.* hath no Title to certain Lands, but that he himſelf hath, by which *B.* hath Special Damage, tho' in Truth *A.* hath no Title, yet *B.* ſhall have no Action againſt him, (e) becauſe *A.* (f) claimed a Title to himſelf, for if an Action would lie where a Man claims a Title to himſelf, how could a Man ask Counſel or begin a Suit without being ſubject to an Action. *Mich.* 32, & 33 *Eliz.* between (g) Sir *Gilbert Gerard* and *Dickenſon.* 4 *Co.* 18. *a. per Curiam.*

3. If in an Action for ſaying, One under whom the Plaintiff claims, leaſed to *C.* for 63 Years, and the ſame is a good Leaſe *per quod*, &c. the Defendant pleads the Leaſe was made to *C. prout*, &c. who convey'd it to the Defendant, and ſo juſtifies in Maintenance of his own Title, yet this ſhall not excuſe him; for the Words import, that he ſpoke them to countenance the Title and Intereſt of a Stranger, and being Sued, he cannot now juſtify by intitling himſelf. *Mich.* 4 *Jac.* between the (h) Earl of *Northumberland* and *Byrt. Cro. Jac.* 163, 164. adjudged, after Iſſue joined upon the Plea, and found for the Plaintiff.

(h) Palm. 531. S. C. and S. P. admitted per Curiam.

4. In an Action upon the Caſe the Plaintiff declared, Whereas ſhe was to be married to ſuch an one, *&c.* the Defendant *falſo & malitioſe* to hinder the ſaid Marriage, writ a Letter to the ſaid Perſon, that the Plaintiff was contracted to him, *per quod* ſhe loſt her ſaid Marriage; and tho' the Defendant claimed a Title to himſelf, yet *Hill.* 13, and 14 *Car.* 2. between (i) *Shephard* and *Wakeman.* 1 *Lev.* 43. after a Verdict for the Plaintiff, by which it was found to be done falſly and maliciouſly, the Plaintiff had Judgment; and if ſuch Action would not lie, by ſuch Pretence any mean and baſe Man might injure a Woman of Honour and Fortune.

(i) 1 Sid. 79, 80. S. C. adjudged. 1 Keb. 255, 269, 308, 326, 459. S. C. adjudged.

Actions.

Of Scandalum Magnatum.

1 *Per* (a) 2 *Rich.* 2. *Cap.* 5. Of Deviſers of falſe News and horrible Lies of Prelates, Dukes, Earls and (b) other Nobles and Great Men, and of Chancellor, Treaſurer, Clerk of the Privy Seal, Steward of the King's Houſe, Juſtices of the one Bench or the other, and other great Officers of the Realm, *&c.* It is Enacted, *None ſhall deviſe, ſpeak or tell any falſe News, or other falſe Things of Prelates Lords, and of others aforeſaid, whereof Diſcord or Slander might riſe within the Realm*, &c.

(a) This Statute, tho' in Print, is not to be found of Record in the Rolls of Parliament, per 4 Inſt. 51. but vide 4 Co. 12. b. (b) This extends to Viſcounts, tho' there were none at the Time of the making this Act. Viſcount Say & Seal & Stephens. Cro. Car. 136. adjudged. Palm. 565. adjudged.

2. If one ſays, I met *J. S.* whom I do not know, but my Lord *P.* ſent after me to take my Purſe; an Action of *Scandalum Magnatum* lies, tho' not poſitively ſaid, (c) my Lord *P.* ſent him, or that it was to take the Purſe feloniouſly; which laſt, in caſe of an Action by a common Perſon, might be a good Exception. *Paſch.* 21 *Car.* 2. between (d) the Earl of *Peterborough* and Sir *John Mordant*. 1 *Lev.* 277. adjudged.

(c) The Earl of L's Men by his Command took the Goods of H. by a forged Warrant, per Goulſ. 115. per Curiam, an Action of Scandalum Magnatum lies not, becauſe not ſaid the Earl knew the Warrant to be forged. (d) 1 Vent. 59, 60. S. C. adjudged and ſaid in theſe Actions the Words ſhould not be taken in mitiori ſenſu. 1 Syd. 434. S. C. adjudged. 2 Keb. 537. 559. 605. S. C. adjudged.

3. If one ſays of a Peer, he is an (e) Unworthy Man, and acts againſt Law and Reaſon, an Action of *Scandalum Magnatum* lies, notwithſtanding the Words are (f) general, and (g) charge him with nothing certain. *Hill.* 28 and 29 *Car.* 2. between (h) the Lord *Townſend* and Dr. *Hughs*. 2 *Mod.* 150, 151, *&c.* adjudged by *North*, *Windham*, and *Scroggs*, againſt the Opinion of *Atkins*, who ſaid, the Statute extended not to Words of ſo ſmall and trivial a Nature, but to ſuch only which were of a greater Magnitude, by which Diſcord might ariſe, *&c.* and therefore the Words *horrible Lies* were inſerted in the Statute.

(e) So if one ſays of a Peer, He has no more Conſcience than a Dog, an Action of Scandalum Magnatum lies. 3 Bulſ. 226.—But for what Words ſuch Action lies, vide the Caſes cited, 2 Mod. 150, 151. 1 Leon. 336. Cro. Eliz. 1. (f) My Lord L. is a baſe Earl and Daultry Lord, and keeps none but Rogues and Raſcals like himſelf. Cro. Jac. 196. by Williams & Croke, Scandalum Magnatum lies; for the Words touch him in his Honour and Dignity, and may raiſe Contempt from the People, and in caſe of Nobility general Words will maintain an Action; but Yelverton & Fleming ſeemed to incline to the contrary, and ſaid the Words touched not his Life, Loyalty or Dignity, but were only Words of Spleen, & adjornatur, and after the Defendant died, and the Writ abated. (g) I value my Lord Marquels of D. no more than I value the Dog at my Feet. Proby & the Marquels of Dorcheſter. 1 Lev. 148. in the Common-Pleas without Debate adjudged for the Plaintiff, but a Writ of Error was brought, pending which Proby was killed, but his Executors after paid the Money. 1 Syd. 233. 1 Keb. 813. (the Words in both theſe laſt Books being) My Lord is no more to be valued than the Dog that lies there. (h) 1 Mod. 232, 233. S. C. adjudged.

Pleader.

Declaration.

The Form and Manner of declaring in general.

(a) Yelv. 113. S.P. arguend' Con. Litl. Rep. 193. vid. (b) Diverſity between an Indictment and a Declaration. Stile 392. per Roll. 435. per Roll. (c) Machinans pregravare, &c. Et bona, nomen, &c. detrahere & pejorare dixit, &c. and not ſaid malitioſe, &c. Rob. Ent. 77. 45, 46. 65, 66. (d) Ow. 51. S. C. adjudged. (e) But where Words are ſpoke without Malice an Action will not lie. 1 Rol. Abr. 87. Pl. 5.

1. (a) IF in an Action for Words it is not laid in the (b) Declaration, *quod* (c) *malitioſe dixit*, yet is it well enough. *Hill* 38 *Eliz.* between (d) *Mercer* and *Sparks*. *Noy*. 35. adjudged upon a Writ of Error, and the firſt Judgment affirmed accordingly, and there ſaid the Words themſelves were (e) Malicious and Slanderous.

2. If the Plaintiff declares that the Defendant *propalavit quædam Scandaloſa verba Prout in his Anglicanis verbis ſequentibus.* Thou, *&c.* this is a good Declaration; for *Prout*, *&c.* is tantamount as if ſaid, *hæc Anglicana verba ſequentia*. *Trin.* 39 *Eliz.* between *Bate* and *Rookewood*. *Cro. Eliz.* 572. adjudged and affirmed upon a Writ of Error.

3. If the Plaintiff declares that the Defendant ſpoke theſe Words of him, Thou, *&c. vel conſimilia*, this is no good Declaration, becauſe of the Uncertainty of what is intended by *conſimilia*. *Mich.* 40 Eliz. between *Hale* and *Cranfield*. *Cro. Eliz.* 645. adjudged.

(f) Cro. Eliz. 645. S. P. adjudged. (g) So where for Words ſpoke, ad tenorum & effectum ſequentem. 3 Mod. 72. adjudged. (h) In Action for a Slanderous Bill fixed in an open Place, cujus tranſcript' & tenor, &c. Raſt. 13. Pl. 4. (i) Hard. 2. S. C. cited.

4. (f) If the Plaintiff declares that the Defendant ſaid of him, *quædam falſa & Scandaloſa verba* (g) *quorum tenor ſequitur in hæc verba*, Thou, *&c.* this is no good Declaration, for it is no expreſs Allegation that he ſpoke the ſame Words, and ſomething might be omitted in the *Quorum Tenor*, *&c.* and (h) tho' it is uſual to plead a Deed or Record *cujus tenor*, *&c.* that is, becauſe the Deed or Record may be viewed whether it agrees with the Recital. *Mich.* 43 *Eliz.* between (i) *Garford* and his Wife againſt *Clerk*. *Cro. Eliz.* 857. adjudged upon a Motion in Arreſt of Judgment after a Verdict for the Plaintiff and the Judgment ſtaid accordingly.

(k) Co. Ent. 26. n. 24. S. P. Co. Ent. 22. n. 20. S. P. Hern's Pleader. 158. S. P. Rob. Ent. 77. S. P. (l) Yelv. 72. S. C. adjudged by three Judges, Poph. abſente; but note, that in Cro. Jac. 80. it appears that upon the firſt Motion. Poph. was abſent; but being moved another time when he was in Court, it was adjudged accordingly.

5. (k) If the Plaintiff declares that the Defendant ſpoke theſe Words of him, *viz.* Thou, *&c.* this is a good Declaration for being ſpoke to him they are ſpoke of him, and ſo all one. *Mich.* 2 *Jac.* between *Kelham* & *Mensby*. *Cro. Jac.* 39. adjudged.

6. If the Plaintiff declares that whereas he was Church-warden, of, *&c.* and by reaſon thereof had taken his Oath to preſent Matters within his Charge, and that whereas he had preſented certain Articles againſt the Defendant before the Official, the Defendant thereupon ſaid, Thou haſt perjuredly preſented me, *&c.* this is no good Declaration, becauſe not ſhewn what he preſented, and if not Matters within his Charge 'tis a vain Preſentment and no Perjury. *Mich.* 3 *Jac.* between (l) *Styles* and *Heap*. *Cro. Jac.* 80. 81, 120. adjudged after a Verdict for the Plaintiff.

7. If the Plaintiff declares *quod intendebat &* (m) *conatus fuit* (n) to marry such a Woman, and that the Defendant said of him, *&c. per quod* she did refuse to marry the Plaintiff, this is no good Declaration, for a *Conatus, &c.* is an *individuum vagum* and implies nothing certain. *Mich.* 12 *Jac.* (o) between *Sell* and *Fairee*. 2 *Bull.* 276, 277. adjudged, and the Court advised the Plaintiff to begin again and to lay an expreſs *Colloquium.*

(m) But if the Plaintiff had declared that he had propoſed the Marriage to her, and that the Defendant ſaid, &c. per quod, &c. this had been well enough. 2 Bulſ. 276. per Croke and Haughton. Hern's Pleader 21 vide.——The Plaintiff declares that J. S. offered him his Daughter in Marriage, and that the Defendant ſaid, &c. per quod ſhe refuſed, &c. and whether it had not been more proper to have ſaid it per quod J. S. refuſed, &c. Taylor & Tally. Palm. 385. dubitatur, 2 Rol, Rep. 373. dubitatur. Latch. 218. vide.——The Plaintiff declares, that whereas there was a Communication of a Marriage between him and one Mary H. & quod veriſimile fuit, that they ſhould be married, and that the Defendant ſaid, &c. per quod, &c. All. 6. adjudged pro Quer'. Hern's Pleader 221. ſuch a Declaration. (n) So if the Plaintiff declares quod intendebat & conatus fuit, to ſell ſuch a Manor, and the Defendant ſaid, &c. per quod, &c. 2 Bulſ. 277. per Coke Chief Juſtice, and Croke. (o) 1 Rol. Rep. 79. S. C. adjudged. Hetl. 18. S.C. cited.

8. If the Plaintiff declares *quod Colloquium fuit motum at H. ſuper quod Colloquium*, the Defendant ſaid, *&c.* this is no good Declaration, becauſe (p) no Place is laid where the Words were ſpoken, for tho' the *Colloquium* that occaſioned the Words was at *H.* (q) yet the Words might be ſpoken afterwards at another Place, and it is not ſaid *ad tunc & ibidem*, as the common Courſe is. *Mich.* 21 *Jac.* between (r) *Taylor* and *Tally*. *Palm.* 385. adjudged upon a Motion in Arreſt of Judgment after a Verdict for the Plaintiff; and note, there are two other like Judgments there cited.

(p) The Plaintiff declares the Defendant ſpoke ſlanderous Words at D. and S. not good; for 'tis not poſſible that at the ſame Time he ſhould ſpeak the ſame Words at ſeveral Places. Dal. 106. Pl. 55. (q) 1 Rol. Abr. 85. Pl. 8. like Point vide. (r) 2 Rol. Rep. 373. S. C. and S. P. per Ley, Chief Juſtice.

9. If in an Action for theſe Words, He hath forſworn himſelf in a Suit brought by *J. S.* the Plaintiff in his Declaration, ſets forth that a Suit was depending between *J. S.* and his Wife againſt *J. N.* (admitting it material to ſhew there was a Suit depending) this is a good Declaration, for this in common Acceptance is the Husband's Suit. *Mich.* 22 *Jac. Yates*'s Caſe. 2 *Rol. Rep.* 471. adjudged.

10. (s) If in an Action for Slander of the Title of the Plaintiff, he declares generally that it was to his Damage, and that he thereby loſt the Sale of his Land, *&c.* but ſhews not to whom he was about to ſell it, this Declaration is not good, for the Words being actionable only in reſpect of the particular Damage that ought to be ſhewed to the Court. *Paſch.* 4 *Car.* between (t) *Harwood* and *Law*. *Palm.* 529. adjudged upon a Writ of Error, and the Judgment in the Court of *Windſor* reverſed accordingly.

(s) Snead & Bagly, S. P. where the Plaintiff declared quod habens propoſitum to make Leaſes, &c. inhabilis exiſtit. 3 Bulſ. 74, 75. adjudged. 1 Rol. Rep. 244. adjudged. Cro. Jac. 397. adjudged. Notwithſtanding the Precedent, Co. Ent. 35. to the contrary; and vide Yelv. 88, 89. where it appears the Judgment upon that Entry was Arreſted after a Verdict for the Plaintiff.——So where the Plaintiff declared quod fuit veriſimilis vendere, &c. Stil. 169, 170, 176, 177. but for this vide the Caſe of Tasburgh & Day. Cro. Jac. 484, 485. 2 Rol. Rep. 43. and vide Cro. Eliz. 197. 3 Keb. 141. (t) Cro. Car. 140, 141. S. C. adjudged upon a Writ of Error accordingly. 1 Jon. 196. S. C. adjudged upon a Writ of Error accordingly.

11. (u) In an Action for Words laid two Ways, the laſt were laid (w) *cumq; etiam, &c.* and whether well laid. *Mich.* 22 *Car.* 2. between *Eſtcourt* and *Cole*. 2 *Mod.* 58. *dubitatur.*

(u) 2 Lev. 193. S. P. adjudged to be well enough, becauſe in caſe otherways, if in Treſpaſs. 3 Lev. 338. S. P. adjudged well enough, the firſt Words being laid poſitively, theſe ſhall be taken ſo alſo, and the Cumque etiam for porro or moreover. (w) But for this vide Title Pleading, where it is not direct and poſitive, but only teſtatum exiſtit quod cum, &c.

Quoad

Quoad the (x) Colloquium.

(x) The Communication of a Bargain was laid 1 Febr. and the Words to be ſpoke the 1 March following, per quod the Bargain did not proceed, and yet well enough, for the Treaty for the Bargain ſhall be intended to have continued till the Speaking. Cro. Jac. 163, 164. adjudged, after a Verdict for the Plaintiff.

1. If the Plaintiff declares *quod quidam Malefactores ignoti* had feloniouſly ſhorn the Sheep of *J. S.* and that there being a Communication between the Defendant and *J. N.* concerning the Sheering of theſe Sheep, the Defendant ſaid, I do know who did ſheer the Sheep (*innuendo* of the ſaid *J. S.*) and thereupon the ſaid *J. N.* demanded who it was, and the Defendant anſwered that it was the Plaintiff did ſheer the Sheep (*innuendo felonice*) this is no good Declaration, for it is not laid that the *Colloquium* was of the Felony but of the Sheering of the Sheep only, ſo that the Defendant might not intend that the Plaintiff did ſheer them feloniouſly, and a Scandal ſhall not be ſuppoſed to ariſe to the Plaintiff by Inference only. *Mich.* 13 *Jac.* between *Helly* and *Hender.* 3 *Bulſ.* 83. by *Dod'* and *Haughton contra Croke* adjudged *niſi*, and the Plaintiff perceiving the better Opinion of the Court againſt him moved it no more.

2. The Plaintiff declared that the Defendant *dixit de arte ſua, &c.* and whether this would ſupply the want of a *Colloquium*. *Mich.* 15 *Car.* 2. between (y) *Terry* and *Hooper*. *Ray* 86, 87. *dubitatur*, the Court being divided, and no Judgment was given, *Twiſden* ſaid, a Man (z) without any *Colloquium* of the Profeſſion of another, might ſpeak Words that might ſlander him therein.

(y) 1 Lev. 115. S. C. the Court divided, and therefore Judgment ſtaid.

(z) Where the Words in themſelves refer to his Office, Profeſſion, or Trade, the Plaintiff need ſay no Colloquium thereof. 1 Rol. Abr. 57. Pl. 36.——And tho' laid and not found by the Jury, the Plaintiff ſhall have Judgment. Reeve & Holgate, 2 Lev. 62. 3 Keb. 54.——But general Words ſhall not be taken to refer thereto. 1 Rol. Abr. 62. Pl. 25. vide. and the References there. 3 Mod. 163.

Quoad the (a) Auditors.

(a) Vide Hob. 62.

1. If the Plaintiff declares that the Defendant ſpoke certain Scandalous Words in *præſentia diverſorum* and doth not ſay *in auditu*, yet is this well enough; for (b) it muſt neceſſarily be intended that it was *in auditu*, when it was *in præſentia*. *Mich.* 38 and 39 *Eliz.* between (c) *Hall* and *Henneſly*. *Cro. Eliz.* 486. adjudged upon a Motion in Arreſt of Judgment after a Verdict for the Plaintiff.

(b) The Plaintiff declares quod palam & publice promulgavit, &c. this implies it was in præſentia & auditu aliorum, elſe it was not palam, &c. Cro. Eliz. 861. adjudged, being moved after a Verdict for the Plaintiff.——Palam & publice in præſentia, and not ſaid in auditu. Raſt. Ent. 12 b. Pl. 1. Hern's Pleader 158. Rob. Ent. 77. (c) Noy 57. S. C. adjudged.

2. The Plaintiff declared, That 1 *Jan.* 45 *Eliz. in præſentia & auditu quamplurimorum ſubditorum domini regis*, the Defendant ſaid, *&c.* and it was held a good Declaration, and that it ſhould not be otherways intended but that they underſtood the Words, and (d) that thoſe Words in a Declaration are but Form, and not material, if altogether left out. *Mich.* 2 *Jac.* between *Kelham* and *Manesby*. *Cro. Jac.* 39. adjudged.

(d) Being after Verdict, Cro. Car. 109. S. P. adjudged otherways if no Verdict. Stile per Bacon. And vide 2 Lev. 193. where it was adjudged the in præſentia & auditu quam plurimorum in the firſt Mar', extended to the Words ſaid in the ſecond.

3. If the Plaintiff declares in an Action for Words (which are actionable only in regard of a particular Signification in a particular City) and ſays that the Defendant ſpoke the Words *inter diverſos ligeos*, this is no good Declaration, for it ought to have been ſhewn that they were Citizens of the Place where, *&c. Paſch.* 15 *Car.* between *Mead* and *Ax*, March 16. adjudged upon a Writ of Error, and the firſt Judgment reverſed accordingly; but note, it does not appear whether there was any Verdict in the Caſe.

Quoad the Perſon ſlandered.

As to his (a) Office, Profeſſion, Trade, &c.

1. If the Plaintiff declares, whereas he is a Freeman of *Wells, exercens artem ſive myſterium* of a Linen-Draper, within the ſaid City for the Space of 5 Years paſt, *&c. emend' & vendend', &c.* that the Defendant ſaid he was a Bankrupt, *&c.* this is a good Declaration (b) tho' not ſaid *ultimo* or *jam elaps'*, nor expreſly laid that the Plaintiff was a Draper at the Time when the Words were ſpoken, for a Man ſhall not be intended to have altered his Profeſſion or Trade, but by Preſumption ſhall continue it during Life. *Trin.* 7 *Jac.* between *Tuthil* and *Milton.* *Yelv.* 158, 159. adjudged.

(a) The Plaintiff declares quod cum fuit conſtitutus, a Juſtice of Peace, &c. he ought to ſhew how, and by whom, but if he ſhews generally that he is a Juſtice of Peace, that is well enough. 1 Bulſt. 15. by two Judges. (b) The Plaintiff declares quod cum fuit mercator' per magnum tempus, &c. Cro. Eliz. 293. adjudged for the Plaintiff.—The Plaintiff declares, quod per multos annos retroactos fuit mercator, and uſed the Trade of Merchandizing, tam infra regnum quam extra, &c. and whether it ſhould be intended he was a Merchant at the Time when, &c. Dotter and Ford. Cro. Eliz. 794. dubitatur. Noy 33. dubitatur.—The Plaintiff declares, quod cum fuit mercator per multos annos jam ultimò elapſos, &c. no good Declaration. Yelv. 21. cited, Hern's Pleader 109. vide.—The Plaintiff declares, quod per multos annos jam retroactos artem Merchandizandi, &c. licitè, exercuit, &c. and adjudged for the Plaintiff. Yelv. 159. cited, yet vide Winch 17.——The Plaintiff declares, That whereas at ſuch a Time he was inſtituted and inducted into a Parſonage, and executed the Office of Paſtor in that Church, by the Space of 4 Years after, &c. having laid a ſpecial Time during which, &c. whether it ſhall be intended he continued Parſon after, when the Words were ſpoke. All. 63, 64. dubitatur.——The Plaintiff declares, that the 2d of March, &c. and for many Years then laſt paſt, he was a Juſtice, &c. and that the Defendant the 3d Day of Aug. &c. ſaid, &c. Hern's Pleader 253. Rob. Ent. 65. ſame Declaration, but the Days omitted.

2. But in an Action by a Juſtice of Peace for calling him Briber, *&c.* the Plaintiff muſt expreſly ſhew in his Declaration that he was a Juſtice of Peace at the Time when the Words were ſpoken, becauſe the Slander to his Perſon is only in reſpect of his Office, which being by Commiſſion (c) is at the King's (d) Pleaſure only. *Trin.* 7 *Jac.* between *Tuthil* and *Milton.* *Yelv.* 158, 159. *per Curiam.*

(c) Yet after Verdict it ſhall not be intended to be determined. Palm. 566. (d) A Freehold in an Office ſhall be intended to continue. All. 63.

3. If the Plaintiff declares *quod cum* (e) *diverſis annis jam elapſis extiterit attornatus*, &c. the Defendant maliciouſly ſpoke theſe Words of him, *viz.* He is a forging Knave; This is no good Declaration, becauſe it does not appear that he was an Attorney at the Time when the Words were ſpoken, and it ought to have been *jam ultimo elapſos. Paſch.* 17 *Jac.* between *Moore* and *Synne.* 2 *Rol. Rep.* 84. adjudged upon a Writ of Error, and the firſt Judgment (being after a Verdict for the Plaintiff) reverſed accordingly.

(e) The Plaintiff declares quod fuit erudit' in lege &c. per diverſos annos jam retroact' nobilibus, &c. pro conſilio ſuo in lege retent', &c. Co. Ent. 21. n. 18. 22. n. 19.

4. (f) But it is otherways where the Words themſelves import a continuance of the Profeſſion, as if he had called him Ambodexter, *&c. Paſch.* 17 *Jac.* between *Moore* and *Synne.* 2 *Rol. Rep.* 85. *per Curiam.*

(f) 1 Brownl. 1. like Point adjudged, and vide the Caſe of the Miſcount Say and Seal. Cro. Car. 135, 136. 1 Jon. 194. Ley 82. Palm. 525, 526.

5. (g) If the Plaintiff declares that he is (h) *eruditus in lege*, and that the Defendant ſaid of him, he is an Aſs, a Fool in the Profeſſion; This is no good Declaration, for it ought to have been that he is (*) *homo conciliarius. Trin.* 2 *Car. Poph.* 207. per *Jones*, Juſtice.

(g) The Plaintiff declared, that he was in Medicinis Doctor, &c. but did not ſhew he was licenſed by the College, &c. or Graduate in either Univerſity, and whether good. March 116. dubitatur.——The Plaintiff declared, that whereas he was a Barriſter, &c. but did not ſhew he was a Practiſer, and therefore Judgment ſtaid after a Verdict for the Plaintiff. Stile 231. (h) The Plaintiff declares, quod fuit erudit' in lege & ut vir erudit', &c. per diverſos annos, &c. nobilibus, &c. pro conſilio ſuo in lege retent', &c. Co. Ent. 21. n. 18. 22. n. 19. (*) 2 Bulſt. 230.

6. If the Plaintiff declares *quod per magnum tempus uſus fuit* the Trade of Buying and Selling of Cattle, and that the Defendant ſaid to him, Thou art a Bankrupt; This is no good Declaration, becauſe not ſaid that he uſed the Trade, *&c.* at the Time when the Words were ſpoken. *Mich.* 8 *Car.* between (i) *Collis* and *Malyn. Cro. Car.* 282. adjudged.

(i) 1 Jon. 304. S. C. adjudged.

7. If the Plaintiff declares by the Name of *J. E. Mercator*, and that by his good Name he had gained the good Will of his Neighbours, *Ac etiam emendo & vendendo* had acquired *diverſa lucra*, and that the Defendant ſaid theſe Words of him *viz.* He is a Bankrupt; This is no good Declaration, becauſe it does not appear that *emendo & vendendo* (k) he got his Livelyhood. *Mich.* 18 *Car.* 2. *Emerſon's* Caſe. 1 *Sid.* 299. adjudged.

(k) The Plaintiff declares that he uſed the Trade of a Mercer, and had got his Wealth by way of Buying and Selling, &c. Hern's Pleader 108.—The Plaintiff declares generally, that he had uſed the Trade of a Mercer, &c. but does not ſhew that he got his Living thereby. Hern's Pleader, 158. Rob. Ent. 77.

Plea.

Juſtification.

1. If in an Action for theſe Words, Thou haſt play'd the Thief with me, and haſt ſtole my Cloth, and half a Yard of Velvet, the Defendant pleads that the Plaintiff was his Taylor, and that he delivered to him a Yard and half of Velvet to make him a Pair of Hoſe, and that he made them too ſtraight, *ratione cujus* he ſpoke theſe Words, *viz.* Thou haſt ſtole Part of the Velvet which I delivered you, *abſq; hoc*, &c. This Plea is not good, (*) for it does not confeſs any Words of Slander, and then the Traverſe is meerly void. *Hill.* 33 *Eliz.* between *Johns* and *Gittings*. *Cro. Eliz.* 239. adjudged.

(*) Thou art a Thief, and haſt ſtole from me a Yard of Velvet and a Yard of Damask; the Defendant pleads that he ſaid the Plaintiff had bribed as much Money as he had for a Yard of Velvet, &c. and it was ſaid the Juſtification did not affirm a Felony in the Plaintiff, and whether good. Hetl. 85. dubitatur.

2. If in an Action for theſe Words, Thou waſt forſworn in ſuch a Leet, the Defendant pleads, That the Plaintiff together with others upon a Jury there, being ſworn before the Steward, did preſent ſuch a Ditch not ſcoured *ad nocumentum, &c.* which was falſe, and ſo juſtifies this is a good Juſtification, for it ſhall be intended that this Preſentment was made upon their own Knowledge, and not upon Evidence. *Mich.* 38, & 39 *Eliz.* between (a) *Wild* and *Cookeman*. *Cro. Eliz.* 492. *per Gaudy* and *Fenner contra Popham*, who ſaid, That a Juſtification of Perjury ſhould not be taken to be good by Intendment.

(a) Noy 34. S. C. and S. P. by 2 Judges againſt 1, but there ſaid Judgment was given upon another Point. Moor 537. Pl. 701. S. C. adjudged.

3. If in an Action for theſe Words, Thou waſt forſworn at the Leet, the Defendant pleads that the Plaintiff being ſworn of a Jury there, did preſent ſuch a Ditch to be a Nuſance, and does not aver the ſaid Ditch to be *infra juriſdictionem* of the ſaid Leet, this is no good Juſtification, for if not within the Leet 'tis no Perjury. *Mich.* 38, & 39 *Eliz.* between (b) *Wyld* and *Cookman*. *Cro. Eliz.* 492. adjudged, *per totam Curiam.*

(b) Noy 34. S. C. adjudged. Moor 537. Pl. 701. S. C. But S. P. does not appear.

4. (c) If the Plaintiff declares, that by Vertue of a Commiſſion out of the Exchequer to the Plaintiff, and one *J. S.* directed, they did take and return the Examinations of ſeveral Witneſſes, and that thereupon the Defendant ſaid the Plaintiff had returned the Examination of divers that were never ſworn, and to this the Defendant pleads, that he did return the Examination of one *J. S.* who was never ſworn, and ſo juſtifies this no good Juſtification, becauſe it extends to one Witneſs only, and is in the ſingular Number, whereas the Charge is in the Plural. *Mich.* 40 *Eliz.* between *Fiſh* and *Thorougood*. *Cro. Eliz.* 623. adjudged.

(c) Poph. 69. like Point cited.

5. If in an Action for ſaying, one under whom the Plaintiff claims leaſed to *C.* for 60 Years, and the ſame is a good Leaſe, *per quod, &c.* the Defendant pleads the Leaſe was made to *C. Prout, &c.* who conveyed to the Defendant, and ſo juſtifies in Maintenance of his own Title; this is no good Juſtification, for the Words import that he ſpoke them to countenance the Title and Intereſt of a Stranger, and being ſued, he cannot now juſtify by entitling himſelf. *Mich.* 4 *Jac.* between the Earl of *Northumberland* and *Byrt. Cro. Jac.* 163, 164. adjudged after Iſſue joined upon the Plea, and found for the Plaintiff.

6. If in an Action for theſe Words, Thou art perjured, the Defendant pleads that the Plaintiff at another Time before had brought an Action againſt the Defendant for ſaying he was perjured, to which the Defendant then pleaded, that the Plaintiff was perjured in a certain Affidavit in the Star-Chamber, and (d) thereupon Iſſue was then taken, and found for the Defendant, this is no good Juſtification, becauſe not ſhewn that any Judgment was given upon the firſt Action, and here nothing certain is alledged upon which Iſſue may be taken. *Mich.* 9 *Jac.* between (e) *Jacob* and *Songate.* 2 *Brownl.* 122. from the Reaſon of the Caſe ſeems to have been adjudged, *per totam Curiam*, yet *vide* the Caſe, and Q. if it be not miſprinted when it is ſaid at the latter End of the Caſe, that Judgment was given for the Defendant.

(d) The Pleadings of which, &c. vide. Co. Ent. 26. n. 24.

(e) 1 Brownl. 11. S. P. between the ſame Parties adjudged.

but ſeems not the ſame Caſe, becauſe of a different Term and Roll.

7. If in an Action for theſe Words, Thou art a Bankrupt, the Defendant pleads, that ſuch a Day and Year the Plaintiff became a Bankrupt, and ſo juſtifies, but does not alledge that he continued a Bankrupt, this is no good Juſtification, for it ſhall not be preſumed that he continued ſo. *Trin.* 18 *Jac.* between *Upſheer* and *Bets. Cro. Jac.* 378. adjudged.

8. If in an Action upon the Caſe, the Plaintiff declares that the Defendant ſpoke theſe Words of her, She hath had three Children and yet was never married, *per quod, &c.* and the Defendant pleads that one *J. S.* in the Preſence of the Defendant and others, did ſay, that there was ſuch a Report, and that the Defendant was cited into the Spiritual Court to certify what he could ſay therein, and thereupon the Defendant did there teſtify that he did hear the ſaid *J. S.* ſpeak *ut ſupra quæ eſt eadem, &c.* this is no good Juſtification, for the Charge in the Declaration is, that he ſpoke theſe Words, *&c.* and he ſays, that he heard *J. S.* ſpeak them, *&c. quæ eſt eadem, &c.* and to ſpeak Words and to ſay I heard another ſpeak them, cannot be the ſame Thing. *Hill.* 20 *Jac.* between *Scarlet* and *Jennings.* 2 *Rol. Rep.* 284. adjudged.

9. If in an Action for theſe Words, She is a Thief to you and to me, and hath ſtolen 20 *l.* from me, and 40 l. from you; the Defendant pleads the Plaintiff is a Thief, and ſtole two Hens from the Defendant, this is no good Juſtification, for it does not anſwer the particular Charge in the Declaration, and the laſt Words are as material to be anſwered as the firſt. *Mich.* 21 *Jac.* between (f) *Hilſden* and *Mercer. Cro. Jac.* 676. adjudged.

(f) 2 Rol. Rep. 414. S. C.

adjudged, the Words there being, She is a Thief to me and a Thief to you, and hath ſtolen from you the worth of 20 l. or 40 l. and there ſaid this was no Anſwer as to the Theft from the Stranger.

In Bar, &c.

1. If in an Action for theſe Words, I will abide by it that *J. S.* was and is a falſe Thief, and was at my Door the Seſſions Day at Night, between one and two of the Clock after Midnight, and would have rob'd me, *&c.* the Defendant pleads that the Plaintiff *non fuit damnificatus in forma qua, &c.* this is no good Plea, for he acknowledges the Speaking of the Words, and then what greater Damage can there be than ſo grievous a Report. *Hill.* 28 *H.* 8. *Ruſſel's* Caſe. *Dier* 26. *Pl.* 171. adjudged, *per totam Curiam*, upon a Demurrer to this Plea.

2. If

2. If *A.* ſays *B.* is perjured, and thereupon *B.* brings his Action, and *A.* juſtifies, and Iſſue is thereupon taken and found for the Defendant, and Judgment thereupon given; and after *A.* again publiſhes the ſame Words of *B.* and thereupon *B.* brings another Action, and *A.* pleads the firſt Judgment in Bar, this is a good Plea. *Hill.* 8 *Jac.* between *Styles* and *Baxter.* 2 *Brownl.* 49. adjudged upon a Demurrer to this Plea.

3. If the Plaintiff declares, whereas ſhe was a Woman of a good Fame and Reputation, &c. the Defendant ſaid of her, She is a common Whore, *&c. per quod, &c.* and the Defendant pleads, That at the Time when the Words were ſpoken the Plaintiff was not of an honeſt Reputation, as in the Declaration is alledged, this is no good Plea. Trin. 24 *Car. Strachy*'s Caſe. *Stile* 118. adjudged upon a Demurrer to this Plea.

4. If an Alderman of *N.* brings an Action for theſe Words, He is a Raſcally Alderman, a Factious Alderman, a Lampooner, and avers that a Lampooner is there underſtood of a Libeller; and the Defendant pleads a former Action brought for the ſame Words, and laid in the ſame Manner, (ſaving only in the firſt Action no Interpretation was given to the Word *Lampooner*) in which Action the Plaintiff was barr'd, This is a good Plea, for the Plaintiff having been once barred, ſhall not intitle himſelf to a new Action for the ſame Words by a new Interpretation thereof. *Hill.* 1. & 2 *Jac.* 2. between *Gardiner* and *Helvis.* 3 *Lev.* 248. adjudged.

Replication.

(a) If in an Action for theſe Words, Thou haſt forged an Obligation, the Defendant juſtifies, becauſe the Plaintiff had forged an Obligation in the Name of *J. S.* and the Plaintiff replies *de injuria ſua propria, &c.* this is a good Replication, (b) for tho' a ſpecial Forgery is alledged, yet it need not be ſpecially traverſed. *Paſch.* 40 *Eliz.* between *Wade* and *Buſſard.* *Cro. Eliz.* 607. adjudged.

(a) 1 Jon. 307. like Point appears. Hern's Pleader 108. vide.

(b) The Defendant pleads the Plaintiff was perjured in a certain Depoſition, and the Plaintiff replies de injuria, &c. without any ſpecial Traverſe. Co. Ent. 26. n. 24.

Fol. 88.

(N) (a) Nuſance.

1. (b) If a Man be diſturbed in going in a (c) common Highway, or if a Ditch be made overthwart the Way, ſo that he cannot paſs, yet ſhall he not have an Action upon the Caſe for this, for the avoiding Multiplicity of Suits, for if he may every Man may have ſuch Action, and the Law has provided another proper Remedy for this common Nuſance, viz. (d) a Preſentment in the Leet or Turn. Co. Lit. 56. where is cited. Trin. 41 Eliz. B. R. between (e) Fineux and Hovenden reſolved.

(a) 2 Rol. Abr. 140, 141, &c. vide.

(b) Moor 180. Pl. 321. S. P. adjudged. 4 Co. 18. a. S. P. 104. b. S. P. 9 Co. 113. a. S. P. 2 Brownl. 147. S. P. arguend' Vaugh. 341. S. P. per Vaugh. arguend'. 3 Mod. 291. S. P. arguend'. (c) So no Action lies for ſtopping a common Ferry. 3 Mod. 294. adjudged. (d) But where the Inhabitants of Southwark, by Cuſtom had a Watering-place for their Cattle, which was ſtop'd by J. S. it was adjudged that every Inhabitant might have an Action, for elſe they would be without Remedy, becauſe ſuch a Nuſance is not preſentable in the Leet or Turn. Weſtbury and Powel. Cro. Eliz. 664. cited. Co. Lit. 56. a. 1 Rol. Abr. 110. Pl. 2. (e) Cro. Eliz. 664. S. C. 3 Judges againſt 1. adjornat'.

2. If a Man puts Logs of Wood ſparſim in a Highway, and ſuffers them there to continue for two Months or other long Time, tho' a Man may with great Care, and in the Day-time paſs ſafely, yet if I ride in the Way, not perceiving the Logs, and my Horſe ſtumbles upon the Logs, and ſo falls and throws me, by which Means I receive

any Damage (Scilicet ſeveral Wounds, as the Caſe was) I may have an Action upon the Caſe againſt him (f) for this (g) ſpecial Damage received; tho' this laying of Logs in the Way be a common Nuſance. Hill. 15 Jac. B. R. adjudged, (h) between.

(f) 1 Keb. 847. like Point adjudged.

(g) The Plaintiff declares, whereas he had the Tithes of the Pariſh of B. and was poſſeſſed of ſuch a Barn, where intendebat portare & ponere the ſaid Tithes, and that alta via regia in B. was the direct Way for the Carriage thereof, and that the Defendant obſtruxit & obſtupavit, the ſaid Way by a Ditch and Gate ex tranſverſo vie erected, per quod, he was conſtrained to carry them a longer and more difficult Way. 2 Jon. 157. adjudged, pro quer' becauſe of the ſpecial Damage Br. Nuſance. 1 Vide Br. Action ſur Caſe. 6. vide. (h) Fowler and Sanders, Cro. Jac. 446. adjudged ſeems to be. S. C.

3. (i) So if a Man makes a Ditch overthwart a common High-way, ſo that my Horſe falls in the Ditch, (k) or if I have any other particular or ſpecial Damage, I may have an Action upon the Caſe for this. Co. Lit. 56. where is cited. Trin. 41 Eliz. B. R. between (l) Fineux & Hovenden reſolved.

(i) Co. 4. 182. S. P. Moor 180. Pl. 321. S. P. admit, per Curiam. Cro. Jac. 491. S. P. per Curiam arguend'. 2 Rol. Rep. 4. S. P. per Chief Juſt' arguend' 26. S. P. arguend'. Cro. Jac. 470. S. P. arguend'. 9 Co. 113. S. P. Fitz. N. B. 177. like Point dubitatur. (k) Upon ſuch Special Damage by a foundrous Way, an Action lies againſt a Corporation or private Perſon that is bound to repair; but if a Townſhip, &c. not Corporate, &c. the Party quoad his Special Damage is without Remedy. Vaugh. 340. but vide Br. Action ſur Caſe. 93. Br. Nuſance, 23. (l) Cro. Eliz. 664. S.C. and S. P. admit per Curiam.

4. (m) If A. being ſeized of a Waſte adjacent to a High-way, digs a Pit in the Waſte within 36 Foot of the High-way, and the Mare of B. eſcapes into the Waſte, and falls into the ſaid Pit and there dies, yet B. ſhall not have any Action againſt A. becauſe the making of the Pit in the Waſte, and not in the High-way, was no Wrong to B. but it was the Default of B. that his Mare eſcaped into the Waſte. Paſch. 5 Jac. B. R. (n) between Blithe & Topham adjudged.

(m) 1 Vent. 295. like Point arguend'.

(n) Cro. Jac. 158, 159. S.C. adjudged.

5. (o) If a Man digs a Ditch in the High-way, into which my Servant falls and breaks his Thigh, by which I loſe his Service for a long Time, I ſhall have an Action upon the Caſe againſt him (p) for this Loſs of Service. Hill. 12 Jac. B. R. in (q) Everard a Hopkin's Caſe, per Curiam.

(o) 2 Bulſ. 334. like point per Curiam. 1 Rol. Rep. 124. like Point per Curiam. (p) So for digging a Pit per quod J. S. for whoſe Life J. held Lands was Drowned 1 Keb. 847. cited. (q) 2 Bulſ. 334, S.C. and S. P. agreed per tot' Curiam. 1 Rol. Rep. 124. S. C per Cro. Co. & Dod. 1 Rol. Abr. 98. Pl. 5.

6. (r) If A. be Owner of an Inn in D. and B. has a Houſe next adjoining thereto, and B. in a Room in his Houſe next to the Inn erects a Furnace in which he melts ſtinking Tallow and ſtinking Greaſe, by reaſon of the ill Smell, of which the Gueſts of the Inn forbear to come thither, to the Damage of the Inn-keeper; A. the Inn-keeper ſhall have an Action upon the Caſe againſt B. for this Nuſance. Mich. 14 Car. B. R. between (s) Morly Inn-keeper of the George in Baſingſtoake and Pragnel adjudged, per Curiam, this being moved in Arreſt of Judgment, and in Truth upon the Evidence it appeared that the Defendant was a Chandler, and he melted it for the Uſe of his Trade: But it was there proved that his Tallow and Greaſe was not like the Tallow and Greaſe of other Chandlers, for this was a Nuſance to the whole Town, and ſo preſented at the Leet; and the Reaſon of the Nuſance was, becauſe he kept the Greaſe ſo long before he melted it, that it ſtunk and had an ill Smell: But this Queſtion (t) whether it lay againſt a Chandler (*) came not in queſtion in the King's-Bench, becauſe it did not appear in the Declaration that he was a Chandler. Intratur 14 Car. Rot. 549. Trin. 8 H. 4. Rot. 57. (u) Willielmus Milburn recuperat per Juratam per billam ſuam in qua queritur verſus Johannem Cutting Cook, de eo quod ipſe Johannes apud Weſtmonaſterium vendebat dicto Willielmo unum caponem piſtum Corruptibilem & recalefactum, qui capo aſſatus per 4 dies in Hoſpitio domini regis & iterum calefactus & piſtus extitit, de quo poſtquam edit vomitum horribilem fecit, ita quod infirmabatur per 2 ſeptimanas; recuperat inquam 20 s. pro damnis (and I have been inform'd that it appears upon the Record at large, that the Juſtices increaſed the Damages.

(r) 2 Rol. Abr. 140, 141. ſeveral like Caſes. Palm. 536. ſeveral like Caſes cited.

(s) Cro Car. 510. S. C. adjudged.

(t) It lies. Palm. 538. per Doo'.

* Fol. 89.

(u) 1 Rol. Abr. 90. Pl. 2. like Point.

(w) 2 Rol. Abr. 140, 141. several like Cases. Hut. 136. several like Cases cited. Palm. 536. several like Cases cited.

7. (w) In an Action upon the Case, If the Plaintiff declares that whereas he was possessed of a Close called D. and the Defendant was possessed of another Close called S. next adjoining to the Plaintiff's Close, the Defendant maliciously intending to deprive the Plaintiff of the Profit of his Close, kept a House for several Years before erected upon his Close, and for one Year before the Action brought, used this House for a Melting-house for Lead, and the Chimney of the said House so exaltavit, and for the said Year so continuavit, that by the Exaltation and Continuation thereof (x) the Smoke ascending out of the said Chimney, per vim ventorum upon the Close of the Defendant afflatur & dissipatur, so that by such Use of the said Melting-house and Chimney, and Continuation thereof, all the Grass and Wood of the Plaintiff in his said Close growing and being, so suffocata corrupta & putrida fuerunt, with the Fume (Scilicet Smoke) of the said Chimney out of the said Chimney arising, that by Reason thereof the Plaintiff had lost all the Grass and Wood of his said Close there growing, and also had lost two Horses and one Cow that were depasturing in the said Close, tho' this is a lawful Trade, and for the Benefit of the Common-wealth, and necessary, yet the Action lies, (y) for he ought to use it in waste Places and great Commons remote from Inclosures, so that no Loss or Damage might arise by reason thereof to the Proprietors of Lands adjoining thereto; tho' It objected, that in such waste Places other Men have Common for Cattle that may be prejudiced thereby also. Mich. 15 Car. B. R. between Poynton & Gill adjudged, per Jones & Barkly, no other of the Judges being present, this Matter being moved in Arrest of Judgment after a Verdict for the Plaintiff. Intratur Hill. 14 Car. Rot. 648.

(x) The Plaintiff declares quod cum he was Register of, &c. and was possessed of a House in which he kept his said Office, and that the Defendant being possessed of another House 16 Foot distant from the Plaintiff's House, had erected there a Brew-house & quandam latrinam, and in the said House had used the Art and Mystery of a Brewer, and therein burnt Sea-cole in great Quantities; and that horribiles vapores & insalubres did arise from the said Brew-house, and Privy & quod ratione inde, the Plaintiff could not use his said House, and his Goods by the said Smoke were spoiled, &c. and hereupon it was agreed per totam Curiam, that if by such Erection, &c. a Neighbour's Goods are spoiled, and his House rendered Uninhabitable, an Action will lie; but whether such Special Damage was in this Case sufficiently alledged. Jones and Powel. Palm. 536, 537, &c. the Court was divided. But Hut. 135, 136. adjudged pro Quer' per tot' Curiam, it appearing there to have been after a Verdict for the Plaintiff; by which it was found that they were maliciously erected to deprive the Plaintiff, &c. (y) 1 Vent. 26. like Point dubitatur.

(z) Holland and Lovel, like Point. 2 Brownl. 148. cited 9 Co. 113. a. b. cited Co. Ent. 14. Pl. 12. Ingland, and Crogate like Point, 9 Co. 113. b. Co. Ent. 9. Pl. 8. Bullen and Shean like Point. Godb. 343. adjudged and affirmed upon Error. 3 Rol. Rep. 308. adjornatur.

8. (z) If a Copy-holder, by the Custom of a Manor, has used to have Common for all his Cattle, Levant & Couchant upon his customary Tenement in a certain Place Parcel of the Manor, and a Stranger digs Turfs there and carries them away, per quod his Common is impaired, an Action upon the Case lies, declaring that the Defendant dug so many Turfs there, and them with his Horses and Carts, herbam tunc & ibidem crescentem pedibus ambulando & conculcando, from the Place aforesaid, minus rite ceperit & abcarriavit per quod querens Communiam suam predict' pro averiis suis, &c. in tam amplo & beneficiali modo prout preantea habuit, &c. habere non potuit, this is a good Declaration, tho' the Commoner cannot have any Damage for the taking and carrying away of the Turf, yet the coming upon the Land with his Horses and Carts to carry them is a Prejudice to the Common, and there per quod his Common is impaired, is the Cause of the Action, and the carrying and taking them is a Means of the Impairing thereof. Mich. 9 Car. B. R. between Terry & Godier adjudged, this being moved in Arrest of Judgment upon such a Declaration, the Damages being intire. Intratur Trin. 9 Car. Rot. 49.

—Trespass lies against a Stranger for suffering his Horses, &c. to eat, &c. the Grass, per quod Communiam habere non potuit in tam amplo & beneficiali modo, &c. Crogate and Marys. 9 Co. 111. adjudged. 2 Brownl. 55. dubitatur, 146. adjornat'. Jenk. Rep. 144. by which Book, (tho' the old Opinions are otherways) yet an Action will lie, else the Commoner may be without Remedy, for the Cattle may be gone before he can take them, Damage feasant.—But he shall not have an Action for every petit Trespass, but for such only per quod Communiam in tam amplo, &c. 9 Co. 113. 1 Brownl. 197. Br. Common 24. Kelw. 47 a. and vide 1 Rol. Abr. 405. Pl. 5. Margine.

9. If J. S. hath Lands adjoining to the Lands of J. D. in which several Tenants have Common of Pasture, and J. S. (a) stores his Lands with Conies without any lawful Grant or Prescription, so that the Conies go into the Lands of (b) J. D. and eat his Grass there, so that the Commoners cannot have sufficient Common for their Cattle, yet cannot a Commoner have an Action upon the Case against J. S. for this Matter, because when the Conies go out of his Land he is not the Owner of them, but the possessory Property of them is in (c) J. D. who is the Owner of the Soil where the Commoner hath Right of Common; and where the Conies are, and (d) the Commoners may kill them. Mich. 10 Car. B. R. between (e) Hinsley & Wilkinson adjudged, per Curiam contra Barkly, in a Writ of Error upon a Judgment in Banco, and the Judgment reversed accordingly. Intratur Hill. 8 Car. Rot. 302. But after this was adjourned to Pasch. 11 Car.

Fol. 90.

(a) So if one erects a Dove-cote, &c. 5 Co. 104. b. Moor 421. 453. Cro. Eliz. 548. and vide 2 Rol. Abr. 139.

(b) J. D. shall have no Action, but may kill them. Boulston's Case, 5 Co. 104. b. Moor 420. Pl. 580, 453. Pl. 621. Cro. Eliz. 547. 2 Bulst. 116. (c) And if the Commoner kill them; Q. If he is not a Trespasser quoad J. D. and vide Cro. Eliz. 876. Owen 114. 4 Leon 7. 2 Leon. 201. Godb. 122. Yelv. 104. 2 Bulst. 115, 116. 1 Rol. Abr. 405. Pl. 1, 2, &c. which Books fully prove he cannot kill them when put there by J. D. the Tertenant; but perhaps in that Case he may have an Action. 1 Rol. Abr. 106. Pl. 19. 405. Pl. 2. (d) 1 Rol. Abr. 405. Pl. 4. S. C. and S. P. Con. (e) Cro. Car. 387. S. C. adjudged upon Error, Barkly dubitante, and the first Judgment revers'd accordingly, and there said that the Judgment in B. past sub silentio. 1 Jon. 556. S. C. adjudged upon Error.

(O) Against whom it lies.

1. If I deliver Goods to A. who delivers them to B. to keep to the Use of A. and B. wastes them, I may have an Action upon the Case against B. tho' I did not deliver them to him. (a) 14 Ed. 4, 13.

(a) This is misprinted, and should be 12 Ed. 4. 13. Fitz. Action sur le Case 19. Br. 96. S. C.

2. If I deliver my Horse to a Smith to shoe, and he delivers him to another Smith who pricks him, I may have an Action upon the Case against him, tho' I did not deliver the Horse to him, contra (b) 12 Ed. 4, 13. per Brian.

(b) Fitz. Action sur le Case, 19. 8. P.

(P) Deceit in Nature of Case.

In what Cases it lies upon a Warranty in Law.

1. If (a) a Vintner sells Wine (knowing it to be corrupt) to another as sound, good, and not corrupt, without any express Warranty, yet an Action of Deceit lies against him, for this was a Warranty in Law. 9 (b) Hen. 6. 53. b.

(a) Kelw. 91. a. like Point per Frowick, Br. Action sur le Case 5. S. P. 2 Rol. Rep. 1 Rol. Abr. appears; but F. N. B. 94. c. S. P. Con. Cro. Jac. 470. vide Bridg. 127. S. P. cited Con. 27. vide (b) Fitz. Action sur le Case 5. S. C. Br. 8. S. C. 2 Rol. Rep. 5. S. C. cited. 69. vide.

2. (c) So

(c) Kelw. 91. a. S. P. per Frowick. (d) Fitz Action sur le Case 5. Br. 8. S. C. Cro. Jac. 197. S. C. cited. 2 Rol. Rep. 6. S. C. cited 1 Rol. Abr. 88. Pl. 6. vide.

2. (c) So if I come to a Tavern to eat, and the Taverner sells and gives me corrupted Meat and Drink, so that I thereby become very sick, an Action upon the Case lies against him without any express Warranty, for there is a Warranty in Law. 9 (d) Hen. 6. 53.

(e) Kelw. 91. a. S. P. per Frowick. (f) Otherways if he knows it not.

3. If a Man (it seems to be intended of a Merchant) sells a Piece de Panno Laneo (f) knowing it not to be well fulled, an Action of Deceit lies, for this is a Warranty in Law. (g) 9 Hen. 6. 53.

Kelw. 91. a. per Frowick. (g) Fitz. Action sur le Case 5. Br. 8. Br. Garranty. 93. S. C.

(h) F. N. B. 94. c. S. P. Bridg. 127. S. P. cited.

4. (h) If a Man sells a Horse to me without warranting him to be sound, if he be distempered in his Body, yet no Action lies against him, contra 20 Hen. 6. 35.

(i) 1 Rol. Abr. 98. Pl. 9. vide. (k) Fitz. Action sur le Case 42. Br.

5. If a Man takes Goods wrongfully from J. S. and sells them to me for Money as his own Goods, and after J. S. takes (i) them from me, I shall have an Action upon the Case against my Vendor 42. (k) Assisarum 8. adjudged.

85. S. C. 4 Co. 18. b. S. C. cited, it appearing there as in Truth the Fact was, that the Defendant offered them to Sale to the Plaintiff; but whether such Offer was material in the Case or not, Q. & vide Moor 126.

(l) For selling false Bills of Credit. Stil. 343. 348. and vide Cro. Jac. 197. Cro. Eliz. 44.

6. If (l) there be a Communication between A. and B. for the buying of certain Sheep, and thereupon B. the Vendor (m) says they are his own Sheep, where in truth they are the Sheep of another, but thereupon A. buys them of B. tho' B. made not any express Warranty of the Sheep, yet an Action upon the Case in Nature of Deceit lies against B. Pasch. 16 Jac. B. R. between (n) Lyster & Furnace adjudged.

(m) In an Action for falsely and fraudulently Selling to the Plaintiff a Horse, that was not the Defendant's own proper Horse, the Plaintiff must prove that the Defendant knew him not to be his own Horse. All 91. 1 Keb. 523. (n) Cro. Jac. 474. S. C. adjudged.

* Fol. 91.

7. So if the Vendor affirms that the Goods are the Goods of a Stranger his Friend, and that he had an Authority from him to sell them to him, and thereupon B. buys them, where in Truth they are the Goods of another, yet if he sold them fraudulently and falsely upon this Pretence of Authority, tho' he did not warrant them, and tho' it is not aver'd that he sold them, knowing them to be the Goods of a Stranger, yet B. shall have an Action upon the Case for this Deceit. Mich. 1650. adjudged between Warner & Tallerd. Intratur Trin. 1650. Rot. 1338. this Matter being moved in Arrest of Judgment.

(o) If A. affirms to B. that J. S. would have bought certain Houses of A. and would have given so much for them, upon which B. fidem adhibens to the said A. buys the said Houses, tho' this Affirmation was false, yet no Action lies again A. 1 Syd. 146. said, and seems to be per Curiam. 1 Rol. Abr. 101. Pl. 16. vide.

8. In an Action upon the Case by A. against B. If the Plaintiff declares, that whereas the Defendant craftily and subtilly intending to deceive and cozen the Plaintiff, offering to sell one Guelding to the Plaintiff, (o) affirmed to the Plaintiff, that he brought up that Guelding of a Colt, and that the said Guelding was then his own; upon which Affirmation of the said Defendant, the Plaintiff being seduced, and giving Credit thereunto, afterwards, that is to say, upon the same Day and Year, and at the Place aforesaid, did buy the said Guelding for five Hogsheads of Cider, to the Value of 25 l. where indeed the Defendant did not breed up the said Guelding of a Colt, neither was the said Guelding the Guelding of the Defendant, but was the Guelding of J. S who afterwards did take away the said Guelding from him, whereby the Defendant did cheat and cozen him of his five Hogsheads of Cider; the Action lies upon this Declaration, tho' there was no Warranty upon the Sale, for this was an apparent Deceit contrary to his own Knowledge, and tho' it is not aver'd that he sold him at the same time when he affirmed he bred him up of a Colt, but that

he Postea the same Day and Place bought him, giving Credit thereunto, this shall be intended immediately after the speaking of the Words, for all the Words could not be spoke together. Pasch. 1652. between (p) Harding and Freeman adjudged after a Verdict for the Plaintiff.

(p) Stil 310. S. C. adjudged, 1 Keb. 523. S. C. cited.

9. If I retain a Man of the Law to be of my Counsel to buy me such a Manor, if he does his Endeavour, tho' he procures it not, yet no Action lies against him. (q) 11 Hen. 6. 18.

(q) Br. Action sur le Case, 108. S. C. 1 Rol. Abr. 96. Pl. 7. S. C. 105. Pl. 3. S. C.

10. If he becomes of Counsel to my Adversary after in this Matter against me, an Action upon the Case lies against him. (r) 11 Hen. 6. 18.

(r) Fitz. Action sur le Case 7. Br. 108. S. C.

11. If I retain him to be of my Counsel at Guildhall in London, at a certain Day, if he does not come at the Day, by which my Cause miscarries, an Action of Deceit lies against him (s) 20 Hen. 6. 34.

(s) 1 Rol. Abr. 10. Pl. 6. S. C.

12. If a Man shews his Evidence to a Man of the Law, tho' he after becomes of Counsel to another, and discovers the Counsel of the said Evidences, yet no Action lies against him, because he was not retained with him. 11 Hen. 6. 18.

13. If a Common (t) Farrier kills my Horse with bad Medicines, an Action upon the Case lies against him, without any express Assumpsit to cure him (u) 19 Hen. 6. 49. but otherways it is of one that is not a common Farrier. 19 Hen. 6. 49.

(t) This in the Original is Marshal.

(u) Fitz. Action sur le Case 10. S. C. 1 Rol. Abr. 96. Pl. 6. S. C.

14. If a Man applies Medicines to my Hand, and through his Negligence my Hand is mayhem'd, yet no Action upon the Case lies without an Assumpsit to cure it. 19 Hen. 6. 49. (x) it seems not to be intended of a common Surgeon.

(x) Before 5 Eliz. cap. 4.

No Man was restrained to exercise any Trade, but he that perform'd it falsly and insufficiently, was answerable in an Action. Hob. 211. 11 Co. 54. b. 1 Sand. 312. —Action against a Barber, for barbing the Plaintiff negligenter & inartificialiter. 2 Bulst. 333. cited.

15. (y) If a Smith (z) picks my Horse, an Action upon the Case lies against him (a) 46 Edw. 3. 12. adjudged.

(y) Br. Action sur le Case 25. S. P. F. N. B. 94 D. S. P. 1 Sand. 312. S. P. per Sand arguend'

(z) Action against a Smith, for denying to Shoe my Horse. Kelw. 50. a. per Frowick. (a) Fitz. Action sur le Case 35. 49. S. C. Br. 22. S. C. 2 Bulst. 333. S. C. cited. 1 Rol. Abr. 96. Pl. 4. vide.

16. If a Farrier takes upon him to cure my Horse, being gravelled in the Feet, and after so negligenter & improvidé takes Care of the Horse, that he (*) dies, an Action lies against him upon (c) this Neglect and Damage. Trin. 39 Eliz. B. R. between (d) Powtuary and Walton

* Fol. 92.

(c) Diversity where he warrants the Cure of him, and where not. Br. Action sur le Case 25. (d) 1 Rol. Abr. 10. Pl. 5. S. C. 96. Pl. 6. vide.

17. If the Plaintiff declares, that upon a Communication between the Plaintiff and the Defendant for the Purchase of a certain Term for Years, which the Defendant then had in certain Lands, the Defendant (a) asseruit to the Plaintiff, that the said Term was (b) worth 150 l. to be sold, to which the said Plaintiff *fidem adhibens* did give the Defendant 150 *l.* for the same, and that after the Plaintiff offering the said Term to Sale, could not get so much for the same: The Action does not lie, for here was only a naked Affirmation of the Defendant that the Term was worth so much, and it was the Plaintiff's Folly to believe him. *Mich.* 39. *Eliz.* between *Harvy* and *Young*. *Yelv.* 20. adjudged.

(a) Otherways if the Defendant had warranted the said Term to be of that Value, and thereupon the Plaintiff had bought it. Yelv. 20. per Curiam. (b) Otherways if the Defendant had affirmed the Rents to be so much, and they had fallen short. Leakins and Cliffel. 1 Sid. 146. adjudged. 1 Keb. 510, 518, 522.

18. If *A.* being a Goldsmith, and having Skill in Jewels and precious Stones, hath a Stone which he affirms to be a Bezar's Stone, and sells it to *B.* for 100 l. *ubi revera* it was no Bezar's Stone, no Action lies against *A.* for every one in selling

ſelling of his Wares, will affirm that his Wares are good, or that the Horſe which he ſells is ſound and yet if he does not warrant them ſo, if falſe, no Action lies. *Paſch.* 1 *Jac. B. R.* between (c) *Chandlor* and *Lopus*. *Cro. Jac.* 4. adjudged upon a Writ of Error in *Camera Scaccarii*, and the firſt Judgment reverſed accordingly by all the Juſtices and Barons, *contra Anderſon.*

(c) New Dier 75. Margine, S. C. cited as adjudged in B. R. and there ſaid that the Opinion of Popham was, That if I have any Commodity (be it Victuals, &c.) that is corrupt, and I knowing it to be ſo, ſell it for good, and affirm it to be ſo, an Action lies for this Diſceit, but tho' it be corrupted if I know it not; tho' I affirm it to be good, yet no Action lies, unleſs I warrant it to be ſo. Cro. Jac. 469. S. C. cited as adjudged in B. R. 2 Rol. Rep. 5. S. C. cited and ſaid that the Judgment was reverſed, becauſe it was not pleaded that he knew it to be falſe at the Time of the Sale.

19. If the Plaintiff declares, That whereas Q. *Elizabeth* was ſeized in Fee of the Advowſon of the Vicarage of *S.* whereto the Tithes in *S.* did belong, and that the Defendant upon the 9th of *June*, did affirm himſelf to be lawful Incumbent thereof, and that he had Right to the Tithes from the Death of *J. N.* and after upon the 16th of *June*, the Plaintiff having a Communication with the Defendant about his Buying of the Defendant the ſaid Tithes till *Mich.* following, the Defendant *ad tunc ſciens* that he had no Right thereto, (the Defendant not having been inſtituted, *&c.*) yet *falſo & deceptive* ſold them to the Plaintiff for 30 *l.* and alledges in *facto* that *J. N.* was after preſented, *&c.* and took the Tithes, *&c.* the Action does not lie, for there was no Warranty that the Plaintiff ſhould enjoy them, and this Affirmation alſo was in Time precedent to the Sale. *Mich.* 5 *Jac.* between *Roſwel* and *Vaughan*. *Cro. Jac.* 196. adjudged.

Pleader.

Declaration.

1. IF in a Writ of Diſceit, the Plaintiff declares, That the Defendant (a) *Sciens* that he had no Right to the Advowſon of *D.* took upon himſelf to be Owner thereof, and ſold the Profits thereof to the Plaintiff; this is a good Declaration, tho' not ſaid *ubi revera*, the Defendant had no Title, *&c.* between (b) *Ruſſel* and *Vaughan*. *Goulſ.* 123. adjudged upon a Motion in Arreſt of Judgment after a Verdict for the Plaintiff.

(a) Falſo & fraudulenter vendidit, &c. after Verdict imports that it was Scienter, and ſupplies the want thereof. Stil. 310. 3 Keb. 807. vide. 1 Keb. 309.—So Sciens, &c. implies that it was fraudulenter. 1 Sid. 146.—So where the Plaintiff declares quod improvide & incaute abſq; conſideratione ineptitudinis loci, he drove his Horſes over the Plaintiff, tho' not ſaid Sciens that they were unruly. 2 Lev. 172.—But Q. if it is not well enough after Verdict, tho' not ſaid Sciens or fraudulenter & deceptive. 3 Mod. 261. it is ſo adjudged. (b) Moor 467. Pl. 666. S. C. adjudged. Mich. 39 and 40 Eliz. it being there ſaid to be an Action upon the Caſe.

2. The Plaintiff declared that the Defendant 31 *May*, 19 *Jac.* bargained with the Plaintiff to ſell him a Mare, and the Defendant *ad tunc & ibidem ſciens* the ſaid Mare to be lame, *&c. equam præd' ſanam & abſque aliqua infirmitate warrantizavit & eandem equam præd'*, 31 *Maii* 19 *Jac. apud L. eid'* the Plaintiff *falſo & fraudulenter ad tunc & ibidem vendidit & ſic dictus Defendens fallaciter decepit* the Plaintiff, and after Verdict *pro quer'* it was moved that this was no good Declaration, becauſe not ſaid *warrantizando vendidit* and the Warranty might be at one Time, and the Sale at another Time of the ſame Day, but for want of the Word *and* after *warrantizavit* it is ſaid the Declaration was held inſenſible, and the Judgment ſtaid by two Judges. *Hill.* 19 *Jac. Cro. Jac.* 630, 631. *vide.* for in the Stating the Caſe the Word *and* is inſerted as before, but perhaps by Miſtake.

(Q) Case in Nature of Diſceit againſt (*) Officers.

(*) Againſt a Clerk that had the Cuſtody of a Record, and ſuffered it to be altered.

1. (a) A Man ſhall not have an Action upon the Caſe againſt a Judge (b) of Record (c) for giving a Falſe Judgment. (d) 9 Hen. 6, 60. b.

Sir Henry Herbert and Paget. Raym. 53. 1 Sid. 77. 1 Keb. 288, 346. vide. (a) Palm. 243. S. P. arguend'. (b) An Action lies againſt a Judge of the Stannary-Court, for refuſing a Plea, which by Law he ought to have accepted. 2 Rol. Rep. 498. per Jon. Juſtice, ceteris abſent. (c) Not againſt a Judge of an Inferior Court for taking inſufficient Bail. Hut. 120. (d) Fitz. Action ſur le Caſe 6. S. C. Br. 9. S. C. Br. Judges 2. S. C.

2. As it does not lie againſt a Sheriff for quaſhing an Eſſoin in his Court with the Conſent of the Suitors, tho' it was erroneouſly done, for the Party might have falſe Judgment for it, (e) 26 Aſſ. 45. but if the Sheriff quaſh the Eſſoin erroneouſly without the Conſent of the Suitors, an Action lies againſt him for this, becauſe no falſe Judgment lies. (f) 26 Aſſ. 45. adjudged.

(e) Fitz. Bill. 12. S. C. (f) Fitz. Bill 12. S. C. Br. 43. S. C.

Br. Action ſur le Caſe 79. S. C. Br. Faux Judgment 18. S. C.

3. (g) If the Bailiffs in ancient Demeſn hold Plea (h) after the Record is removed in Bank, by which the Tenant loſes his Land there by Recovery, he may have an Action upon the Caſe againſt them. 14 Ed. 3. Action upon the Caſe, 39 adjudged.

(g) F. N. B. 93. E. like Point. (h) Action againſt the Under-Steward of a Court-Baron, for proceeding after a corpus cum cauſa delivered. 3 Leon. 99. adjudged.

4. (i) If an Eſcheator returns a falſe Office contrary to what was found by the Jury in Prejudice of the Party, an Action upon the Caſe lies againſt him, for he is not a Judge but an Officer in this. (k) 9 Hen. 6, 60. adjudged.

(i) 4 Inſt. 226. S. P. (k) Fitz. Action ſur le Caſe 6. S. C.

Br. 9. S. C. 2 Vent. 26. S. C. cited. Palm. 143. S. C. cited.

5. If a Sheriff returns upon an Exigent 3 or 4 Exactus, and that there were not more Counties, where in Truth there were 5 Counties, the Plaintiff ſhall have an Action upon the Caſe againſt him. 9 Hen. 6. 60. b.

6. If a Sheriff hath a Court by Preſcription, and hath uſed to execute Proceſs himſelf, no Action lies againſt him, becauſe he does it as Judge. Mich. 8 Jac. B. per Curiam.

7. If a Sheriff upon a Venire facias returns 12 Jurors, where one hath nothing upon which Iſſues may be levied, the Succeſſor Sheriff when a Diſtringas iſſues to him, is bound by this Return, ſo that he can't return a nihil, and therefore he may have a Writ of (l) Diſceit againſt his Predeceſſor Sheriff, and ſhall recover Damages, having regard to what he loſes by the Return of Iſſues that cannot be levied. (m) 19 Hen. 6. 38. b.

(l) Br. Action ſur Caſe 53. S. C. (m) Fitz. Return del Mitount 13. S. C. Br. Return del Brief 49. S. C.

8. If the Sheriff returns the Tenant ſummoned in a real Action, where he was not, by which he loſes by Default, an Action lies againſt (n) him for this. (o) 26 Aſſ. 48.

(n) For the Judgment ſhall ſtand and the Party is put to have his Remedy againſt the Sheriff. Moor 349. Pl. 467. adjudged. Br. Action ſur Caſe 51. Goulſ. 128. (o) Fitz. Bill 13. S. C.

9. So this lies againſt the Sheriff, tho' the Summoners and Vepers are dead, for he is in this Action to recover all in Damages and not the Land. (p) 1 Hen. 6. 1. b. but Quere.

(p) Fitz. Action ſur le Caſe 1. S. C. Br. 73. S. C. 1 Rol. Abr. 105. Pl. 11. S. C.

10. (q) If

(q) March 99. S. P. per Crawly.

10. (q) If a Sumner of the Ecclesiastical Court upon a Premonition directed to him by the Ecclesiastical Court, to warn J. S. to pay certain Costs awarded against him by the Court, returns to the Court that he hath warned the said J. S. by which the said J. S. is excommunicated, where in Truth he never warned him, J. S. may have an Action upon the Case against him for this false Return, tho' he be an Ecclesiastical Officer, for the Excommunication is a great Damage to him as well Temporal as Spiritual. Mich. 12 Jac. B. R. between (r) Powle and Godfry adjudged, for during that he cannot have any Action, and is liable to an excommunicato capiendo.

(r) 2 Bulst. 266. S. C. adjudged per tot' am Curiam. S. C. adjudged.

Moor 835. Pl. 1126. S. C. adjudged. 12 Co. 127. S. C. adjudged. 1 Rol. Rep. 63, 64.

(s) 1 Sid. 23, 24. S. P. adjudged. Post. Pl. 17. like Point, with several Notes

11. (s) If the Sheriff takes an Obligation according to the Statute of 23 H. 6. for Appearance, and the Party does not appear, yet no Action upon the Case lies against the Sheriff, for he let him to Bail by the Command of the Statute. Trin. 13 Jac. B. Carter per Curiam.

thereupon. 2. Sand. 59. S. P. adjudged.

Fol. 93.

12. If an Attorney by Deceit between him and the Sheriff, puts a Writ of Seisin upon the File of the Sheriff's Writs, by which I am ousted of the Possession of my Land, supposing a Judgment against me where there was not any, a Writ of Deceit lies against the Attorney. (t) 17 Edw. 3, 51. b.

(t) Fitz. Disceit 39. S. C.

(u) Moor 430. like Point, per Curiam.

13. (u) If a Venire facias comes to the Sheriff in a Quare impedit, and the Sheriff sends to the Bailiff of the City of C. to return the Pannel, who does it accordingly, whereas he had no Warrant to do it, not being Bailiff of the Franchise, for which the Pannel is quashed, the Plaintiff for this Default in the Sheriff, and for his Damages, shall have an Action upon the Case against the Sheriff. (w) 38 Ass. 13. adjudged.

(w) Br. Bill. 21. S. C.

Return de Brief 77. S. C. Action sur le Case 120. S. C. Fitz. Barre. 307. S. C. 2 Vent. 26. S. C. cited 1 Rol. Abr. 94. Pl. 2. S. C.

14. If the Sheriff imbezils an Exigent delivered to him at my Suit, an Action upon the Case lies, tam pro me quam pro domino rege.

(x) Fitz. Bill 14.

(x) 41 Ass. 12. adjudged.

15. So it lies against him, tho' the Sheriff delivered the Writ to one of his Coroners, and he was rob'd thereof by another of them, who was named in the Exigent if he was before in the Custody of the Sheriff, and he suffered him to go at large, for this was his own Folly. (y) 41 Ass. 12. adjudged.

(y) Fitz. Bill 14. S. C. Br. Action sur le Case 121. S. C. Br. Barre 68. S. C.

16. In a real Action, If the Demandant delivers a Writ of Summons to the Sheriff, and the Sheriff summons the Tenant accordingly, and after does (z) not (a) return the Writ, an Action upon the Case lies against him. Hill. 32 Eliz. B. R. between (b) Marsh and Astry admit.

(z) 2 Inst. 452. vide. Et Q. if an Action lies, unless the Writ be

delivered in pleno Com', &c. according to the Act. (a) For not returning a Cap' Utlegat'. Cro. Eliz. 873. adjornat'. (b) 1 Leon. 146. S. C. and S. P. appears. Cro. Eliz. 175. S. C. and S. P. appears.

(c) Ante Pl. 111. like Point, vide. (d) So if he returns, cepi corpus & parat' habeo, &c. for the Return in Effect and Construction of Law is true.

17. (c) If a Capias be directed to the Sheriff, who takes the Party, and takes a Bond from him for his Appearance, according to the Statute of 23 Hen. 6. and at the Day of the Return of the Writ thereupon, returns (d) cepi Corpus, but the Defendant does not appear at the Day, (e) yet no Action upon the Case lies against the Sheriff, because there is not any Falsity in the Sheriff, for he bailed him by the Command of the Statute, and he is to be amerced by the Court, if the Defendant do not appear. Mich. 43, 44 Eliz. B. R. between (f) Bowles and Lassels adjudged.

Page and Tulse. 2 Mod. 83, 84, &c. adjudged by 3 Judges against 1. 1 Mod. 244. adjudged by 3 Judges, Scroggs delivering no Opinion. (e) But in this Case the Defendant must not Demur to the Declaration, but must plead the Statute, &c. Langton and Gardiner, Moor 428. Pl. 596. adjudged.

adjudged. Cro. Eliz. 400. adjudged. Parker and Melby, 2 Keb. 591, &c. 1 Syd. 439. adjudged. 1 Mod. 57. adjudged. Con. by 3 Judges againſt 1, and the Reaſon there given, becauſe the Plaintiff had relied upon the Falſity of the Return, quod paratum, &c. 1 Vent. 85, 86. adjudged pro quer' and the Reaſon order'd to be enter'd upon the Roll, quia the Defendant had not pleaded the Statute. 2 Sand. 155. cited. Benſon and Melby, 2 Sand. 154, 155. adjudged per tot' Curiam. 2 Keb. 670. adjudged.——Or elſe upon Not Guilty, the Defendant may give it in Evidence, 1 Syd. 439. 1 Mod. 58. 1 Ven. 85.—— But if not given in Evidence, perhaps after Verdict, he is without Remedy, and Judgment ſhall be given for the Plaintiff. 1 Syd. 23. vide. (f) Cro. Eliz. 852. S. C. adjudged, the Return being that he was languidus, &c. which the Court ſaid was immatetial as to the Plaintiff: the Sheriff having Bailed him according to the Statute. Noy. 39. S. C. adjudged, the Return being that he was languious, &c. tho' no ſuch Return was ever ſeen before, and he might have returned the Truth that he had let him at large upon Bail. But whether he could have made ſuch a ſpecial Return. Q Et vide. 1 Syd. 439. Mod. 57. 2. Ven. 86. 2 Mod. 86, 180, 181.

18 (g) If a Sumner of the Eccleſiaſtical Court falſely and maliciouſly, colore officii ſui of a Sumner, to the Intent to ſcandalize J. S. with the Fame of Incontinency with A. and to put him to Expenſes in the Eccleſiaſtical Court, cites J. S. to appear for Incontinency with A. upon which J. S. appears, and is there charged by the Judge with it, and upon his Anſwer diſcharged, by which he is put to Expenſe, J. S. may have an Action upon the Caſe againſt the Sumner upon ſuch a Declaration, tho' he be an Officer of the Eccleſiaſtical Court, for in as much as it is alledged that he cited him falſely and maliciouſly, & colore officii it ſhall be intended that he did it without Proceſs. Hill. 8 Car. B. R. between (h) Carlian & Mill, this being moved in Arreſt of Judgment. Intratur Hill. 7. Rot. 1147.

(g) Kerchewal and Smith, like Point, in an Action againſt Churchwardens for ſuch a Preſentment. Cro. Car. 285. appears. 1 Jon. 305. appears. 1 Rol. Abr. 112. Pl. 9. like Point againſt Church-wardens. 2 Mod. 52. like Point per Curiam. Hockin and Mathews, like Point. 1 Vent. 86, 87. adjudged. 1 Syd. 463. adjudged. 1 Lev. 292. adjudged. (h) Cro. Car. 291. S. C. adjudged, becauſe it is alledged to have been done falſo & malitioſe. 1 Jon. 312. S. C.

19. Hill. 17 Edw. 3. B. R. Rot. 69. Action brought by John Bokeland, Knight, of the County of Wilts, againſt the Sheriff of the ſame County, for not levying 10 l. and 4 s. pro expenſis ſuis in attendentia in Parliamento, &c. ſimile ibidem. Rot. 138.

20. If a Diſtringas iſſues to the Sheriff to diſtrain the Defendant in an Action by all his Lands and Cattles, &c. and the Sheriff returns too ſmall Iſſues, (i) tho' an Averment lies by the Statute of (k) Weſtm. 2 Cap. 43. yet the Plaintiff may well have an Action upon the Caſe againſt the Sheriff, becauſe it appears by the Words of the Statute, that this is a falſe Return, and the Words are quod diſtringeret per all his Lands and Chattels, ita quod de exitibus eorum, &c. ſo that if he does not return all the Iſſues, he does not do as he is commanded, alſo if this Action does not lie the Plaintiff had no Remedy at the Common Law, which was very miſchievous, and the Statute ordains that the King ſhall have the Iſſues, but (*) does not reſtrain the Plaintiff of any Remedy that he had at the Common Law. 8 Hen. 6, 12. b. vide 10 Hen. 7, 11. b. Quere Nota quod. Trin. 3 Car. Miſtreſs Dorothy Benet of London, Widow, upon good Advice brought ſuch an Action again the Sheriffs of London, Scilicet, for returning too ſmall Iſſues againſt the Mayor and Commonalty of London.

(i) Br. Dammages 69. S. C. Averment 12. S. C. (k) Which ſee fully explained. 2 Inſ. 449.

* Fol. 94.

21. (l) If the Sheriff take an Inquiſition upon an Elegit, and upon Requeſt refuſes to deliver Poſſeſſion to the Plaintiff, and yet after at the Day of the Return of the Writ, returns that he had delivered Poſſeſſion to the Plaintiff at the Day of the Inquiſition taken, an Action upon the Caſe lies againſt him for this falſe Return, tho' the Plaintiff after the Inquiſition might enter without any Delivery, for perhaps the Poſſeſſion is kept with a ſtrong Hand, ſo that he cannot enter without the Aid of the Sheriff. Hill. 8 Car. B. R. between Liſter & Bromly adjudged, this being moved in Arreſt of Judgment. Intratur Mich. 8. Rot. 68.

(l) Winch. Rep. 100. like Point appears.

22. If my Servant is robb'd, and he goes to a Juſtice of Peace, and prays to be examined touching the Robbery, and the Juſtice refuſes to examine him ſo that I am thereby damnifyed, and cannot proceed againſt the Hundred, I ſhall have an Action againſt the Juſtice; for the Examination by him in this Caſe is not as a Judge, but as a particular Miniſter by (a) the Act appointed for

(a) Stat. 27. Eliz. cap. 13.

for this Purpose. In the Case of *Green* against the Hundred of *Buecle-Church*. *Trin* 31 *Eliz.* 1 *Leon.* 323. *per Periam* and *Anderson*, *Windham dubitante.*

(b) 1 Rol. Abr. 99. Pl. 2. like Point, vide.

23. (b) If the Plaintiff declares that he affirmed a Plaint of Debt in the Court of *B.* against *C.* and thereupon caused *C.* to be arrested, and that the Defendant (being the Major Town-clerk and Jaylor of *B.*) did conspire to delay the Plaintiff in his said Suit, and in Peril of his said Debt had let *C.* go at large without taking any Bail, this Action does lie, for the not taking of Bail is not the Cause of the Action but the Conspiracy. *Mich.* 31 & 32. *Eliz.* between *Cockshall* and the Major, *&c.* of *Boalton.* 1 *Leon.* 189. adjudged, *per totam Curiam præter Periam.*

(c) So an Action lies against the Major and Commonalty of L. for making a false Certificate of a Custom. Hob. 87. said.

24. If upon a Mandamus to restore *J. S.* to his Place of a Burgess of *P. vel causam nobis signif' &c.* the Major, *&c.* return a good Cause, *&c.* the Matter of which is false, an Action lies for this (c) false Return. *Trin.* 13 *Jac. James Bag*'s Case. 11 Co. 99. b. *per Curiam.*

(d) Moor 432. like Point per Curiam.

25. (d) If a Minister of Justice hath a Warrant to (e) attach (*) the Goods of another, and can do it, and does it not, an Action upon the Case lies against him. *Trin.* 14 *Jac.* 3 *Bulst.* 212. *per Coke* Chief Justice.

(e) So if I shew J. S. to the Sheriff, and give him a Writ to arrest him, and he does not. Cro. Eliz. 873. per Walmsly. (*) But if upon a Capias utlegatum, before Judgment the Sheriff neglects to extend or seise Goods, &c. this is the King's Loss, and the Party shall have no Action, tho' it was objected the Sheriff extending, &c. would have been a Means to force the Defendant to appear, but it was said that if it had been shewn that the Sheriff might have taken his Body, &c. there would have been more Reason to support the Action. 2 Vent. 90.

26. If a Distress at the Suit of *A.* issues out of the Court of *C.* directed to *J. S.* (who is not the usual Officer) to distrain the Cattle of *B. &c.* or that *B.* should find Pledges to appear the next Court, and thereupon *J. S.* distrains the Cattle of *B.* and after redelivers them to *B.* without taking sufficient Security, *&c.* and *B.* does not appear, *&c.* an Action lies against *J. S.* for this Deceit, notwithstanding he is no known Officer, but *hac vice* only between *Wild* and *Douze. Latch* 159. adjudged upon a Writ of Error upon a Judgment in *Cheyny* Court.

27. If a *Fieri facias de bonis Ecclesiasticis* of *J. S.* be directed to the Bishop of *E.* and he returns *quod nulla habet bona Ecclesiastica*, which is false, an Action upon the Case lies against the Bishop for this false Return. *Hill.* 17 and 18 *Car.* 2. between (f) *Pichard* and *Payton.* 1 *Sid.* 276. *per Curiam.*

(f) 1 Keb. 947. S. C. and S. P. per Curiam. 2 Keb. 83. S. C. and S. P. per Curiam.

28. If the Plaintiff declares, that within the City of *London* there is an ancient Bridge, and that by the Custom of the said City, two Officers to look after it called Bridge-masters, by the Citizens at a Common-Hall assembled have been yearly chosen or continued, and that if one of them within the Year hath died, another for the Remainder of the said Year hath always been chosen as aforesaid; and that there are certain Fees and Profits belonging to the said Office, and that *A.* and *B.* were elected to this Office; that *A.* during his said Year died, and upon a Hall by the Defendant (being then Lord Major) called for the Election of a Bridge-master in the Place of *A.* then and there the Plaintiff and one *J. S.* as Competitors stood for the said Office, and (g) thereupon a Question did arise who had the greater Number of Electors, and the Plaintiff did aver his Number to be the greater, and thereupon did request the Defendant, that according to the Custom they might go to the Poll; but the Defendant did refuse to number the Polls, and made Proclamation that the Electors should depart, and discharged the Court, and *J. S.* was Sworn *per quod* the Plaintiff lost the Profit of the Place, *&c.* This Action lies as well for this (h) injurious Prevention of him in obtaining the Office, as for an Hinderance of him in the Execution thereof, for *qui destruit medium destruit finem. Mich.* 23 Car. 2. B. R. between (i) *Turner* and Sir *Sam. Sterling.* 2 *Vent.* 25, 26, *&c.* adjudged *per totam Curiam contra Vaughan*, and 1 *Vent.* 206, 207, upon a Writ of Error in B. R. affirmed *per totam Curiam.*

(g) According to the Report of this Case in 2 Lev. 50. the Custom was laid, that if the Electors were so divided, that the Plurality could not be known by the View, the Major ought to grant the Poll, and that the Electors were so divided, &c. (b) If upon a Writ de Coronatore eligend', the Sheriff will not return him Coroner that is chosen by the Major Part, an

Action lies. 2 Vent. 26. agreed per Archer, vide 2 Sid. 168, 169, &c. 3 Keb. 664, 859. Diverſity between an Office of Government only, and an Office of Profit. (i) 3 Keb. 26, 33. S. C. affirmed upon Error. 2 Lev. 50. S. C. adjudged and affirmed upon a Writ of Error, per totam Curiam præter Vaughan, tho' it was not aver'd that he had been elected if the Poll had been granted, for the Major did not his Duty, and the per quod he loſt the Profit of his Place is ſufficient after Verdict.

29. If (k) the Plaintiff declares that the Defendant being Sheriff of Y. did arreſt J. S. at the Suit of the Plaintiff, and afterwards did ſuffer him to go at large, and the Defendant pleads the Statute 23 *H. 6. cap.* 10. and that he took good and ſufficient Bail, and the Plaintiff replies and traverſes that the Defendant took good and ſufficient Bail. This Action does not lie, for *quoad* the Plaintiff, the (l) Sufficiency of the Bail is altogether immaterial, 'tis for the Security of the Sheriff, and if the Party does not appear, the Plaintiff need not take an Aſſignment thereof, but proceed againſt the Sheriff by way of Amercement, and leave the Sheriff to take his Advantage againſt the Bail. *Hill.* 28 and 29 *Car.* 2. between (m) *Ellis* and *Yarborough*, 2 *Mod.* 177. adjudged *per totam Curiam*, upon a Demurrer to the Plaintiff's Replication.

(k) Cro. Eliz. 624. S. P. adjudged.

(l) The Plaintiff declares that the Defendant, &c. had taken inſufficient Bail on purpoſe to deceive and defraud the Plaintiff, &c. 1 Sid. 96. vide.—In an Action upon a Bail Bond, one of the Sureties pleads he was not ſufficient, and held no Plea, Cotton and Weal. Moor 636. Pl. 875. Cro. Eliz. 862. 2 And. 175. (m) 1 Mod. 227. S. C. adjudged, per totam Curiam.

(R) (*) Againſt whom it lies.

(*) At what Time, and in what Caſes at Common Law and upon the Statute of Weſtm. 2. cap. 11. reſpondeat ſuperior, &c. vide 2 Inſ. 382, 466. 9 Co. 98 a. Plummer and Whitcot, 2 Jon. 60. 2 Dev. 158. 1 Ven. 314. 2 Mod. 119. 3 Keb. 591, 656, 701, 754, 758, 773. Noy 69.

1. If the Sheriff's Deputy ſubſtracts a Writ that is to be returned, a Writ of Diſceit lies for this againſt the Sheriff himſelf, and not againſt the Deputy. 19 H. 6, 71. b. (it ſeems as if this were not Law. (a) for the Deputy himſelf may be puniſhed for Matter of Falſity.

(a) 1 Leon. 146. like Point. Cro. Eliz. 175. like Point, and S. C. cited. 1 Roll. Rep. 78. like Point, per Coke.

2. If the Under-ſheriff, when a venire facias comes to the Sheriff, in the Abſence of the Sheriff ſends his Mandat to the Bayliff of C. to return the Pannel, whereas there is not any ſuch Bailiff of C. that hath any Authority to return it, and yet he returns it, for which Cauſe it is quaſhed, the Plaintiff ſhall have an Action upon the Caſe for this Default againſt the Sheriff himſelf. (b) 38 Aſſ. 13. adjudged.

(b) 1 Rol. Abr. 93. Pl. 13. S. C. (*) 2 Mod. 32. S. P. per North.

3. (*) If a Bailiff errant or ſpecial arreſts a Man upon a capias ad ſatisfaciendum, and after the Priſoner reſcues himſelf, he at whoſe Suit he was arreſted, cannot have an Action upon the Caſe for the Eſcape (*) againſt the Bailiff, but muſt have it againſt the Sheriff, for the Bailiff is but a Servant to the Sheriff. Mich. 37 Eliz. B. R. between (c) Atterton & Harward agreed.

(*) So an Action lies not againſt the Bailiff for refuſing Bail, but for not carrying the Party before the Sheriff in order to put in Bail. 2 Mod. 32.

4. If the Demandant in a Writ of Entry Sur Diſſeiſin delivers a Writ of Summons to the Under-ſheriff of the County, and after he ſummons the Tenant upon the Land accordingly, and notwithſtanding does not return the Writ, an Action upon the Caſe may be brought againſt the Under-ſheriff, if the Plaintiff pleaſes, for perhaps the Sheriff had no Notice thereof, and it may be that the Under-ſheriff took the Fees for the Execution of the Writ. Hill. 32 Eliz. B. R. between (d) Marſh & Aſtry adjudged.

(c) Cro. Eliz. 349 S. C. but S. P. does not appear.

5. If a Warrant upon a fieri facias to levy a Debt at the Suit of J. S. be directed to an Under-bailiff of a Liberty, and he by Force thereof levies the Debt, and after conceals the Writ, and makes not any Certificate thereof, an Action upon the Caſe lies againſt the Under-bailiff, becauſe he has done a perſonal Tort. Mich. 12 Jac. B. R. between (e) Bell & Catesby adjudged.

(d) 1 Leon. 146. S. C. adjudged, Cro. Eliz. 175. S. C. adjudged.

(e) 1 Rol. Rep. 78. adjudged.

6. If

for this Purpose. In the Case of *Green* against the Hundred of *Buecle-Church*. *Trin* 31 *Eliz.* 1 *Leon.* 323. *per Periam* and *Anderson*, *Windham dubitante.*

(b) 1 Rol. Abr. 99. Pl. 2. like Point, vide.

23. (b) If the Plaintiff declares that he affirmed a Plaint of Debt in the Court of *B.* against *C.* and thereupon caused *C.* to be arrested, and that the Defendant (being the Major Town-clerk and Jaylor of *B.*) did conspire to delay the Plaintiff in his said Suit, and in Peril of his said Debt had let *C.* go at large without taking any Bail, this Action does lie, for the not taking of Bail is not the Cause of the Action but the Conspiracy. *Mich.* 31 & 32. *Eliz.* between *Cockshall* and the Major, *&c.* of *Boalton.* 1 *Leon.* 189. adjudged, *per totam Curiam præter Periam.*

(c) So an Action lies against the Major and Commonalty of L. for making a false Certificate of a Custom. Hob. 87. said.

24. If upon a Mandamus to restore *J. S.* to his Place of a Burgess of *P. vel causam nobis signif' &c.* the Major, *&c.* return a good Cause, *&c.* the Matter of which is false, an Action lies for this (c) false Return. *Trin.* 13 *Jac. James Bag*'s Case. 11 *Co.* 99. b. *per Curiam.*

(d) Moor 432. like Point per Curiam.

25. (d) If a Minister of Justice hath a Warrant to (e) attach (*) the Goods of another, and can do it, and does it not, an Action upon the Case lies against him. *Trin.* 14 *Jac.* 3 *Bulst.* 212. *per Coke* Chief Justice.

(e) So if I shew J. S. to the Sheriff, and give him a Writ to arrest him, and he does not. Cro. Eliz. 873. per Walmsly. (*) But if upon a Capias utlegatum, before Judgment the Sheriff neglects to extend or seise Goods, &c. this is the King's Loss, and the Party shall have no Action, tho' it was objected the Sheriff extending, &c. would have been a Means to force the Defendant to appear, but it was said that if it had been shewn that the Sheriff might have taken his Body, &c. there would have been more Reason to support the Action. 2 Vent. 90.

26. If a Distress at the Suit of *A.* issues out of the Court of *C.* directed to *J. S.* (who is not the usual Officer) to distrain the Cattle of *B. &c.* or that *B.* should find Pledges to appear the next Court, and thereupon *J. S.* distrains the Cattle of *B.* and after redelivers them to *B.* without taking sufficient Security, *&c.* and *B.* does not appear, *&c.* an Action lies against *J. S.* for this Deceit, notwithstanding he is no known Officer, but *hac vice* only between *Wild* and *Douze. Latch* 159. adjudged upon a Writ of Error upon a Judgment in *Cheyny* Court.

27. If a *Fieri facias de bonis Ecclesiasticis* of *J. S.* be directed to the Bishop of *E.* and he returns *quod nulla habet bona Ecclesiastica*, which is false, an Action upon the Case lies against the Bishop for this false Return. *Hill.* 17 and 18 *Car.* 2. between (f) *Pichard* and *Payton.* 1 *Sid.* 276. *per Curiam.*

(f) 1 Keb. 947. S. C. and S. P. per Curiam. 2 Keb. 83. S. C. and S. P. per Curiam.

28. If the Plaintiff declares, that within the City of *London* there is an ancient Bridge, and that by the Custom of the said City, two Officers to look after it called Bridge-masters, by the Citizens at a Common-Hall assembled have been yearly chosen or continued, and that if one of them within the Year hath died, another for the Remainder of the said Year hath always been chosen as aforesaid; and that there are certain Fees and Profits belonging to the said Office, and that *A.* and *B.* were elected to this Office; that *A.* during his said Year died, and upon a Hall by the Defendant (being then Lord Major) called for the Election of a Bridge-master in the Place of *A.* then and there the Plaintiff and one *J. S.* as Competitors stood for the said Office, and (g) thereupon a Question did arise who had the greater Number of Electors, and the Plaintiff did aver his Number to be the greater, and thereupon did request the Defendant, that according to the Custom they might go to the Poll; but the Defendant did refuse to number the Polls, and made Proclamation that the Electors should depart, and discharged the Court, and *J. S.* was Sworn *per quod* the Plaintiff lost the Profit of the Place, *&c.* This Action lies as well for this (h) injurious Prevention of him in obtaining the Office, as for an Hinderance of him in the Execution thereof, for *qui destruit medium destruit finem. Mich.* 23 Car. 2. B. R. between (i) *Turner* and Sir *Sam. Sterling.* 2 *Vent.* 25, 26, *&c.* adjudged *per totam Curiam contra Vaughan*, and 1 *Vent.* 206, 207, upon a Writ of Error in B. R. affirmed *per totam Curiam.*

(g) According to the Report of this Case in 2 Lev. 50. the Custom was laid, that if the Electors were so divided, that the Plurality could not be known by the View, the Major ought to grant the Poll, and that the Electors were so divided, &c. (b) If upon a Writ de Coronatore eligend', the Sheriff will not return him Coroner that is chosen by the Major Part, an

Action lies. 2 Vent. 26. agreed per Archer, vide 2 Sid. 168, 169, &c. 3 Keb. 664, 859. Diversity between an Office of Government only, and an Office of Profit. (i) 3 Keb. 26, 33. S. C. affirmed upon Error. 2 Lev. 50. S. C. adjudged and affirmed upon a Writ of Error, per totam Curiam præter Vaughan, tho' it was not aver'd that he had been elected if the Poll had been granted, for the Major did not his Duty, and the per quod he lost the Profit of his Place is sufficient after Verdict.

29. If (k) the Plaintiff declares that the Defendant being Sheriff of Y. did arrest J. S. at the Suit of the Plaintiff, and afterwards did suffer him to go at large, and the Defendant pleads the Statute 23 *H.* 6. *cap.* 10. and that he took good and sufficient Bail, and the Plaintiff replies and traverses that the Defendant took good and sufficient Bail. This Action does not lie, for *quoad* the Plaintiff, the (l) Sufficiency of the Bail is altogether immaterial, 'tis for the Security of the Sheriff, and if the Party does not appear, the Plaintiff need not take an Assignment thereof, but proceed against the Sheriff by way of Amercement, and leave the Sheriff to take his Advantage against the Bail. *Hill.* 28 and 29 *Car.* 2. between (m) *Ellis* and *Yarborough*, 2 *Mod.* 177. adjudged *per totam Curiam*, upon a Demurrer to the Plaintiff's Replication.

(k) Cro. Eliz. 624. S. P. adjudged.

(l) The Plaintiff declares that the Defendant, &c. had taken insufficient Bail on pur- Bail Bond,

pose to deceive and defraud the Plaintiff, &c. 1 Sid. 96. vide.—In an Action upon a one of the Sureties pleads he was not sufficient, and held no Plea, Cotton and Weal. Moor 636. Pl. 875. Cro. Eliz. 862. 2 And. 175. (m) 1 Mod. 227. S. C. adjudged, per totam Curiam.

(R) (*) Against whom it lies.

(*) At what Time, and in what Cases at Common Law and upon the Statute of Westm. 2. cap. 11. respondeat superior, &c. vide 2 Inst. 382, 466. 9 Co. 98 a. Plummer and Whitcot, 2 Jon. 60. 2 Dev. 314. 2 Mod. 119. 3 Keb. 591, 656, 701, 754, 758, 773. Noy 69. (a) 1 Leon. 146. like Point. Cro. Eliz. 175. like Point, and S. C. cited. 1 Roll. Rep. 78. like Point, per Coke.

1. If the Sheriff's Deputy substracts a Writ that is to be returned, a Writ of Deceit lies for this against the Sheriff himself, and not against the Deputy. 19 H. 6, 71. b. (it seems as if this were not Law. (a) for the Deputy himself may be punished for Matter of Falsity.

2. If the Under-sheriff, when a venire facias comes to the Sheriff, in the Absence of the Sheriff sends his Mandat to the Bayliff of C. to return the Pannel, whereas there is not any such Bailiff of C. that hath any Authority to return it, and yet he returns it, for which Cause it is quashed, the Plaintiff shall have an Action upon the Case for this Default against the Sheriff himself. (b) 38 Ass. 13. adjudged.

(b) 1 Rol. Abr. 93. Pl. 13. S. C. (*) 2 Mod. 32. S. P. per North.

3. (*) If a Bailiff errant or special arrests a Man upon a capias ad satisfaciendum, and after the Prisoner rescues himself, he at whose Suit he was arrested, cannot have an Action upon the Case for the Escape (*) against the Bailiff, but must have it against the Sheriff, for the Bailiff is but a Servant to the Sheriff. Mich. 37 Eliz. B. R. between (c) Atterton & Harward agreed.

(*) So an Action lies not against the Bailiff for refusing Bail, but for not carrying the Party before the Sheriff in order to put in Bail. 2 Mod. 32.

4. If the Demandant in a Writ of Entry Sur Disseisin delivers a Writ of Summons to the Under-sheriff of the County, and after he summons the Tenant upon the Land accordingly, and notwithstanding does not return the Writ, an Action upon the Case may be brought against the Under-sheriff, if the Plaintiff pleases, for perhaps the Sheriff had no Notice thereof, and it may be that the Under-sheriff took the Fees for the Execution of the Writ. Hill. 32 Eliz. B. R. between (d) Marsh & Astry adjudged.

(c) Cro. Eliz. 349 S. C. but S. P. does not appear.

5. If a Warrant upon a fieri facias to levy a Debt at the Suit of J. S. be directed to an Under-bailiff of a Liberty, and he by Force thereof levies the Debt, and after conceals the Writ, and makes not any Certificate thereof, an Action upon the Case lies against the Under-bailiff, because he has done a personal Tort. Mich. 12 Jac. B. R. between (e) Bell & Catesby adjudged.

(d) 1 Leon. 146. S. C. adjudged, Cro. Eliz. 175. S. C. adjudged.

(e) 1 Rol. Rep. 78. adjudged.

6. If

6. If upon a Plaint levied in the Court of *B.* before the Bailiffs of *B.* according to the Custom there, a Warrant is directed to the Under-bailiffs to take *J. S. ita quod habeant corpus ejus coram ballivis ad prox' Curiam*, and the Under-bailiffs take him and commit him to the Prison, *sub Custodia* of the Jaylor of the Prison of *B.* if they have him not at the Day, *&c.* an Action lies against them and not against the Jaylor, for there was no Commitment to him by any lawful Authority, and that Custody the Jaylor had was only as a Servant to the Under-bailiffs. *Trin.* 41 *Eliz.* between *Baldry* and *Johnson. Cro Eliz.* 743. adjudged.

(S) Against whom it lies upon a Warranty in Law against the Master.

(*) In the Original it is mon Merchant.

1. If a Servant that is (*) my Agent sells an (a) unsound Horse or other Merchandise in a Fair to a Man, no Action lies against the Master for the Deceit, for he did not command his Servant to sell it to any particular Man. (b) 9 Hen. 6. 53. b.

(a) But if a Goldsmith makes Plate wherein he mingles Dross, so that it is not according to the Standard, and by his Servant sells it; an Action lies against the Master, because it fails in the Price in Silver. Cro. Jac. 471. per 2 Judges, and there vide Diversity pœtii & valoris. 2 Rol. Rep. 28. vide. (b) Fitz. Action sur le Case 5. S. C. cited. 2 Rol. Rep. 6. C. cited.

(c) Fitz. Action sur le Case 5. S. C. Bridg. 128. S. C. cited.

2. But if the Servant by Command and Colvin of the Master, sells it to any particular Person, if it be unsound, an Action lies against the Master, for this is his Sale. (c) 8 Hen. 6. 53. b.

(d) Fitz. Action sur le Case. 8. S. C. Br. 8. S. C.

3. If the Servant of a Taverner sells Wine to another which is corrupted, an Action upon the Case lies against the Master, tho' he did not command the Servant to sell it to any particular Person. 9 (d) Hen. 6. 53. b.

4. If *A.* being possest of certain artificial and counterfeit Jewels of the Value of 168 l. and knowing them to be such, delivers them to *B.* his Servant, commanding him to transport the said Jewels unto *Barbary*, and them to sell to the King of *Barbary*, or such other Person as would buy them, but gives *B.* no Charge to conceal their being counterfeit, and thereupon *B.* goes into *Barbary*, and knowing these Jewels to be counterfeit, shews them to *C.* for good and true Jewels, and affirming to *C.* that they are worth 810 l. desires *C.* to sell them to the said King, whereupon *C.* does sell them to the said King for 810 l. which Money *C.* pays *B.* and *B.* thereupon immediately returns to *England*, and pays the 810 *l.* to *A.* his Master, and after the Jewels being discovered to be counterfeit, *C.* is imprisoned by the said King till he repays the 810 l. out of his own Effects, of all which Matter *C.* gives Notice to *A.* and demands Satisfaction, *&c.* yet no Action lies against *A.* for Jewels are in themselves of an uncertain Value, and *B.* was not by *A.* particularly directed to *C.* and all that was done *quoad C.* was the voluntary Act of the Servant, for which the Master is not bound to answer. *Mich.* 16 *Jac.* between (e) *Southern* and *How Bridg. Rep.* 125, 126. *&c.* adjudged, *per totam Curiam.*

(e) 2 Rol. Rep. 5. 26, 27, S. C. adjudged, Poph. 143. S. C. adjudged per totam Curiam. Cro. Jac. 469. S. C. and said the Court inclined against the Plaintiff, principally because A. did not order B. to conceal their being Counterfeit.

(T) Against

(T) Against the Servant.

1. If the Servant of a Taverner sells Wine that is corrupted (a) knowing it to be so, no Action of Diseit lies against the Servant, for he did it but as a Servant. Contra 9 Hen. 6. 53. b.

(a) If the Attorney in an Action of Debt knows of, and was a Witness to a Release of the Debt made before the Action brought for it; yet no Action lies against the Attorney, for he acted only as a Servant, and in the way of his Calling. 1 Mod. 209. per Curiam.

(U) Against whom it lies upon an express Warranty.

1. If my Servant leases my Lands to another for Years, reserving a Rent to me, and to perswade the Lessee to accept thereof, he promises that he shall enjoy the Land during the Term without Incumbrances, if the Land be incumbered, &c. the Lessee may have an Action upon the Case against (b) my Servant, because he made an express Warranty. Trin. 15 Jac. B. R. between (c) Broking and Came, per Curiam.

(a) 2 Rol. Rep. 270. and there cited, 11 Ed. 4. like Point Con.
(b) Yet perhaps my Servant shall have no Remedy against me. Cro. Jac. 471.
(c) Cro. Jac. 425. S. C. but S. P. does not appear.

(X) In what Cases it lies upon a Warranty in Law (a) against an Attorney.

(a) 2 Sid. 171. vide Stile 426.

1. If my Attorney makes Default in a Plea of Land, by which I lose the Land, I shall have a Writ of Diseit against him, and shall recover all in Damages. (b) 21 Edw. 4. 45. b. 61. b. (c) but Quere if he did not lose it by Collusion.

(b) This is misprinted, and should be 21 Ed. 3. 45. b. 61. b.
(c) An Action lies against an Attorney for suffering Judgment against his Client by nil dicit, whereas he had given him a Warrant to plead the general Issue. Winch Rep. 90. said, but it must be laid to have been done by Covin. Winch 90. said.

2. If the Tenant makes an Attorney in Bank, and after Conusance of this Plea is demanded by a Franchise, and granted, he continues Attorney for him in the Franchise, yet if he makes Default there by which the Land is lost, no Writ of Diseit lies against him, because he is not bound to go there. 21 Edw. 3. 46.

3. So an Attorney in a Plea is not bound to go to the Nisi prius, and therefore if he makes Default at the Nisi prius, no Writ of Diseit lies against him. 21 Edw. 3. 46.

4. (d) If an Attorney by Collusion with *J. S.* and without any Warrant from me, appears for me in an Action of Trespass at the Suit of *J. S.* and suffers the Inquest to pass against me by Default, whereupon *J. S.* recovers

(d) Cro. Jac. 695. S. P. per Cur' arguend' Dier 362. b. S. P. appears. 1 Keb. 89. S. P. said.

(b) But perhaps the Judgment ſhall not be vacated. against me, (e) I may have a Writ of Diſceit againſt the Attorney. *Fitz. Nat. Br.* 96. *E.*

Cro. Jac. 344, 695. 3 Inſt. 122. 1 Keb. 89. 2 Rol. Abr. 724. vide.

Fol. 96.

(Y) In what Caſes it lies upon an expreſs Warranty in reſpect of the Warranty, and the Time of the Making thereof.

1. If a Man knowing his Horſe to be Lame and Foundred, offers him to me to buy, and warrants him to be ſound, &c. relying upon which I buy him, by which I am deceived, (a) tho' the Warranty here was before the Sale, yet becauſe this was the Cauſe of the Sale, an Action upon the Caſe lies thereupon. Paſch. 3 Jac. B. R. between Goldſmith and Preſton admit.

(a) But it is a general Rule that the Warranty muſt be made at the Time of the Sale.

Cro. Jac. 4. 196, 197. Bridg. 127. not after. Godb. 31. F. N. B. 98. K. Fitz. Diſceit 24. Br. Garranty 57, 58.

(Z) In what Caſes it lies upon an expreſs Warranty.

(a) F. N. B. 94. c. S. P. Poph. 143. S. P. cited.

1. (a) If a Man (b) ſells a Tun of Wine, and warrants it to be ſound and not corrupted, if it be corrupted an Action upon the Caſe lies. 11 Hen. 6. 18.

(b) This Action lies, tho' he hath not paid for it, for the other may have Debt for his Money. Br. Garranty 59.

2. So if a Man ſells a Horſe, and warrants him to be ſound of his Limbs, if he be not, an Action upon the Caſe lies. 11 Hen. 6. 18.

3. If a Man ſells a Horſe and warrants him to be ſound, &c. whereas he knows him to be Lame and Foundered, an Action upon the Caſe lies. Paſch. 3 Jac. B. R. between Goldſmith and Preſton admit.

4. If a Smith promiſes to ſhoe my Horſe well and commodiouſly, if he pricks him, an Action upon the Caſe lies. 14 Hen. 6. 18. b. (c) it ſeems to lie without this Warranty.

(c) 1 Rol. Abr. 91. Pl. 15. S. P.

5. So if he does not ſhoe him, by which I travel without, and my Horſe is damnified for Want of Shoes, an Action upon the Caſe lies againſt him. 14 Hen. 6. 18. b.

(d) 1 Rol. Abr. 91. Pl. 16. vide.

6. (d) If a Farrier, tho' he be not a common Farrier, promiſes to cure my Horſe of a Diſtemper, if he kills my Horſe through negligent Adminiſtration of his Medicines, an Action upon the Caſe lies againſt him. (e) 19 Hen. 6. 49.

(e) 1 Rol. Abr. 91. Pl. 13. S. C. Fitz. Action ſur le Caſe 10. S. C.

7. If one retains a Man of the Law to be of his Counſel to get a certain Manor, and the Counſellor warrants him to gain the Manor, yet no Action lies againſt the Counſellor if he does not obtain it, (f) for this reſts merely in Covenant, and therefore the Warranty ought to have been by Deed. (g) 11 Hen. 6. 18. (Semble this is intended with Conſideration).

(f) 1 Rol. Abr. 9. Pl. 1, 2. &c. vide.

(g) 1 Rol. Abr. 91. Pl. 9. S. C. Br. Action ſur le Caſe 108. S. C.

8. So if a Man warrants to purchase a Manor and does not, no Action lies without a Deed, because it sounds in Covenant. 11 Hen. 16. 18 b. (Semble it is intended without Consideration.

9. If a Man sells certain Packs of Wool, with Warranty that they are good and merchantable, if they are full of Moaths, an Action upon the Case lies. 19 Hen. 6. 49. b.

10. If a Man sells certain Bales of Green, and warrants them to be merchantable, whereas he knows them to be (h) damaged an Action upon the Case lies against him. 20 Hen. 6. 35. adjudged.

(h) In the Original it is evelane ove Zabul. Q. How to be rendered in English.

11. If a Man undertakes to carry my Mare safe and sound over Humber in a Vessel, if he (i) overloads his Boat with other Horses, by which overloading my Mare is lost, an Action upon the Case lies against him (k) 22 Ass. 41. adjudged (it seems as if it must be intended of a common Carrier of such Things over the River.

(i) For this vide Ante Margine. Where an Action lies against a Carrier, Title, Action upon the Case. (k) 1 Rol. Abr. 10. Pl. 18. S. C. Br. Action sur le Case 78. S. C. Fitz. 40. S. C.

12. If a Man carries a Bale of Woad to a Carrier, and warrants it to him to be but of the Weight of 800 l. and prays him to carry it to such a Place, and that he should have 2 s. for the Carriage of every 100 Weight, whereas it was in Truth of the Weight of 2000 l. but the Carrier giving (*) credit to the Promise aforesaid, carries it to the Place appointed, but by the Deceit in the Weight, his Waggon in which he carries it was so overloaded, that by their excessive Labour he loses three of his Horses that drawed the Waggon, an Action upon the Case lies against him upon this Warranty, tho' he might have weighed it presently upon the Receit, for he might take it upon the other's Promise without weighing of it. Mich. 13 Jac. B. R. (l) between Bayly and Merril, for the (m) Weight is not discernable by the Sight.

* Fol. 97.

(l) 1 Rol. Rep. 276. S. C. and S. P. per Houghton, but 275, Croke seems Con. Cro. Jac. 386. S. C but S. P. does not appear. (m) So of the Length of Things. 11 Ed. 4. 6. A. Fitz. Disceit 23. Br. Disceit 29. 3 Bulst. 95.

13. (n) But the Action does not lie in this Case, if he had only affirmed to the Carrier that it was 800 Weight, for this is no Warranty. Dubitatur Mich. 13 Jac. B. R. between (o) Bayley and Merril.

(n) Poph. 143. like Point cited. (o) Cro. Jac. 386, 387. S. C. adjudged. 1 Rol. Rep. 275. S. C. 2 Judges against 2. & adjorn'. 3 Bulst. 94, 95. S. C. adjorn', and no Judgment ever pronounced, for the Plaintiff perceiving the Court against him, moved it no more.

14. (p) If A. sells a Horse to B. and warrants him to be sound of Wind and Limb, and clear of Legs, whereas he well knows that he is Shoulder pitcht, and has Splints upon his Legs, an Action lies against him upon this Warranty, (q) for these Imperfections are not subject to the View of an unskilful Person. Trin. 18 Jac. B. R. between (r) Dorrington and Edwards adjudged, this being moved in Arrest of Judgment.

(p) Bridg. 128. like Point cited. (q) But Q. of the Warranty of a Horse that is blind. 2 Rol. Rep. 5. Bridg. 128. vide Cro. Jac. 387, &c. 3 Bust. 95. 3 Keb. 101. Br. Disceit 29. Fitz. Disceit 23. (r) 2 Rol. Rep. 188. S. C. adjudged.

(A) What

(A) What shall be a good Warranty.

1. If a Man sells certain Sheep to another, and warrants them to be sound at the Time of the Sale, and (a) that they shall continue sound for the Space of one Year after, this is a good Warranty, upon which an Action upon the Case lies, tho' it be the Act of God if they continue sound, for this is not impossible. Trin. 39 Eliz. B. R. between (b) King and Brayne, per 2 Justices.

(a) Vide Br. Disceit 29. Fitz. Disceit 23.

(b) Owen 60. S. C. and S. P. per 2 Judges.

2. So if a Man warrants such a Ship to return safe from such a Place, for it is usual between Merchants to insure them in such Manner (c) Trin. 39 Eliz. B. R.

(c) Owen 60. S. C. and S. P. per 2 Judges.

3. So if one warrants that such a Man will live a Year, for this is the common Usage of Insurers among Merchants and others. Trin. 39 Eliz. B. R.

4. If A. promises B. for a certain Sum of Money for the Pasture of certain Sheep in certain Lands for a certain Time, to preserve the Sheep in the said Land, for the Time aforesaid, Sanas & liberas a putredine; in this Case, if the Sheep at the Time of the Promise were altogether unsound, infirm, rotten and corrupted, tho' they die after of this Rottenness within the Time aforesaid, yet is not this any Breach of the Promise, if he keeps them during the said Time, for the Effect of the Promise is only to keep them in the said Lands, and that the Land should not infect them with the Rot; for if before the Promise they were altogether rotten, it was not possible for him to restore them to Soundness, nor did he promise so to do, but only upon a Presumption that if they were sound then, that they should not be infected with the Rot during the Time they should depasture with him. Trin. 1651. Matrevers and Aland, adjudged upon a Demurrer. Intratur Pasch. 1651. Rot. 57.

(B) Disceit in Nature of an Action upon the Case who may have it.

The Master.

1. If a Bailiff Errant takes J. S. in Execution upon a Cap' ad Satisfaciend' at the Suit of J. D. and after J. S. escapes by a Rescue of himself, the Sheriff may have an Action upon the Case against him for this Escape, for he is thereby chargeable over for this to J. D. and this Escape made to his Bailiff (*) was an Escape to himself. Mich. 37 Eliz. B. R. (a) between Atterton and Harward adjudged.

* Fol. 98.

(a) Cro. Eliz. 349. S. C. and S. P. admit arguend', by the Counsel.

2. But if such a Prisoner taken by a Bailiff of a Franchise, escapes from the Bailiff, the Sheriff shall not have any Action upon the Case against him, (b) because he is not chargeable over, but the Bailiff only is chargeable.

(b) Cro. Eliz. 26. S. P. and like Point, per Curiam. 1 Rol. Abr. 99. p. 3. S. P.

3. If a Bailiff Errant takes J. S. in Execution at the Suit of J. D. and after he escapes by a Rescue of himself, the Sheriff if he will may have an Action upon the Case against the Bailiff for this

Escape, because when he takes upon him to be his Bailiff, there is an Assumpsit in Law to keep the Prisoners safely, and not to suffer them to escape. Dubitatur Mich. 37 Eliz. B. R. between (a) Atterton & Harward.

(a) Cro. Eliz. 349. S. C. but S. P. does not appear.

4. (b) If my Servant be cozened of my Money, I may have an Action upon the Case for this Deceit against the Cozener. Pasch. 8 Jac. in Camera Scaccarii (c) Paul Tracy's Case per Curiam.

(b) Noy. 105. 106. likepoint and by the better Opinion of the Court the Action lies not for the Cozenage, but the Loss of the Money is a Damage to me (c) Cro. Jac, 223. S. C. adjudged, and affirmed upon Error in Camera Scaccarii.

5. If a Surgeon in Consideration of a Sum of Money, promises to cure my Servant of a Hurt that he has in his Leg, and after applies unwholsome Medicines thereto of purpose to make the Wound worse, by which I lose the Service of my Servant for a long Time, the Master may well have an Action upon the Case against the Surgeon for the Loss of the Service of his Servant. Hill. 12 Jac. B. R. between (d) Everard & Hopkins per Curiam.

(d) Rol. Rep. 124 S. C. adjourn'. 2 Bulst. 332. S. C. and quoad the Point of Law the Court inclined for the Plaintiff, but for Default in the Pleadings adjourn', and after it was ended by Composition. 1 Rol. Abr. 88. Pl. 5.

(C) The Servant.

1. If a Bailiff itinerant or special, arrests J. S. upon a Capias ad satisfaciend' at the Suit of J. D. and J. S. escapes by the Rescue of himself, and after J. D. recovers in an Action upon the Case for this Escape against the Sheriff, who after in such Action recovers against the Bailiff upon an Assumpsit to save him harmless from Escapes, the Bailiff may after have an Action upon the Case against J. S. that escaped, because he is chargeable over. Dubitatur Mich. 37 Eliz. B. R. between (e) Atterton & Harwood.

(e) Cro. Eliz. 349. S. C. and there said that by the better Opinion of the Court, the Bailiff (who in this Case was special, and liable only upon his special Assumpsit) should not have an Action, for his voluntary Act shall not intitle him to an Action against a Stranger.

2. So in the Case Supra, if the Sheriff recovers against the Bailiff in an Action upon the Case for the Escape (as he may as it seems upon an Assumpsit in Law) the Bailiff may well after have an Action upon the Case against J. S. who escaped because he is charged over for it. Dubitatur Mich. 37 Eliz. B. R. between (f) Atterton & Harwood.

(f) Cro. Eliz. 349. S. C.

3. If the Bailiff of a Franchise makes a false Return to the Sheriff, and the Sheriff returns it to the Court accordingly, an Action upon the Case lies against the Bailiff, and not against the Sheriff, for no Default is in him. Trin. 39 Eliz. B. R. between (g) Palmer & Marsh, per Curiam.

(g) 1 Rol. 99. Pl. 1. S. C. and S. P. Moor. 432. S. C. and S. P. per Curiam, Cro. Eliz. 512. S. C. but S. P. does not appear.

(D) At what Times it lies.

1. If A. sells Sheep to B. as his own Goods, saying that they are his own Goods, whereas they belong to D. B. may have an Action against A. for this Deceit before D. hath seized the Sheep, or interrupted him, because they are Things transitory, and therefore the Action lies before Interruption, for if he should stay till D. interrupted him, he may be dead before, or other Disadvantage may happen. Pasch. 16 Jac. B. R. between (a) Lister & Furnace adjudged.

(a) Cro. Jac. 474. S. C. adjudged, Mountague absente.

(a) Cro. Eliz. 123. like Point adjudged.

2. (a) If *A.* recovers *in Debt* against *B.* and thereupon a *Capias ad satisfaciend'* is directed to C. the Sheriff of *N.* to take *B.* in Execution, which is accordingly done, and after *B.* rescues himself, *per quod* C. becomes liable to answer for the Debt, now C. may have an Action against *B.* before *A.* sues C. for the Rescue and Escape was a Wrong to C. and he is always chargeable to *A.* for it, and if C. must not stay till sued by *A. B.* may die in the Interim, or fly his Country, *&c. Hill.* 29 *Eliz.* between the Sheriffs of *Norwich* and *Bradshaw. Cro. Eliz.* 53. adjudged.

3. *A.* brings an Action against *B.* in which C. is Attorney for *A.* and after Verdict for *A.* C. enters Judgment before the Rules (according to the Course of the Court) are out, *per quod B.* is prevented from moving in Arrest of Judgment, and whether *B.* may have an Action against C. *Mich.* 22 *Car.* 2. between (b) *Goodyar* and *Banks. Raym.* 194. *dubitatur*, and *Twisden* thought it hard the Attorney should be sued after the Judgment is set aside; But note, it does not appear in the Case otherways than from what *Twisden* said, that the Judgment was set aside before the Action brought.

(b) 2 Rob. 688. S. C. adjour', it appearing the Judgment was set aside before B. brought his Action 716, adjour'——an Action brought against the Plaintiff's Attorney for entring Judgment against the Defendant when the Court awarded a non pros. Hut. 125, 126. and yet it appears the Judgment was set aside before the Action brought.

Fol. 99.

(E) Action upon the Case in Nature of Deceit against Officers.

In what Case it lies.

Upon an Escape.

(a) Cro. Jac. 807. S. C. and S. P. per Admittance. Moor. 852. Pl. 1162. S. C. and S. P. adjudged, per Admittance, but vide 807. Pl. 1. this Case and the several Books where reported.

1. If a Man be Arrested upon mean Process at the Suit of J. S. and he escapes, J. S. shall have a special Action upon the Case against the Sheriff for this Escape. My Reports, 14 Jac. (a) May against Proby & Lumly adjudged, per Admittance. 16 Edw. 4. 3. by all the Justices.

(b) 2 Bulst. 236. S. C. adjudged. Moor. 834. Pl. 1123. S. C. adjudged, and note, according to Moor the Action was Debt.

2. If a Man brings an Action against J. S. before the Mayor, Bayliffs, and Stewards of a Town, where the Bayliffs are the Jaylors of the Prison of the Town, and J. S. for want of Bail is committed to the Bayliffs upon mean Process, and they suffer him to go at large before Judgment and Execution, and after the Plaintiff recovers against him, the Plaintiff may have a special Action upon the Case against the Bayliffs for this Escape, for by this he is deprived of the speedy Means to have him in Execution after Judgment, the which he might have had, if he had not been suffered to go at large. Hill. 4 Jac. B. R. the Bayliffs of Newcastle, per Curiam.

3. If at the Petition of *A.* and the rest of the Creditors of *B.* a Commission upon the Statute against Bankrupts is issued out against *B.* and thereupon the Commissioners sit and offer Interrogatories to C. and he refuses to be examined, and by them is thereupon committed to Prison, and the Gaoler suffers him to escape, *A.* may have an Action against the Gaoler for this Escape. *Trin.* 12 *Jac.* between (b) *Barns* and *Cary.* 1 *Rol. Rep.* 47. adjudged.

(F) Against

(F) Against whom it lies.

Against Officers.

(a) Where against the Master.

1. If the Sheriff returns mandavi ballivo libertatis, &c. qui mihi responsum dedit, &c. if the Matter of the Return be false, no Action lies against the Sheriff, but only against the Bailiff, (b) for the Sheriff ought to accept of the Return of the Bailiff if it be sufficient in Law, and not examine the Truth of it. (c) Trin. 39 Eliz. B. R. per Curiam.

(a) The Lord of a Franchise must answer for it if his Bailiff is unable. 2 Brownl. 50. per tot' Curiam. —The Bailiff of a Franchise shall answer for his Deputy. Lit. Rep. 33. per Curiam. (b) The Plaintiff declares, that upon a Capias against J. S. at the Suit of the Plaintiff, to the Defendant being Sheriff of E. directed, the Defendant did direct his Warrant to the Bailiff of such a Liberty to take, &c. who did take him accordingly, yet the Defendant knowing thereof, had returned non est inventus. Cro. Eliz. 729. adjudged, mo quer', but it did not there appear what or whether the Bailiff had made any Return to the Sheriff (c) Moor. 432. S. C. and S. P. per Curiam, 1 Rol. Abr. 98. Pl. 3. S. C. and S. P. Cro. Eliz. 512. S. C. but S. P. does not appear.

2. If upon a fieri facias against an Administrator, the Sheriff makes a Warrant to the Bailiff of a Franchise to execute it, and after the Bailiff is removed, and another Bailiff elected, and after the old Bailiff returns in his own Name to the Sheriff, that the Administrator has not any Goods præterquam, &c. the which is false, and after the Sheriff makes a Return accordingly to the Court, yet no Action upon the Case, for this false Return lies against the old Bailiff, for the Return ought to have been made in the Name of the new Bailiff, and so the Sheriff has (d) accepted of a Return as of a meer Stranger which is void, and he ought to take Notice of the right Ministers of the Law, and therefore the old Bailiff is not punishable for this false Return but the Sheriff. Trin. 39 Eliz. B. R. between (e) Palmer & Marsh adjudged, yet it does not lie against the Bailiff.

(d) 1 Rol. Abr. 94. Pl. 2. vide.

(e) Palmer and Porter, Moor. 431. Pl. 606. S. C. adjudged. Cro. Eliz. 512. S. C. adjudged.

3. (f) If a Writ of Execution comes to the Sheriff, and he makes out his Mandat to the Bailiff of a Liberty, who takes him, and after suffers him to escape, an Action lies against the Bailiff of the Franchise, and not against the Sheriff. 5 Edw. 4. 1. b. 2. Brook escape 40.

(f) 1 Rol. Abr. 98. Pl. 2. S. P. appears. Cro. Eliz. 26. S. P. and like Point, per Curiam. Nov. 27. S. P. cited.

(G) In what Cases it lies.

Fol. 100.

1. If a Man acknowledges a Fine in my Name, or in an Action in my Name acknowledges a Judgment of my Land, this shall bind me perpetually, and in such Case I may have a Writ of Deceit against him who acknowledges it. (a) 19 Hen. 6. 44. So if a Man acknowledges a Recognisance Statute, Merchant or Staple. (b) 19 Hen. 6. 44.

(a) Br. Deceit. 17. S. C. Fitz. 10. S. C. Br. fine de terre 54. Br. Estoppel 182. (b) Br. Deceit 17. S. C. Fitz. 10. Br. fine de terre 54. Br. Estoppel 182.

2. If

2. If a Man makes an Obligation in my Name, (c) I shall not have a Writ of Deceit against him, because I may avoid the Deed by the Plea of non est factum (d) 19 Hen. 6. 44.

(c) The Original is il navera, &c. pur ceo que il poit, &c. so appears to be misprinted. (d) Br. Deceit 17. S. S. Fitz. 10. Br. fine de terre 54.

3. If a Man razes the Name of the Obligor out of an Obligation, and in the room puts in the Name of J. S. and after sues him upon this Obligation, J. S. may have an Action upon the Case against him for this. Trin. 43 Eliz. B. R. per Gawdy.

(e),1 Rol. Abr. 37. Pl. 15. L. C.

4. (e) If A. be excommunicated, and the Letters of Excommunication are brought to the Parson of the Parish to be read and published in the Church against A. and the Parson having Malice to B. puts out the Name of A. and puts in the Name of B. and then pronounces B. excommunicated, B. may have an Action upon the Case against the Parson, for this is not only an injurious Vexation, but a Scandal also to B. Trin. 43 Eliz. B. R. (f) Harris's Case adjudged, per Curiam.

(f) Kenton and Mallinger. Cro. Eliz. 838. seems to be S. C. adjudged.

5. (g) If a Man casts a Protection for himself quia moratur, by which the Parol is put without Day, where he was all the Time within the Realm about his own Business, and not at the Place, a Writ of Deceit lies against him, (h) 20 Hen. 6. 10. 33 Edw. 1. Liber Parliamentorum 103. b.

(g) Cro. Eliz. 794. S. P. per Curiam arguend', Palm. 143. S. P. cited. Cro. Eliz. 629. S. P. per 2 Judges arguend'.

(h) Fitz. Deceit. 12. S. C. Br. 1. S. C.

6. (i) So if a Man casts a Protection quia profecturus and never goes, an Action lies. 20 Hen. 6. 10. 18 Edw. 3. 12. b. Trin. 7 Hen. 5. B. R. Rot. 70. adjudged.

(i) Cro. Eliz. 714. S. P. and S. C. cited.

7. But if in going towards the Parts beyond Sea, he is seized with a Distemper so that he cannot go nor ride, and before this the Protection is allowed, no Action lies against him. 18 Edw. 3. 13.

8. If a Man casts a Protection quia moratur in Everwick, if he abides in Everwick a Week in every Month, and for the rest of the Time abides in another Place in the same County about his own Business, it seems as if Deceit lies against him. Quære 29 Ed. 3. 17. b.

(k) Moor. 776. Pl. 1075. like Point adjudged. Cro. Eliz. 90. like Point adjudged. F. N. Br. 95. D. like Point.

9. (k) If A. entices B. to play with him at Dice, at a Play called Passage, upon which B. plays with him, and when it comes to the Turn of B. to play, A. delivers in true Dice with which he should play, and when it comes to the Turn of A. himself to play, he puts in and plays with false Dice, Scilicet, such Dice as he knows will run five or six upon every Die, by which B. loses 10 l. an Action upon the Case lies for this Deceit by B. against A. Hill. 8 Car. B. R. between Hartweil & Oake adjudged, tho' it was moved in Arrest that the Declaration was repugnant, because it was laid that he played with false Dice, Scilicet, that he quasdam (l) aleas falsasset falso titulatas quas numeros de sex & quinq; super quamlibet aleam quolibet jactu attingere sciviſſet falso & fraudulenter projecit & lusus fuit yet the Court gave Judgment for the Plaintiff, I being of Counsel for the Plaintiff. Mich. 8 Car. Rot.

(l) Quosdam talos falso titulat', &c. held a good Word for Dice. Cro. Eliz. 90. F. N. B. 95. D. and vide Co. Ent. 8. Pl. 6.

10. (m) If a Man takes my Cattle with Force and Arms, and chases them in the Close and Emblements of J. S. per quod, I am thereby subject to the Action of J. S. I may have an Action upon the Case against him, and such (*) a Declaration is good in an Action upon the Case, for the per quod is the Ground of the Action. Mich. 9 Car. B. R. between (n) Tiffin & Winkefield adjudged, this being moved in Arrest of Judgment. (Intratur Trin. 9 Car. Rot. 451.)

(m) Lane 67. S. P. per Altham Just' arguend' 68. like Point per Tanfield' Ch. Baron.

* Fol. 101.

(n) Cro. Car. 325. S. C. adjudged.

11. If I deliver my Sheep to J. S. who is a common Shepherd for the Inhabitants of a Village, and they after stray and return again, and after I sell them, and after J. S. maliciously intending not only to deceive me of the said Sheep falsly and fraudulently, but also to induce a Scandal upon me as to the said Sheep, and to damnifie me, affirms that these Sheep are not my Sheep, but Strays, and procures the Bailiff of the Manor to seise and carry away the said Sheep as Strays (they not being proclaimed and marked as Strays according to Law) per quod I am not only falsly and frau-

fraudulently deceived and defrauded of the said Sheep, and the Profit that might have been taken thereby, but am also brought into great Scandal and Trouble, I may have an Action upon the Case against J. S. upon this Matter, for he did it contrary to the Trust in him reposed, and this puts me to Trouble and Expense, and was done by him falsly and maliciously. Mich. 22 Car. B. R. between (a) Newbon and Newbon adjudged, it being moved in Arrest of Judgment that the Action does not lie. Intratur Trin. 22 Car. Rot. 207.

(a) Newman and Zachary. All. 3. S. C. adjudged notwithstanding the Plaintiff might have his Action against the Bailiff. Ante 6, 7. Pl. 1.

12. If a Man recovers against my Tenant in a præcipe in capite, to the Intent to oust me of my Court and Seigniory, a Writ of Deceit lies against him. (b) 17 Edw. 3. 31. b. 36. b.

(b) Fitz. Deceit 38. S. C.

13. And in this Writ I shall recover according to my Damage, Scilicet for the Deceit, and therefore because this is a Prejudice to me, for now he holds by Estoppel of the King, and I shall not have the Ward of his Heir against the King, unless by Petition; but I shall not recover Damages to the Value of the Seigniory, because this is not lost tho' there be a Tenure by Estoppel of the King. (c) 17 Edw. 3. 31. b. 37.

(c) Fitz. Deceit 38. S. C.

14. (d) If my Feoffee upon Condition to re-enfeoff me, acknowledges a Statute and after re-enfeoffs me, and after the Conusee sues Execution against me, I may have a Writ of Deceit against the Feoffee, for (e) I enfeoffed him to be reinfeoffed discharged. 28 Ed. 3. 91.

(d) 1 Rol. Abr. 10. Pl. 13. S. P.

(e) In the Original this is he enfeoffed, &c. and so appears plainly to be misprinted.

15. If it be agreed between you and me, that you shall make an Estate to me in certain Lands, if you make a Feoffment thereof to another, I shall have an Action upon the Case for the Deceit (f) 3 Hen. 7. 14.

(f) Fitz. Action sur le Case. 20. S.C.

16. (g) If one Man having a Term for Years, offers to sell it to another, and says that a Stranger would have given him 20 l. for this Term, by the Means of which Speech the other buys it, where in Truth he was never offered 20 l. for the Term, tho' he was deceived in the Value, yet no Action upon the Case lies. Mich. 40 and 41 Eliz. B. R. adjudged.

(g) 1 Rol. Abr. 91. Pl. S. vide 1 Sid. 146. S. P. seems to be per Curiam.

17. If *A.* is employed by *B.* to Sail from *England* to the *Indies*, and *A.* covenants that he or his Servants will not thence Import any Calicoes, *&c.* and *A.* retains *C.* as his Servant in this Voyage, and acquaints him with the Covenants, and notwithstanding *C.* falsly and fraudulently brings thence certain Calicoes, *&c.* (a) *A.* shall have an Action against *C.* for tho' no Action lies by a Master for the bare Breach of his Command, yet if a (b) Servant does any Thing falsly and fraudulently to the Damage of his Master, an Action will lie. *Mich.* 18 *Car.* 2. between (c) *Hussy* and *Pusy.* 1 *Sid.* 298, 299. adjudged after a Verdict for the Plaintiff.

(a) By which the Covenant was broke, and A. sued by B. and Damages recovered against him. 1 Lev. 188. (b) 1 Rol. Abr. 105. Pl 10. like Point. (c) 1 Lev. 188. S. C. adjudged, tho' objected it was not laid to be done ea intentione to damnify the Plaintiff; for let C. intend quicquid velit, A. was damnified thereby.

18. If *A.* hires *B.* to carry a Load of Timber from one Town to another, to be Unloaded there at such Place as *A.* should appoint, and *B.* gives Notice to *A.* that he will bring it such a Day, and requests him to appoint a Place where he should lay it, and he brings it accordingly, but *B.* will not appoint any Place where it shall be laid, so that the Horses of *A.* are kept so long in the Cart, that being hot they catch cold and die, yet *A.* shall have no Action against *B.* for he might have taken his Horses out of the Cart and walked them, or put them in a Stable; or if *B.* would not have appointed a Place as soon as he came there, he might have unloaded in any convenient Place; So that the Injury that the Horses received was through his own Default. *Trin.* 29 *Car.* 2. between (d) *Virtue* and *Birde.* 2 *Lev.* 196. adjudged.

(d) 1 Vent. 310. S. C. adjudged. 3 Keb. 766. S. C. adjudged.

(H) Where it lies upon Legal Proceedings in Courts.

(a) March 47. S. P. appears. Cro. Eliz. 629. S. P. per 2 Judges arguendo.

1. (a) If a Man ſues an Action of Debt againſt me in the Name of J. S. without the Will of J. S. I ſhall have a good (b) Action upon the Caſe againſt him for this Vexation. (c) 7 Hen. 6. 43. Admit per Iſſue, and ſo it is held, Fitzherbert Action ſur le Caſe 3.

(b) Or I may have Remedy upon the 8 Eliz. cap. 2. but Q. where there are ſeveral Plaintiffs, and one of them gives his Conſent. Cro Eliz. 236. 2 Sid. 162, 163. (c) Br. Action ſur le Caſe. 49. S. C. Br. Diſceit 15. S. C.

(d) Fol. 102.

2. If A. ſued B. for Tithes in the Eccleſiaſtical Court where B. pleaded Payment, and had two Witneſſes to prove it, and therefore A. diſcontinued his Suit, and after one of the Witneſſes died, upon which A. knowing (d) this, and that one Witneſs will not ſerve in the Eccleſiaſtical Court, commences again his Suit againſt B. there for the ſame Tithes, ſuppoſing that B. cannot now prove Payment there, yet no Action lies for B. againſt A. for this Vexation, for then every Man that brings two Actions for the ſame Thing ſhould be puniſhed for the Vexation. Trin. 43 Eliz. B. R. between (e) Bray and Partridge adjudged.

(e) Cro. Eliz. 836. S. C. adjudged. per totam Curiam. 1 Rol. Abr. 34. Pl. 5. Noy 23. 37. S. C. adjudged.

(f) So an Action lies for Arreſting a Man by Proceſs out of an inferior Court, where the Cauſe of Action aroſe out of the Juriſdiction. 2 Mod. 214. per Curiam. (g) Fitz. Action ſur le Caſe. 4 Br. 50.

3. If B. comes to anſwer a Writ that R. hath depending againſt him in Bank, and A. cauſes him to be arreſted in London, and he ſues a Corpus cum cauſa, by which he was removed and diſcharged, and the Day after he goes into London for his Evidences, and (f) A. knowing the ſaid Writ to be depending againſt him at the Suit of R. Arreſts him again, he may have an Action upon the Caſe againſt him for this Vexation. (g) 7 Hen. 6. 45. Admit.

(h) 1 Rol. Abr. Pl. 11, 12. vide and the Notes there.

4. (h) If A. recovers Debt or Damages againſt B. and after B. pays the Sum recovered to A. before any Execution ſued out, and upon this A. releaſes to B. all Actions, Executions, &c. and after within the Year ſues out a Capias againſt B. and takes him in Execution, B. ſhall not have any Action upon the Caſe againſt A. for this Vexation in ſuing out Execution after a Releaſe, but he is put to his Audita querela, which is the Remedy which the Law has provided for it. Mich. 16 Jac. B. R. between (i) Bemiſhe and Gilderſly adjudged, per Curiam.

(i) Cro. Jac. 505. S. C. adjudged.

(k) 1 Rol. Abr. 34. Pl. 11, 12. vide and the Note there.

5. (k) So in this Caſe if after the ſaid Releaſe, and after the Year he ſues Execution by a Capias, and takes him in Execution, which is erroneous, being after the Year, yet no Action upon the Caſe lies for this Vexation, but he is put to his Writ of Error to help himſelf. Mich. 16 Jac. B. R. between (l) Bemiſhe and Gilderſly adjudged.

(l) Cro. Jac. 505, 506. S. C. but S. P. does not appear.

6. If A. ſues an Action againſt B. in which J. S. and J. D. are manucaptors for B. and after A. recovers againſt B. and ſues a Capias ad ſatisfaciendum againſt him, which was returned nihil, and after A. knowing that W. was not a manucaptor for the ſaid B. but that J. S. and J. D. were manucaptors in Deceit of the Court, procures two Scire Facias's to be awarded againſt W. as manucaptor of B. upon which two nihils are returned, and thereupon a Capias ad ſatisfaciend', by which the

the said W. is taken in Execution, he shall have an Action upon the Case against A. tho' it was the Act of the Court to grant such judicial Process, for they were procured (m) in Deceit of the Court, and to the Damage of the Party, and so the Action lies for the Wrongful Vexation. Mich. 40, & 41 Eliz. B. R. between (n) Baron and Sleigh.

(m) Cro. Eliz. 628. S. C. adjudged per 2 Judges.

(n) Where an Action lies for a Matter done in Deceit of the Court. Cro. Eliz. 793, 794.

7. If A. brings an Action against B. in London, where C. and D. become manucaptors for B. and after C. in the Name of B. falso & deceptive procures an Habeas Corpus out of the Exchequer to remove the Suit there, and after hires E. and F. whom he knew to be insufficient to become manucaptors for the said B. and after a procedendo is granted, and after A. recovers there against B. and B. goes beyond Sea, so that he cannot have an Execution against him, and by reason of the said Fraud of C. the first manucaptors are discharged, so that A. cannot have Execution against them, A. may have an Action upon the Case against C. for this Deceit. Hill. 41 Eliz. B. R. between (o) Skalehorne and Harrison.

(o) Cro. Eliz. 714. S. C. but

S. P. not adjudged, because the Jury did not find that he did procure the Habeas Corpus, &c. vide.

8. So in the said Case, tho' C. does not procure the Habeas Corpus, but another, but C. falso & deceptive informs the Clerks of the Court in the Exchequer, that the second Bail is sufficient where it is not, and so the first Bail is discharged and the Plaintiff defrauded of his Debt, an Action upon the Case lies. Pasch. 41 Eliz. B. R. between (p) Harrison and Scallerd adjudged.

(p) Cro Eliz. 714. S. C. adjudged. Cro. Jac. 602. S. C. cited, and said the better Opinion was for the Plaintiff, but that no Judgment was given. Palm. 142, 143. S. C. cited, and said the Court doubted thereof, and that no Judgment was given. Palm. 276. S. C. cited, and some said that Judgment was given for the Plaintiff; but Dod' said it was ended by Composition.

9. If A. hath a Judgment and Execution by Fieri facias for a Debt against (*) B. and the Sheriff upon the said Writ of Fieri facias returns to the Court that he had taken Goods to the Value, but that they remained in his Hands pro defectu emptorum, upon which he Sciens all this, fraudulently, and to the End to charge B. again, sues out another Fieri facias to the same Sheriff, upon which the Sheriff takes other Goods of B. and therewith satisfies A. his Debt, B. may have an Action upon the Case, because this is a Vexation and Damage, and done by Fraud against his own Knowledge on purpose to vex B. tho' he executes his Malice in an illegal Proceeding. Trin. 17 Jac. B between (q) Waterer and Freeman adjudged, per Curiam, Hobart's Reports 278. the same Case.

* Fol. 103.

(q) 1 Rol. Abr. 34. Pl. 5. S. C. with several Notes there.

10. (a) If *A.* brings Trover against *B.* for a Fountain of Silver, and being at Issue, and *C.* produced as a Witness on the Part of *B.* swears it was not worth above 180 *l. ubi revera* it was worth 500 *l.* by reason of which false Oath, the Jury give but 200 *l.* Damages, (b) yet *A.* shall have no Action against *C.* for such Perjury was not punishable by the Common Law, and if this Action would lie, a Man might be punished by the Statute, and by way of Action also, and no Precedent is to be found, but if this should be suffered, every Witness would be drawn in question, and here how can it be known what Damages the Jury would have given? *Mich.* 38 and 39 *Eliz.* (c) between *Damport* and *Symson. Cro. Eliz.* 520. adjudged, *per totam Curiam contra* Anderson.

(a) Hut. 11. S. P. adjudged. 12 Co. 128. like Point per Curiam Con. 3 Mod. 108. vide.

(b) But after Conviction in the Star-Chamber, or by Indictment, &c. an Action lies, but not before. 2 Rol. Rep. 199. Cro. Jac. 601. 1 Sid. 50, 51. 1 Keb. 128.

(c) 2 And 47. S. C. adjudged by 3 Judges. Ow. 158. S. C. being for Jewels adjudged by 3 Judges Con. And' 2 Rol. Rep. 198. S. C. cited and there said, that the Action being for Jewels, the Witness might mistake the Value. Palm. 144. S. C. cited, and said the Uncertainty of the Value of a Jewel was the Reason of the Judgment.

11. But if one makes a false Affidavit in Chancery against an Officer of the Customs, and afterwards Petitions the Commissioners of the Customs against

againſt him, and thereupon cauſes him to be turned out of his Place; an Action lies for the malicious Procurement of him to be turned out of his Place. *Mich.* 15 *Car.* 2. between *Coxe* and *Smith.* 1 *Lev.* 119. adjudged after a Verdict for the Plaintiff, and ſaid *per Curiam*, the Action was not founded upon the Oath or Petition, for theſe were but Inducements to prove the malicious Procurement of him to be ſo turned out, and that it was falſly and maliciouſly done is found by the Verdict.

(d) Action againſt a Juror that labours another unduly, &c. Palm. 315. cited vide.

12. If upon an Iſſue between *A.* and *B.* a (d) Stranger that was not returned of the Jury, cauſes himſelf to be ſworn in the Name of one that was returned of the Jury, and a Verdict is given for *B.* *A.* may have an Action upon the Caſe againſt the Stranger. *Paſch.* 16 *Car. March* 81. *per Reeves* and *Foſter*, Juſtices.

(e) Godb. 405. Pl. 486. vide.

(f) 1 Sid. 414, 415. S. C. adjornatur. 1 Mod. 58. S. C. no Judgment. 2 Keb. 361. 462, 496, 659, 664, 801, 832. S. C. adjudged niſi. 1 Lev. 240. adjudged.

13. (e) If *A.* exhibits a Petition to a Committee of Parliament appointed for the Examination of publick Grievances, and therein charges *B.* being a Doctor of Law and Vicar-General to the Biſhop of *L.* with ſeveral great Offences, as Extortion, *&c.* in his Office; and for the better Manifeſtation of theſe Grievances, cauſes the ſaid Petition to be printed, and to be delivered to ſeveral of the Members of the ſaid Committee, yet no Action upon the Caſe lies; for this Printing and Delivering of the Caſe as aforeſaid, is according to the Order and Courſe of proceeding in Parliament. *Hill.* 19 and 20 *Car.* 2. between (f) *Lake* and *King.* 1 *Sand.* 131. adjudged.

(g) 2 Keb. 547. like Point, adjornatur. Stile 379, 451. S. P. per Roll Chief Juſtice. Skinner and Gunton like Point. Raym. 176. appears. 1 Vent. 12, 18, 19. appears. 1 Sand. 228, 229. appears. 2 Keb. 473, 476, 497. appears. 3 Lev. 210, 211. like Point adjudged upon Demurrer, by 2 Judges againſt 1. Levinz dubitante, becauſe not ſaid Sciens he had no Cauſe of Action. (h) The Plaintiff declares, That the Defendant falſo & malitioſe cauſed him to be arreſted for 500 l. ubi revera he had no Cauſe of Action, vel ſaltem non tantam cauſam actionis. 1 Lev. 275. after a Verdict for the Plaintiff it was adjudged for him; for tho' it was not poſitively ſaid he had no Cauſe of Action, and it was not tantam if it wanted but 1 s. yet being found falſe, &c. 3 Lev. 211. (i) It is now ſettled that an Action lies for a malicious Arreſt, where there is no probable Cauſe of Action. 2 Mod. 52. per Pemberton Sergeant, arguend' it lies for bringing vexatious Actions. Stil. 451. per Roll, yet Mod 4. per Keeling, the Party has his Recompence by Law, and therefore no Action lies; but 1 Sid. 463. per Twiſden Con. (k) 2 Keb. 546. S. C. adjudged, the Plaintiff declaring that the Defendant affirmed he owed him 600 l. ubi revera he owed him but 40 l. and there ſaid arguend' that the Writ in the Common Pleas does not expreſs the Cauſe of Action; ſo that the Information of the Party is the Sheriff's Direction. But as to that vide 13 Car. 2. cap. 2. 1 Mod. 4. S. C. but no Judgment, the Plaintiff declaring that he was arreſted in placito debiti for 600 l. and that the Defendant did affirm to, &c. 1 Lev. 275. adjudged; it being found that he falſo & malitioſe charged him with a greater Sum than was due. 3 Lev. 211. S. C. cited.—For a Suit without Cauſe in the Spiritual Court, vide. Ante 1 Rol. Abr. 34. Pl. 5, 6. Margin. Hockin and Matthews. 1 Vent. 86. 1 Sid. 463. 1 Lev. 292.

14. (g) If the Plaintiff (h) declares that he being (i) Arreſted in *Middleſex* at the Suit of the Defendant, and the Defendant intending to detain him in Priſon *falſo & malitioſe dixit* to the Sheriff of *Middleſex*, that the Plaintiff owed him 5000 *l.* requiring him to take Bail accordinly, *per quod* he was detained in Gaol ſeveral Days; this Action lies becauſe of the Special Damage that the Plaintiff received by this falſe Affirmation. *Mich.* 21 *Car.* 2. between (k) *Daw* and *Swain.* 1 *Sid.* 424. adjudged, notwithſtanding it was objected that the Sheriff ought to have Bailed or Detained at his Peril.

(I) In what Caſe it lies.

1. (a) IF A. is commorant in Middleſex, and B. knowing thereof falſo & malitioſe lays an Action againſt him in London, and to the end that his Goods ſhould be forfeited, makes a Suggeſtion that A. is commorant in London, and ſo proſecutes the Suit till A. may have an Action upon the Caſe againſt B. for this Vexation. Hill. 7 Jac. In Scaccario between (b) Shosbye Plaintiff, and Walker & Bromlye Defendants adjudged, quod vide, Cokes Entries, Action ſur le Caſe 42.

(a) 1 Mod. 4. S. P. cited.

(b) Lane 49, 50. S. C. Noy 23. S. C. cited.

2. Hill. 13 Edw. 3. B. R. 101. Thomas Ufflete, Receptor denariorum regis pro vadiis ſolvendis ſolidariis in exercitu regis in Scotia, &c. implacitat plurimos pro captione ſive reſcuſſione equi per ipſum capti pro ſervitio regis ad portand' 400 l. uſque Scotiam apud F. ad damnum 1000 l. Defendant pleads not guilty, ideo venit Jurata.

3. Paſch. 1 Edw. 3. B. R. Rot. 59. Oto de Grandiſono cuſtos inſularum de Gernere & Jereſy & aliarum inſularum adjacentium recover per Juratam 1000 l. verſus Johannem de Vivers, for that he with 200 others impriſoned him per 11 Days, quo minus officium ſuum exercere non potuit.

4. If Tenant by Stat' Merchant cuts down Timber Trees, it ſeems as if the Value of them may be recouped in a ſcire facias ad computand', but he in the Reverſion may have an Action upon the Caſe againſt him, for the Damage above the Value. 21 Edw. 3. 26. B.

(K) The Gift of the Action.

1. IF a Man finds my Goods, and does not deliver them upon Demand, an Action upon the Caſe lies for the Non-delivery of them upon Demand, per quod much of the Profit of the Goods is loſt, tho' this is only a Non-feaſance. Paſch. 15 Jac. B. R. Mould & Pynn adjudged upon a Writ of Error.

2. (a) An Action upon the Caſe lies for Toll, ſhewing that ſuch a Body politick in a Town has uſed, Time out of Mind, to repair certain Walls, Gates, and Bridges within the Town, and in Conſideration thereof have had, Time out of Mind, &c. de quolibet ſummagio braſii ſcilicet of every Horſe-load of Malt imported within the ſaid Town to be ſold unum obolum, and that the Defendant ſuch a Day did import ſo many Horſe-loads of Malt to be ſold within the Town, per quod he ought to have paid ſo much for Toll the which he refuſed to pay, licet requiſitus, &c. tho' an Action of Debt lies, (b) yet this Action lies alſo, being grounded upon a Deceit. Mich. 11 Car. B. R. between Sproſly & Evans, per Curiam, ruled upon a Writ of Error (*) as to this Point, upon a Judgment given in the Town of Ludlow, tho' reverſed for another Matter.

(a) 1 Rol. Abr. 106. N. 2.

(b) But yet 3 Lev. 400.

* Fol. 104. this Point is it was there

doubted, becauſe this Toll is quaſi a Debt, for which Debt or an Aſſumpſit lies, tho' agreed Caſe would lie for a tortious Misfeaſance.

3. In an Action upon the Cauſe, If the Plaintiff declares that the Defendant diruit & proſtravit unum murum which divided the Houſe of the Plaintiff and Defendant, and alſo pulled off the Tiles from the Houſe of the Plaintiff, (c) per quod the Water came into the Plaintiff's Houſe and rotted the Timber thereof, the Action lies, for tho' he might have an Action of Treſpaſs

(c) A. Covenants to make a Leaſe, and deliver quiet Poſſeſſion to B. and after is diſſeiſed by C. he may have an Action upon the Caſe, declaring, &c. per quod he could not perform his Covenant. 2 Rol. Rep. 354. per Ley Chief Juſtice.

for pulling of the Tiles, yet this, Action lies also in as much as it is alledged, that by reason thereof the Timber of the House is rotted. Mich. 10 Car. B. R. between Booth & Oliver adjudged, this being moved in Arrest of Judgment after a Verdict for the Plaintiff.

If *A.* recovers a Term for Years against *B.* by Verdict, *&c.* and after *B.* enters upon the Possession of *A.* *A.* may have an Action upon the Case or Trespass against *B.* at his Election. *Mich.* 1654. between *Jones* and *Graves*, *Stile* 427. adjudged.

(L) (*) Case not Assize.

(*) If A. claims reasonable Estovers in a certain Wood, and the Owner cuts downs and grubs up the whole Wood, A. shall have Case only, and not an Assize, per Yelv. 188. per Curiam. But Hob. 43. F. N. B. 589. 9 Co. 112 b. Cro. Jac. 256. are contra. (a) Kelw. 130. S. P. adjudged. (b) Br. Action sur le Case 44. S. C. Br. Nusance 31.

1. (a) For Negligence in Non feasance, an Action upon the Case lies, and not an Assize. (b) 11 Hen. 4. 83.

(c) Br. Action sur le Case 44. S.C.

2. As if he who ought to repair a Bridge does not repair it per quod it falls, an Action upon the Case lies for this. (c) 1 Hen. 4. 83.

(d) Br. Action sur le Case 44. S.C.

3. So if he who ought to scour a Ditch does not scour it, per quod my Land is surrounded, an Action upon the Case lies. (d) 11 Hen. 4. 83.

(e) Br. Action sur le Case 44. S. C. Br. Nusance 31. S. C.

4. But for the Mis-feasance of a Thing, no Action upon the Case lies but an Assize. (e) 11 Hen. 4. 83.

(f) Br. Action sur le Case 44. S.C.

5. As for the making an Hedge cross a Way, no Action upon the Case lies. 11 Hen. 4. 83. D. 8. El. 250, 88. Contra Pasch. 15 Jac. B. R. adjudged.

(g) I think at this Day there is no great Question but the Plaintiff hath his Election; but however as to this Matter, vide Bendl. Pl. 255, 249. 1 Leon. 247. Cro. Eliz. 191. 3 Leon. 174. Dier. 195 b. 250 b. 319 b. with the References in the several Margins. 2 And. 7. 53. Co. Ent. 12.

6. If a Man stops my Way totally, tho' an Assize lies for it, yet I may have an Action upon the Case at (g) my Election, as in Slade's Case, Debt or an Action upon the Case lies upon a Contract. Pasch. 15 Jac. B. R. adjudged, this Matter being moved in Arrest of Judgment. Pasch. 42 Eliz. B. R. between (h) Church & Cantel adjudged. Trin. 11 Jac. B. R. between Collocote & Tucker adjudged. Mich. 3 Jac. B. Gainsford's Case, per Curiam.

(h) Noy 37. S. C. adjudged and affirmed upon Error.

(i) Adston and Pamphyn. Cro. Eliz. 466. like Point adjudged. Dier. 250 b. Margine.

7. (i) If a Man stops a Watercourse, per quod my Land, of which I am seized in Fee, is surrounded, tho' I may have an Assize, yet I may have an Action upon the Case at my Election. Mich. 32, 33. Eliz. B. R. between (k) Stye & Mordant adjudged.

(k) 1 Leon. 247. S. C. adjudged.

(l) Cro. Eliz. 198. S. C. and S. P. per Curiam, but by reason of an Exception to the Pleadings, adjornatur.

8. If I have Common in Blackacre as appendant to certain Land, of which I am seized in Fee, and the Tenant of Blackacre plows the Land, I may have an Action upon the Case against him for the Disturbance of my Common, tho' I am seized in Fee of the Land to which the Common is appendant. Mich. 32, 33. Eliz. B. R. between (l) Loveret & Townsend adjudged.

9. If a Man diverts totum cursum aquæ from my Watercourse to my Mill, tho' I may have an Assize for this, yet an Action upon the Case lies at my Election. Mich. 10 Jac. B. R. Kirby's Case, per Curiam.

(M) For what Act it lies.

The Gift of the Action.

Fol. 105.

1. (a) If a Miller takes Toll of one that ought to be Toll-free, no Action upon the Case lies for this, but a General Action of Trespass; for it is altogether unlawful as if he had taken one half of the Corn. (b) 41 E. 3. 24 B. (c) 44 E. 3. 20.

(a) 2 Rol. Abr. 556. Pl. 1. S. C. 1 Leon. 109. S. C. cited.

(b) Fitz. Action sur le Case 31. S. C. Br. 14. S. C.

(c) Br. Action sur Case 19. S. C. Br. Trespas 47. S. C. Fitz. Brief 579. S. C.

2. But if the Lord of a Manor prescribes to have his Tenants to be Toll-free in Markets for Buying and Selling, if Toll be taken in a Market from one of the Tenants, the Lord may have Trespas upon the Case. (d) 43 E. 3. 30. adjudged. (e) 7 H. 4. 2. b. per Roy, it seems as if the Books are so to be intended, for it is not a Trespas vi & armis as to him.

(d) Fitz. Action sur le Case 32. S.C.

(e) Br. Aid de roy 24. S. C.

3. If a Man takes upon him to cure a Horse, if he performs the Cure so negligently, that the Horse dies, an Action upon the Case lies against him, and not a General Action of Trespas. (f) 43 E. 33. (g) 48 E. 3. 6.

(g) Br. Action sur le Case 24. S. C.

4. So if a Surgeon takes upon him to cure the Hand of another that is wounded, and he does it tam negligenter that he is mayhemed, an Action upon the Case lies against him. (h) 48 E. 3. 6. (i) 11 H. 6. 18. by contrary Medicines. But if he does his Endeavour, the Action does not lie. 48 E. 3. 6. b.

(h) Br. Action sur le Case 24. S. C. and S. P. appears.

(i) 1 Rol. Abr. 91. Pl. 9 S. C.

5. If I cut down certain Wood, and a Stranger takes it out of my Possession, tho' I may have an Action of Trespas, yet I may also have an Action upon the Case at my Election. Pasch. 43 Eliz. B. R. adjudged between (k) Basset & Maynard.

(k) Moor 691. Pl. 955. S. C. and S. P. appears, adjudged, and affirmed upon Error, in Cam' Scacc'. 5 Co. 24 b. S. C. and S. P. appears. Cro. Eliz. 819, 820. S. C. and S. P. appears. Noy 32. S. C. and S. P. appears.

6. If a Man comes upon my own Ground, and makes a Nusance to my Water-course, as if he makes a Lime-pit, &c. I cannot have an Action upon the Case against him for this, but an Action of Trespas. (l) 13 H. 7. 26. b. Curia.

(l) Br. Action sur le Case 133. S. C. All. 84. S. C. cited and denied.

7. So if a Miller takes more Toll than he ought to have, no Action upon the Case lies against him, but a Writ of Trespas. (m) 41 E. 3. 24 b.

(m) Fitz. Action sur le Case 31.

8. If a Servant that drives his Master's Cart, by his Negligence suffers the Cattle to perish, an Action upon the Case lies against him, and not an Accompt. 7 H. 4. (n) 15 b.

(n) This is misprinted in the Original, and should be 14 b. which Case vide. Br. Action sur Case 34. Fitz. Accompt 19.

9. If a Man delivers Money to my Use, I may have an Action upon the Case against the Bailiff. My Reports, 14 Jac. (o) Beckingham & Lumb against Vaghan.

(o) 1 Rol. Rep. 391. S. C. adjudged.

10. If a Merchant's Servant takes his Master's Goods that are arrived at a Port of England, and before Payment of the Custom Lands them, per quod the Goods are forfeited and seized by the King, tho' the Master may have an Action of Trespas against the Servant, yet he may have an Action upon the Case against him. Trin. 8 Jac. Scaccario, between (p) Leveson & Kirk adjudged.

(p) Cro. Jac. 265, 266. S. C. adjudged per totam Curiam preter Snig. Lane 65. 66, &c. S. C. adjudged. Snig assenting.

11. If in a real Action I lose by Default, after the Summoners Veiors & Pernors are dead, per quod, I cannot have a Writ

Writ of Deceit, I may have an Action upon the Caſe againſt the Sheriff, If I was not ſummoned. (q) 1 H. 6. 1. b.

(q) Fitz. Action ſur le Caſe 1. S. C. Br. 73. S. C. 1 Rol. Abr. 92. Pl. 9. S. C.

12. If a Man that ought to enclose againſt my Land does not enclose, per quod the Cattle of his Tenants enter into my Land, and do Damage to me, I may have an Action upon the Caſe againſt him, without bringing any Curia claudenda 11 R. 2. Action ſur le Caſe 36. adjudged.

13. If a Man that is bound by his Tenure to repair a certain Street by Preſcription, does not repair it, per quod my Land is ſurrounded, I may have an Action upon the Caſe againſt him. 29 E. 3. 32. b.

Fol. 106.

14. If a Man enters upon the Poſſeſſion of the King's Farmer, and takes the Profits, per quod the Farmer cannot pay the King, an Action upon the Caſe lies againſt him for the Profits. (r) 11 H. 4. 65.

(r) Fitz. Action ſur le Caſe 29. S. C. Br. 43.

15. But if a Man enters upon the King's Grantee of the Land of a Ward, where there is not any Rent reſerved, and takes the Profits, the Grantee ſhall not have an Action upon the Caſe againſt him, but an Ejectment de Gard. (s) 11 H. 4. 65.

(s) Fitz. Action ſur le Caſe 29. S. C. Br. 43.

16. Where the Statute of 3 Ed. 4. Enacts, That none ſhall import any foreign Cards within the Realm upon a certain Pain, if the King reſerving a Rent gives License to one Man to import Cards, if another Man imports Cards, the King's Licenſee ſhall not have an Action upon the Caſe againſt him; ſuppoſing that he cannot pay his Rent to the King, but the Remedy that the Statute of 3 Ed. 4. gives ought to be purſued. Co. 11 (t) Monopolies 88. b.

(t) Noy 173, 174. S. C. and S. P. appears. Moor 671. Pl. 919. S. C. and S. P. appears.

17. But if the King reſerving a Rent grants that none ſhall uſe ſuch a Thing but the Grantee, (admitting this Grant good) if another does uſe it, the Grantee may have an Action upon the Caſe againſt him; ſuppoſing that by this he cannot pay the Rent to the King. It ſeems as if this might be collected out of Co. 11. (u) Monopolies 85.

(u) Noy 173, 174, &c. S.C. but S. P. does not appear. Moor 671. Pl. 919. S. C. but S. P. does not appear, otherways than by Inference thence to be made.

18. If the Servant of A. buys Cattle of B. to the Uſe of A. for 20 l. to be paid at a Time after, and the Servant by the Command of A. pays B. the 20 l. and after B. comes to A. and (x) ſays, That his Servant had not paid him, upon which A. pays him again, A. may have an Action upon the Caſe againſt B. upon this Deceit. Mich. 4 Car. B. R. between (y) Dame Grace Cavendiſh & Middleton adjudged, being moved in Arreſt of Judgment, that he ought to have Account, and not this Action; the which intratur Trin. 4 Car. Rot. 243.

(x) The Plaintiff in an Action upon the Caſe declares, That whereas 100 l. was delivered him to pay over to J. S. that the Defendant did affirm that he was J. S. per quod the Plaintiff paid him the 100 l. ubi revera he was not J. S. &c. Moor 538. Pl. 705. adjudged pro Quer' Cro. Jac. 223. vide. (y) Cro. Car. 141, 142. S. C. adjudged per totam Curiam. 1 Jon. 196, 197. S. C. adjudged.

19. (z) If a Copyholder hath Common by Preſcription in the Waſtes of the Lord, (a) and the Lord ſtores the Waſtes with Conies, every one of the Copyholders may have an Action upon the Caſe againſt the Lord, averring, that by this his Common is impaired. Mich. 11 Jac. B. R. between (b) Clayton & Sir Jerom Horſy, per Curiam admit.

(z) 1 Rol. Abr. 405. Pl. 2. S. P. 90. Pl. 9. vide.

(a) And ſo it is, tho' the King grants to the Lord a free Warren there. 1 Jon. 12. Winch 16. Palm. 319. (b) Cro. Jac. 229. S. C. but S. P. does not appear.

(a) F. N. B. 127. C. F. vide 2 Leon. 95. vide.

20. (a) If *A.* hath the Upper-room, and *B.* the Under-room, and *A.* neglects to cover his Upper-room, *B.* may have an Action upon the Caſe againſt *A.* and thereby compel him to cover his Upper-room for the Preſervation of the Timber of the Under-room. 23 *H.* 7. *Kelw.* 98 b. *per Fineux* and *Brudnel.*

21. So *A.* may enforce *B.* to ſupport his Under-rooom for the Preſervation of the Upper-room of *A.* 23 *H.* 7. *Kelw.* 98. b. *per Fineux* and *Brudnel.*

22. (b) If my Servant without Cauſe or Licence departs from my Service, and *J. S.* knowing him to be my Servant, retains him in his Service and ſo keeps him, an Action lies. *Mich.* 33 *Eliz.* between *Adams* and *Bayfield.* 1 *Leon.* 240. *dubitatur.* J. S. not having (c) procured him to depart from my Service.

(b) Kelw. 180. vide. 2 Lev. 63. S. P. adjudged and affirmed upon a Writ of Erroz, the plaintiff declaring, That whereas retinuiſſet A. to be his Servant foz one Yeaz, he departed without Licence, and the Defendant ſatis ſciens & machinans to depzive the Plaintiff of his Service, retinuit & cuſtodivit the ſaid A. licet ſæpius requiſit' to the contrary, &c. (c) If pzocured my Appzentice, &c. an Action lies. Noy 10, 106. admit.

23. If the Plaintiff declares that *J. S.* being ſeiſed of a Meſſuage in Fee, 22 *Apr.* 32 *Eliz.* did demiſe to the Plaintiff a Cellar from Week to Week, *&c.* and that after, *viz.* 29 *Jul.* 32 *Eliz.* J. S. did Demiſe to the Defendant a Warehouſe, being right over the ſaid Cellar, to hold from Week to Week, *&c.* and that the Plaintiff being poſſeſſed of the Cellar, and the Defendant of the ſaid Warehouſe, and the Plaintiff then having in the ſaid Cellar three Butts of Sack, of the Value of 40 *l. &c.* the Defendant 30 *Jul.* 32 *Eliz.* ſo great a Weight of Goods in the ſaid Warehouſe did place, and thereby did ſo over-burden the Floor of the ſaid Warehouſe, that by Force and Weight of the ſaid Burthen, the ſaid Floor the ſaid 30 *Jul.* broke, and the ſaid Goods did fall upon the ſaid Butts and broke the ſame, *&c.* and the Defendant pleads, that a ſhort Time before, the Floor as great a Weight as this did ſuſtain, and that the Warehouſe was to him Let to lay in 30 Tun weight, and that he had placed there but 14 Tun, and that what Damage to the Plaintiff had happened, was by reaſon that the Floor at the Time, as alſo before the Leaſe to him made, was rotten, and the Wall whereupon the Floor lay, ſo decayed, that the ſaid Floor broke, *&c.* for want of Reparations before the Leaſe to him made, the Plaintiff ſhall have his Judgment, for it is expreſly alledged that the Floor by the Weight of the ſaid Merchandize did break, and that is not traverſed but anſwered argumentatively only, *viz.* That it did bear more before, *ergo,* &c. and tho' it was ruinous when the Defendant took it, yet if it fell by reaſon of any Weight by the Defendant there placed, he muſt anſwer for the Conſequence thereof. *Mich.* 36 *Eliz.* between (d) *Edwards* and *Halinder.* *Poph.* 46. adjudged in the Court of Exchequer, and affirmed upon Error in *Cam' Scaccarii.*

(d) 2 Leon. 93, 94. S. C. adjudged and affirmed upon Erroz.

24. If *A.* being a Maſon and uſing to ſell Stones, is poſſeſſed of a certain Stone-Pit, and *B.* intending to diſcredit and deprive him of the Profit of the ſaid Mine, impoſes ſo great Threats upon his Workmen, and diſturbs all Comers, threatning to Mayhem and vex them with Suits if they bought any Stones; ſo that ſome deſiſt from Working, and others from Buying, *&c. A.* ſhall have an Action upon the Caſe againſt *B.* for the Profit of his Mine is thereby impaired. *Paſch.* 18 *Jac.* between (e) *Garret* and *Taylor.* *Cro. Jac.* 567. adjudged.

(e) 2 Rol. Rep. 162. S. C. adjudged, it being laid there that the Defendant thzeatned, &c. his Wozkmen only, per quod the Wozkmen departed from his Service, &c.

25. (f) If *A.* obtains a Judgment in Debt againſt *B.* as Executor to his Father, and thereupon *A.* takes out a *Fieri facias,* but before the Sheriff can execute it, (g) B. *ſecrete & fraudulenter,* ſells, removes and diſpoſes of all the Teſtator's Goods; ſo that the Sheriff is forced to return *nulla bona,* &c. an Action upon the Caſe lies againſt *B.* for the Sheriff could not return a *Devaſtavit,* and if this Action does not lie, the Party is without Remedy. *Paſch.* 21 *Jac.* between *Yates* and *Alexander,* per *Ley* and *Dod'* Con. *Haughton. Godb.* 285. *adjournatur.*

(f) 2 Rol. Rep. 312. like Point, dubitatur. 2 Rol. Rep. 292, 294. S. P. dubitatur.

(g) A. recovers againſt B. who after removes his Goods; ſo that A. cannot take them in Execution, yet no Action lies. 1 Mod. 286. Twiſden ſaid he remembered it ſo adjudged.

26. If the Plaintiff declares that he was and yet is poſſeſſed of a Leaſe for ſeveral Years *ad tunc & adhuc v.ntur'* of, and in a Houſe, and that he demi-

ſed the ſame to the Defendant for 6 Months; and that after the 6 Months expired, the Defendant being permitted to Occupy the ſaid Houſe for 2 Months longer, (h) pulled down the Windows, *&c.* this Action does well lie, in regard that the Plaintiff is chargeable over in an Action of Waſte. *Paſch.* 6 *Car.* between (i) *Weſt* and *Trewd.* *Cro. Car.* 187. adjudged.

(h) For burning the Houſe. Cro. Eliz. 461. like Point, per 2 Judges. 777. like Point cited, but no Judgment. (i) 1 Jon. 224. S. C. adjudged.

27. (k) If *A.* (l) rides an unruly Horſe in *Lincoln's-Inn-Fields* (being a Place much frequented by the King's Subjects, and unfit for ſuch Purpoſe) to break and tame him, and the Horſe breaks from *A.* and runs over *B.* and grievouſly hurts him, *&c.* *B.* ſhall have an Action againſt *A.* for tho' the Miſchief was done againſt the Will of *A.* yet ſince it was (m) his Fault to bring a wild Horſe into ſuch a Place where Miſchief probably might enſue, *A.* muſt anſwer for the Conſequence of ſo ill an Act. *Trin.* 28 *Car.* 2. (n) *Anonymus.* 1 *Vent.* 295. *per Curiam*; but no Judgment does appear to have been given.

(k) 2 Rol. Abr. 548. Pl. 1. vide. (l) According to the Report of the ſame Caſe. 3 Keb. 65. b. 2 Lev. 172. the Defendant drove a Coach with unruly Horſes, &c. (m) Againſt a Butcher for ſuffering an Ox in default of tying, to run from his Stall and gore the Plaintiff. 1 Vent. 295. cited. —A tame Fox gets looſe, and grows wild, he that kept him ſhall not anſwer for the Damage he does after he reſumes his wild Nature. 1 Vent. 295. per Twiſden. Verdict. tho' (n) Michel and Alleſtry. 3 Keb. 650. S. C. adjudged. 2 Lev. 172. S. C. adjudged after objected it was not ſaid Sciens they were unruly, for it was laid to be done Improvide & abſque Conſideratione ineptitudinis loci.

28. If a Copyholder in Fee ſurrenders a Meſſuage to the Uſe of one for Life, the Remainder to another in Fee, and the Defendant (the Husband of the Tenant for Life) pulls down Part of the Meſſuage, *&c.* he in the Remainder may have an Action upon the Caſe againſt him. *Trin.* 34 *Car.* 2. between *Jefferſon* and *Jefferſon.* 3 *Lev.* 130, 131. by *Pemberton* Chief Juſtice, and *Levinz*, contra *Windham*, and *Carleton*, and *Pemberton*, and *Levinz* ſaid, That where *Coke* ſays, that before the Statute of *Glouceſter*, the Leſſor was without Remedy for Waſte done by his Tenant, that muſt be intended according to the ſubject Matter of which he was ſpeaking, *ſcilicet*, that he had no Remedy by Action of Waſte, and *Pemberton* ſaid, that without Doubt at this Day the Leſſor may waive his Remedy by Action of Waſte, and bring an Action upon the Caſe.

(N) For what (a) Things it lies.

(a) For uſing the ſame Mark which the Plaintiff hath uſed to ſet to his Clothes. Poph. 144. cited. Cro. Jac. 471. cited. 2 Rol. Rep. 28. cited.

1. If the Beadle of an Hundred ought by Vertue of his Place to have by Preſcription certain Gallons of Beer of every Brewer at a certain Price, if the Brewers will not ſuffer him to have it accordingly, an Action upon the Caſe lies. 19 R. 2. Action ſur le Caſe 51. adjudged.

(b) 1 Rol. Abr. 103. K. 2. vide, and the Notes there.

2. If a Man ought to have Toll upon the Buying of Cattle in a Market, if one buys Cattle and does not pay the Toll, (b) an Action upon the Caſe lies for this. (c) 7 H. 4. 44. b. 9 H. 6. 45. b.

(c) Fitz. Action ſur le Caſe. 26. S. C. Br. 37. S. C.

(d) Fitz. Action ſur le Caſe. 28. S. C.

3. If thoſe that are coming to my Market are diſturbed or beat, per quod I loſe my Toll, an Action upon the Caſe lies. (d) 11 H. 4. 47. b. 9 H. 6. 46. (e) 41 E. 3. 24. b. Fitz. Na. Bre. 124. e.

(e) 2 Vent. 26, 28. S. C. cited. Fitz. Action ſur Caſe. 31. S. C. Br. 14. S. C.

4. So if upon a Sale in a Fair, a Stranger diſturbs the Lord in taking the Toll, an Action upon the Caſe lies for this. 9 H. 6. 45.

5. If a Man hath the Aſſiſe of Bread and Beer, Fines, Amerciaments and other Matters of Frankpledge by the King's Grant, and he diſtrains for an Amerciament, and a Stranger makes a Reſcue, an Action upon the Caſe lies againſt him. (e) 38 H. 6. 9. b.

(e) Fitz. Action ſur le Caſe 14. S. C. Br. 74. S. C.

6. If a Man diſturbs my Steward in holding my Leet, an Action upon the Caſe lies againſt him. (f) 38 H. 6. 16. 19 R. 2. Action upon the Caſe 52.

(f) Fitz. Action ſur le Caſe. 15. S.C. Br. 75. S. C.

7. If a Man Time out of Mind hath had a Leet, and other Court, &c. within a Manor and Town, and there hath not been any other Courts in the Town; if a Stranger holds a Court in the Town, and diſtrains the Tenants, and them by many Diſtreſſes does impoveriſh, per quod they cannot pay their Rents, an Action upon the Caſe lies againſt him. 13 H. 4. 11.

8. If my Tenants within a certain Seigniory, ought Time out of Mind to go free to every Market and Fair, to ſell and buy Goods without Payment of Toll, and one takes Toll of my Tenants in his Fair or Market, an Action upon the Caſe lies againſt him. 43 E. 3. 30.

Fol. 107.

9. If a Man diſturbs the Servants and Tenants of a Lord in the Collecting of his Tithes due, &c. an Action upon the Caſe lies againſt him. 19 R. 2. Action ſur le Caſe 52.

10. Where there is damnum abſq; injuria, no Action upon the Caſe lies. (g) 11 H. 4. 47.

(g) Fitz. Action ſur le Caſe 28. S. C. Br. 42. S. C.

11. (h) As if a School be ſet up in the ſame Town where an ancient School has been Time out of Mind, by which the old School receives Damage, yet no Action upon the Caſe lies, becauſe it is lawful for a Man to teach where he pleaſes, and this is for the Eaſe of the People (i) 11 H. 4. 47. adjudged. 22 H. 6. 14. b.

(h) 1 Mod. 69. S. P. per Twiſden arguend'.

(i) Noy 184. S. C. cited. Fitz. Action ſur le Caſe. 28. S. C. Br. 42. S. C. 2 Br. 147. S. C. cited.

12. If I retain a Maſter in my Houſe to inſtruct my Children, this is to the Damage of the common Maſter, yet no Action lies. 11 H. 4. 47.

13. (k) So if I have a Mill, and my Neighbour builds another Mill upon his own Ground, per quod the Profit of my Mill is diminiſhed, yet no Action lies againſt him; for every one may lawfully erect a Mill upon his own Ground. (l) 11 H. 4. 47. (m) 22 H. 6. 14. adjudged. 24 H. 8. Fitz. 46.

(k) Hardr. 162,163. vide

(l) Noy 184. cited. Fitz. Action ſur le Caſe. 28.S.C.

(m) Fitz. Action ſur le Caſe 11. S. C. Brownl. 57. S. C.

14. So if a Man hath a Houſe upon his own Ground by Preſcription; yet if I build a Houſe upon my own Ground next adjoining, no Action lies againſt me. (n) 22 H. 6. 14. b.

(n) Fitz. Action ſur Caſe 11. S. C.

15. (o) So if I have 100 Acres of Paſture in a Town, and before this Time, no Man hath ever had any Paſture within the ſame Town, and thoſe of the Town have uſed to Agiſt their Cattle in my Paſture; and another that has Freehold within the Town, converts his Arable Land into Paſture, ſo that thoſe of the Town agiſt their Cattle there, per quod this is a Damage to me, yet I cannot have any Remedy againſt him, for it is lawful for him to make the beſt Advantage he can of his own Land. (p) 22 H. 6. 14. b.

(o) Noy 184. S.P.arguend'.

(p) Br. Action ſur Caſe 57. S. C.

16. (q) If I have had a Mill by Preſcription in my own Land, if another erects a new Mill upon his own Land, if this draws away the Stream from my Mill, or ſtops it, or makes too great a Quantity of Water to run to my Mill, by which I receive Damage, ſo that my Mill cannot grind as much as it was uſed to do, I ſhall have an Action upon the Caſe againſt him (r) 22 H. 6. 14.

(q) Dyer 248. Pl. 80. vide.

(r) Fitz. Action ſur le Caſe 11. S. C.

17. If I have had a Houſe by Preſcription upon my Ground, another cannot erect an Houſe upon his own Ground next adjoining thereto, ſo near to it that he ſtops the Light of my Houſe. (s) 22 H. 6. 15. per Markham. Co. (t) 9. Bland's Caſe 58. reſolved.

(s) Br. Action ſur Caſe 57. S. C.

(t) 1 Bulſt. 115. S. C. cited. Hut. 136. S. C. cited. 2 Rol. Abr. 140. Pl. 10. S. C. 2 Leon. 93. S. C. cited.

18. So

(u) Br. Action sur Case 57. S. C. 2 Leon. 93. S. P. arguend'.

18. So he cannot build an House upon his own Ground, so near my Ground as to cause the Rain to fall and drop upon my House. (u) 22 H. 6. 15. per Markham.

(w) Kelw. 26. b. 27. a. S.P. arguend' 40. S. P. agreed per Curiam.

19. (w) If I am a Freeman, and another says, I am his Villain, and lies in wait to take and imprison me, & tantis insultibus & affraiis effecit per quod circa negotia mea, &c. palam intendere, &c. an Action upon the Case lies against him. (x) 2 E. 4, 5.

(x) Br. Action sur Case 90. S. C. Fitz. 16. S. C.

(y) Br. Action sur Case 90. S. C. Fitz. 16. S. C.

20. But if he does not alledge that he in tantis insultibus & affraiis effecit per quod circa negotia sua, &c. palam intendere, &c. no Action lies (y) 2 E. 4, 5. b.

Fol. 108.

(z) Fitz. Action sur le Case 21. S. C.

21. If a Man menaces my Tenants at Will of Life and Member, per quod they depart from their Tenures, an Action upon the Case lies against him. (z) 9 H. 7. 8.

(a) Fitz. Action sur Case 21. S. C.

But the Threatning without their Departure, is no Cause of Action. (a) 9 H. 7. 8.

(b) 1 Brownl. 197. like Point said. Cro. Car. 437, 438. like Point adjudged. 2 Brownl. 149. S. P. cited. And vide 1 Rol. Abr. 406. Pl. 9. Palm. 211. And vide 1 Rol. Abr. 560. Pl. 16, 17, 18. (c) Moor 546. Pl. 727. S. C. adjudged. Cro. Eliz. 629. S. C. adjudged nisi Clinch dubitante, who said, that then the Lord who hath an Intereſt in the Timber, ſhould never have any Profit thereby, and the Timber will decay to the Prejudice of the Common-wealth. 1 Rol. Rep. 196. S. C. cited.

22. (b) If a Copyholder prescribes to have the Toppings of Trees growing upon his Copyhold, and the Lord cuts down the Trees, and carries away the Body of the Trees, and leaves the Toppings to the Copyholder; yet the Copyholder shall have an Action upon the Case against the Lord, for he ought to have not only the present Toppings, but also those which should grow hereafter. Mich. 3 Jac. B. R. cited per Coke to have been so adjudged in B. R. between (c) Stebling and Gosnold, which was adjudged. Mich. 40, 41 Eliz. B. R.

23. If the Lord in ancient Demesn will not hold his Court out of Malice, &c. the Demandant in a Writ of Right there, shall have an Action upon the Case against the Lord, for otherways by such Means the Lord at any Time might make it Frank-fee. 11 E. 2. Action sur Case 46.

(d) 4 Co. 28. b. S. P. per Curiam arguend'. And vide 2 Keb. 357.

24. (d) But if the Custom of a Copyhold Manor be, that a Copyholder for Life may name his Successor, and that the Lord ought to admit him, and a Copyholder for Life, according to the Custom names his Successor, who after the Death of the Copyholder, comes to the Lord according to the Custom, and prays him to admit him, and the Lord (e) refuses to admit him, yet no Action upon the Case lies for him against the Lord, because this was but an Estate at Will by Common Law, and tho' Custom hath fixed the Estate, yet that shall not enure to such collateral Purposes as this is, adjudged. My Reports. 12 Jac. between (f) Ford and Hoskins, 13 Jac. adjudged.

(e) No Action lies against the Feoffor, that has sealed the Deed of Feoffment, and refuses to make Livery. Moor 842. said 2 Bulst. 338. per Dod'. 2 Vent. 27. S. P. per Tyrrel Just. arguend'. —No Action against the Tenant that refuses to attorn to a Grant in Pais of the Reversion. Moor 843. said. 2 Bulst. 338. S. P. per Haught'. 1 Rol. Rep. 196. per Haughton. 2 Vent. 27. S. P. per Tyrrel Just. arguend'. (f) Cro. Jac. 368. S. C. adjudged. 2 Bulst. 336, 337. S. C. adjudged per totam Curiam. 1 Rol. Rep. 125, 126, 195, 196. S. C. adjudged per totam Curiam.

(g) 4 Co. 28. b. S. P. per Curiam arguend'.

25. (g) So if a Copyholder Surrenders to the Use of one, and the Lord refuses to admit him; no Action upon the Case lies against him. My Reports 12 Jac.

(h) Otherways if the Surrenderer prays the Lord, &c. for he shall have an Action. 2 Bulst. 217. cited, yet Q.

26. So if such a (h) Copyholder that is to be admitted, prays the Lord to hold a Court, and he will not, yet no Action upon the Case lies against him. (i) My Rep. 12 Jac.

(i) 2 Bulst. 336. S. C. and S. P. per Haught' Just. 1 Rol. Rep. 125. S. C. and S. P. per Curiam.

27. (k) If ceſtuy que uſe at Common Law had requeſted his Feoffees to make a Feoffment to J. S. and they had refuſed, yet no Action upon the Caſe lay againſt them, but his Remedy was in Chancery only. (l) My Rep. 12 Jac. per Curiam.

(k) 2 Vent. 27. S. P. per Tyrrel Juſtice. (l) 2 Bulſ. 336. S. C. and S. P. per Coke Ch. Juſtice, 337. S. P. per Coke Ch. Juſtice. 1 Rol. Rep. 125. S. C. and S. P. per Coke and Dod'.

28. (m) If it be the Cuſtom of a Copyhold Mano; that Surrenders ſhall be made to one of the Tenants of the Mano;, if he will not take ſuch Surrender, yet no Action upon the Caſe lies againſt him. (n) My Rep. 12 Jac.

(m) 5 Co. 84 a. vide.

(n) 2 Bulſ. 337. S. C. and S. P. per Coke Ch. Juſtice. 1 Rol. Rep. 126. S. C. and S. P. per Coke and Haughton.

29. (o) But if a Man dyings a Bargain and Sale to an Officer to be enrolled accoyding to the Statute, and he will not enroll it within 6 Months, an Action upon the Caſe lies againſt him. (*) My Rep. 12 Jac. per Coke.

(o) 1 Sid. 209. like Point, per Twiſden. 2 Vent. 27. S. P. per Tyrrel Juſtice, arguend'. (*) 2 Bulſ. 336. S. C. and S. P. per Coke Ch. Juſtice, 338. S. P. per Dod' Juſtice. 1 Rol. Rep. 126. S. C. and S. P. per Coke.

30. If Feoffees to my Uſe at the Common Law would not have joined in Voucher where they might, per quod Judgment paſt againſt them, yet I could not have had an Action upon the Caſe againſt them; but my Remedy was in Chancery only Contra. (p) 14 H. 24 b.

(p) This is miſprinted, and ſhould be 14 H. 8. 24 b.

31. (q) If an Archdeacon will not (r) induct a Clerk who is admitted and inſtituted, an Action upon the Caſe lies againſt him for that; becauſe he had jus ad rem, and the Church is full by Inſtitution. (s) F. N. B. 46 H. (t) My Rep. 12 Jac. per Curiam.

(q) 2 Bulſ. 265. S. P. ſaid. 1 Rol. Rep. 64. S. P. per Curiam. 2 Vent. 26. S. P. ſaid. 12 Co. 128. S. P. per Curiam agreed——But no Action lies upon a Promiſe to preſent J. S. to a Benefice. 2 Bulſ. 338. per Dod'.—If A. hath the Nomination, and B. the Preſentation, and B. refuſes to preſent the Party that A. nominates, no Action upon the Caſe lies. Moor 842 ſaid. 2 Bulſ. 337, 338. ſaid the Party to be preſented hath jus, &c. vide, and 338. what is there ſaid by Dod'. 1 Rol. Rep. 196. ſaid. (r) No Action upon the Caſe againſt an Ordinary for refuſing to admit. Moor 836. ſaid. 1 Rol Rep. 64. per Curiam.—But ſuch Action lies againſt an Ordinary for admitting contrary to a Verdict in a jure patronatus. Hob. 317, 318. per Hobart. 2 Vent. 26. cited. (s) Cro. Jac. 369. S. C. cited. (t) 1 Rol. Rep. 125. S. C. and S. P. per Curiam.

32. (u) If a Man ſeized in Fee makes A Leaſe foy Years, and after comes to the Land to ſee if any Waſte was there committed, and endeavours to enter upon the Land (*) but a Stranger diſturbs him and will not let him enter to view the Waſte, the Leſſoy may have an Action upon the Caſe againſt him, foy the Law allows him to enter and ſee whether any Waſte is committed, and foy want thereof he not knowing may be pyejudiced as to the byinging his Action, and ſo this is damnum & injuria, Paſch. 16 Jac. B. R. between (x) Hunt and Todner adjudged, the Novelty of this Action being ſhewed in Arreſt of Judgment.

(u) 2 Rol. Rep. 311. S. P. per Chamberl' Juſtice. Co. Lit. 56 a. like Point.

* Fol. 109.

(x) Cro. Jac. 478. S. C. adjudged per totam Curiam, 2 Rol. Rep. 21. S. C. adjudged.

33 Mich. 10 E. 3. B. R. Rot. 27. An Action byought by the Patron againſt the Parſon foy ſuing in Court Chriſtian foy the Advowſon of the Church and Tithes againſt the Statute, and Damage recovered to 40 l.

34. Hill. 9 E. 3. 6 Rot. 58. A Man recovers 6 Marks damage againſt the Pyioy of Lewis foy pyoſecuting an Excommunication in the Court Chriſtian upon a Suit there foy Rent, and the Pyoſecution Was after a Pyohibition. And ſomething was there raſed after, and there immediately after predictus Prior convictus eſt pro proſecutione de tranſgreſſionibus contra pacem regis in Curia Chriſtianitatis, & ſimiliter Raſum eſt judicium.

35. (y) If it be the Cuſtom of a Pariſh that the Parſon of the Pariſh ought yearly to find one Bull and one Boar within the ſame Pa-

(y) 1 Rol. Abr. 110. Pl. 3. like Point.

riſh for the Increaſe of Cattle for the Maintenance of Hoſpitality, and that in Conſideration thereof the Parſon ſhall have the Tenth of the Increaſe, &c. if the Parſon does not find a Bull and Boar according to the Cuſtom, every Pariſhioner that receives Damage thereby by the want of Encreaſe of his Cattle, and in Decay of his Hoſpitality, may have an Action upon the Caſe againſt the Parſon. (z) Trin. 39 Eliz. B. R. per Curiam.

(z) Moor 355. P. L. 481. S. C. adjudged, and S. P. appears. Cro. Eliz. 569. and S. P. adjudged.

36. (a) If a Pariſhioner ſets out his Tithes of Hay duly, and requires the Parſon to carry them off his Land, but he does not (b) carry them off in a convenient Time, per quod his Graſs where the Hay lies is impaired by the Hay's lying upon the Graſs; an Action upon the Caſe lies againſt the Parſon. Mich. 13 Car. B. R. between Chaſe & Ware, per Curiam, adjudged in a Writ of Error, and ſuch Judgment given in Banco affirmed accordingly. Intratur Trin. 13 Car. B. R. Rot. 564. Mich. 15 Car. B. R. between Lee & Ruſſel, per Curiam.

(a) Latch. 8. S. P. ſaid. Godb. 329. S. P. argu-end'. 330. S. P. cited. 2 Rol. Rep. 328. S. P. cited. 2 Leon. 93. like Point cited. Noy 31. like Point cited.

(b) The Plaintiff declares, That within the Pariſh of D. there is a Cuſtom, that every Pariſhioner ſhall pay 14 Cheeſes yearly in lieu of Tithe Milk; and that the Plaintiff being a Pariſhioner, &c. did tender, &c. to the Defendant who was Parſon, and that the Defendant hath not carried them away to his Damage, &c. Miſeman and Denham, 2 Rol. Rep. 328, 329. adjornatur. Ley 69, 70. 2 Judges againſt 1 for the Plaintiff, but no Judgment. Palm. 341, 381. no Judgment. Godb. 329, 330, &c. ſaid that he hath heard it was adjudged for the Plaintiff vide.—Where, and in what Caſes a Man ſhall have an Action againſt another, for not taking and carrying away the Thing tendered. vide 2 Rol. Rep. 328, 329. Ley 69, 70. Palm. 341, 381, &c. Godb. 329. 330, &c. 3 Keb. 766.

37. But in the ſaid laſt Caſe when the Tithes are ſet out, and Notice thereof given to the Parſon, and he ſends his Servant to carry them away, and the Pariſhioner then threatens the Servant, and will not ſuffer him to carry them away, and after the Parſon leaves them there a long time, to the Damage of the Graſs of the Pariſhioner, yet the Parſon is excuſed, if no new Requeſt was after made to the Parſon to carry them away. Mich. 15 Car. B. R. between Lee and Ruſſel, adjudged a good Plea in Bar of the Action of the Pariſhioner againſt the Parſon, no new Requeſt being alledged, and this upon Demurrer. Intratur Trin. 15 Car. Rot. 691.

38. If a Man makes a Feoffment of certain Lands by Indenture, reſerving a Way over the Land from ſuch a Place to ſuch a Place, tho' this Way commences by Reſervation, and not by Grant or Preſcription; yet if it be ſtopped he may have an Action upon the Caſe. Trin. 11 Jac. B. R. between (c) Chollocombe & Tucker adjudged.

(c) 2 Bulſ. 121. S. C. adjudged, but it does not appear the Way was reſerved upon a Feoffment.

(O) (*) Spiritual.

(*) 1 Lol. Abr. 108. Pl. 31.

Fol. 110.

1. (a) If A. and his Predeceſſors have uſed, Time out of Mind, to find a Chaplain to ſing Divine Service, and to (b) perform the Sacraments and Sacramentals in the Chapel of B. within his Manor of D. for B. his Servants and Family, and he does not find a Chaplain according to the Cuſtom, B. may have an Action upon the Caſe againſt him. (c) 22 H. 6. 46 b. Co. 5. Williams 73.

(a) Litl. Rep. 95. like Point argu-end' and S. P. cited.

(b) Whether an Action lies againſt a Parſon for refuſing to give J. S. the Sacrament. 1 Sid. 34, 35. dubitatur, but 1 Keb. 947. that it lies agreed per Curiam; becauſe a Man is bound to receive upon a Penalty.—Againſt a Biſhop for not taking Caution of a Party Excommunicated. Raym. 226. arguend' 2 Inſt. 623.—Againſt an Ordinary for refuſing to grant Adminiſtration. Cart. 126. cited. (c) Fitz. Action ſur Caſe 12. S. C. Br. 61. S. C.

2. If the Vicar of B. hath used Time out of Mind, either by himself, or by another Chaplain to celebrate Divine Service in the Chapel of D. within the Manor of S. which is within the Parish of B. every Sunday & Holy-day throughout the Year, before the Noon of the same Day, and to Administer the Sacrament, to the Lord of the said Manor of S. Hominibus tenentibus & Servientibus suis infra præcinctum ejusdem Manerii inhabitantibus & commorantibus, and the Vicar does not perform it, yet the Lord shall not have an Action upon the Case against him for this, but he ought to sue him in the Spiritual Court to compel him to perform it; for if the Lord might have this Action, (d) then might every Tenant of the Manor have the same Action, of which perhaps there are many, and so there should be an infinite Number of Actions for one Default, for this is not a private Chapel as it is in 22 H. 6. Co. 5. (e) William's Case 72. resolved.

(d) 1 Sid. 34. like Point arguend'.
(e) Cro. Eliz. 664. S. C. cited.

3. (f) If the Inhabitants of a Town have by Custom had a watering Place for their Cattle, if this be stopp'd by any other, any Inhabitant of the Town may have an Action upon the Case against him that stops it, for otherways he should be without Remedy, in as much as such Nusance is not presentable in a Leet or Turn. Co. Lit. 56. a Case cited to have been adjudged so between (g) Westbury & Powel for the Inhabitants of Southwark in B. R.

(f) 1 Rol. Abr. 109. Pl. 35. like Point.
(g) Cro. Eliz. 664. S. C. cited.

4. No Action upon the Case lies for a Legacy, and tho' in the Time of *Cromwell's* Rebellion such Actions were (a) commonly brought, they were allowed only least there should be a Failure of Justice, when there was no Ecclesiastical Court. *Mich.* 13 *Car.* 2. (b) *Nicholson* and *Sherman. Raym.* 23. adjudged *nisi.*

(a) 2 Sid. 21. 85, 86. vide.
(b) 1 Keb. 116. S. C. adjudged nisi.

5. If a Parson is guilty of Dilapidations, and after takes another Benefice by which his former becomes void, his Successor may have an Action against him, and declare, that by the Custom of the Realm he ought to pay to him *tant' denar' sum' quant' sufficiunt ad reparand'*, &c. *Pasch.* 2 *Will.* and *Mar.* between *Jones* and *Hill.* 3 *Lev.* 268. adjudged after a Verdict for the Plaintiff, but at the first the Court inclined to the contrary, and that there was no Remedy but in the Spiritual Court; and as to the Cases cited in *Deg's* Parsons Law, upon Search of the Rolls it appeared there was no Judgment given in any of them; But *Polexfen* and *Ventris* being dead, and the Case argued before *Powel* and *Rookeby*, they gave Judgment for the Plaintiff; and *Day* and *Hallington's* Case was cited, where in such a Case Judgment was given for the Plaintiff upon Demurrer.

(P) (a) In nature of a (b) Conspiracy.

(a) Where upon the 8 H. 6. cap. 10. for procuring the Defendant to be indicted or appealed in a

1. If in an Issue between 2 a Stranger gives false Evidence against 1 per quod the Verdict passes against him, yet no Conspiracy lies against him, because that which is given in Evidence is not upon Record. 39 E. 3. 13. adjudged.

County, in which he was never Conversant, in which Action he shall recover treble Damage. Kelw. 21. F. N. B. 115. J. Br. Conspiracy 38. (b) 3 Inst. 110. vide the Explanation of the Word, and the Judgment at the Suit of the King and of the Party, &c.

2. (c) If a Man brings an Action upon the Case in nature of a Conspiracy, and that he (d) maliciously procured him to be indicted of an Offence, and prosecuted till fuit legitimo modo acquietatus, if the Indictment was not good, the Action does not lie, for he was not legitimo

(c) 3 Leon. 139, 140, &c. like Point adjornatur. 1 Leon. 279. like Point arguend'. Godb. 76. S. P. per Clinch Justice. Yelv. 46. like Point adjudged Con. by 4 Judges against 1. Palm. 45. S. P. 2 Judges against 2. 3 Keb. 141. S. P. per Curiam Con. Stile 157. like Point adjudged Con. (d) This is according to the Original, but some Words seem to be wanting, viz. The Plaintiff declares that the Defendant maliciously.

gitimo modo acquietatus; and this Action is all one with a Conspiracy as to this. Hill. 8 Car. B. R. in Hunt & Line's Case resolved per Curiam.

3. As in an Action upon the Case, If the Plaintiff declares that the Defendant falsely and maliciously procured him to be indicted for Deceit, in the Sale to him of one Silk Stocken (and the Word Pair is omitted between the Word One and Silk) after Verdict for the Plaintiff adjudged that the Action does not lie, because the Indiament was not good, by reason of the Omission of the Word Pair. Hill. 8 Car. between Hunt & Line, per Curiam adjudged.

Fol. 111.

4. In an Action upon the Case in nature of a Conspiracy against A. and B. his Wife, for that they maliciously conspired to indict, and did indict him accordingly for the stealing of a Ruff, Anglice a Woman's Ruffe de bonis & catallis de B. the Wife, and upon not guilty pleaded a Verdict, was found for the Plaintiff, tho' a Woman being a Feme-Covert can (e) have no Goods, yet after a Verdict it shall be intended to have been as it might be, Scilicet that this was the Goods of the Wife dum sola fuit, and that the Stealing was then, and not when she was Covert. Hill. 9 Car. B. R. between Skinner & Parker and Mary his Wife in Camera Scaccarii in a Writ of Error, per Curiam adjudged, and the first Judgment affirmed accordingly. Trin. 8 Car. Rot.

(e) 1 Rol. Abr. 74. Pl. 1. vide.

5. (f) If an Action upon the Case be brought against three for that they conspiratione inter eos habita maliciously and falsely did accuse the Plaintiff of a certain Felony, and did procure him to be bound to the Assizes, and did there prefer a Bill of Indictment again him, of which an Ignoramus was found, and two of the Defendants plead not guilty, and the third justifies, and they who pleaded not guilty are found not guilty, and the Issue as to him who justified is found for the Plaintiff, the Plaintiff shall have Judgment (g) for this Action upon the Case differs from a Writ of (h) Conspiracy. Mich. 9 Car. B. R. between Palke & Dunning adjudged, per Curiam, this being moved in Arrest of Judgment; but after Judgment was staid, per Curiam for another Exception, and after the Parties agreed, and so no Judgment was entered. Intratur Trin. 9 Car. Rot.

(f) Skinner and Gunton like Case for conspiring to arrest the Plaintiff in a great Action. Raym. 176. adjudged, per tot' Curiam. 1 Vent. 12, 18, 19. adjudged, per tot' Curiam. 1 Sand 228, 229, 230. adjudged, per tot' Curiam preter Morton, who was of Opinion that it was an Action of Conspiracy, and there is a Nota, per Sanders, that he thought the Plaintiff ought not to have had his Judgment, for that he took it to be a formed Action of Conspiracy, by reason of the Words per Conspirationem inter eos habitam, &c. 2 Keb. 473, 476, 497. adjudged, nisi Godb. 76. vide. Raym. 180. S. P. adjudged. (g) Cro. Eliz. 701. S. P. adjudged. Godb. 76. S. P. per Clench Justice. Cro. Car. 139. S. P. adjudged. 1 Rol. Abr. 112. Pl. 9. S. P. 1 Jon. 94. S. P. per Jones. (h) Diversity between a Writ of Conspiracy upon an Indictment of Felony, and upon an Indictment of Trespass. F. N. Br. 116. K. L. 2 Inst. 562. but vide. 1 Sand. 230. that it must be intended Case, without the Words per Conspirationem, &c. Q.

6. In an Action upon the Case, If the Plaintiff declares that the Defendant did procure him to be brought before J. S. a Justice of Peace, and there accused him for the stealing of a Bull de homine ignoto, and after Examination the Justice as much as in him lay discharged him, and after the Defendant procured him to be brought before J. D. another Justice, and there accused him of the same Felony, and maliciously procured him to be bound by the said Justice to answer this at the next Assizes, at which Assizes he appeared, and the Defendant falso & malitiose ambiit & conatus fuit to indict him of the said Felony, &c. the Action does not lie upon this Declaration, because all that is laid to be done besides the last Part of the Endeavour is not laid to have been done falso & malitiose, but only to be done ordinarily by legal Process, and tho' the Procurement of him to be bound to the next Assizes is laid to have been done maliciously, yet this is not laid to have been done falsely, and that which is laid in the End that he ambiit & conatus fuit falso & malitiose to indict him, this is not any Act done but an Endeavour only for which no Action lies. Pasch. 11 Car. B. R. between Palke & Dunning, per Curiam, resolved after a Verdict for the Plaintiff, and after Judgment for him, and this staid, and a Supersedeas granted.

7. If A. and B. prefer a Bill of Indictment of Felony against (*) D. before the Justices of Gaol-delivery to the Grand Inquest by Conspiracy before-hand had, and in an Action upon the Case in Nature of a Conspiracy for this malicious Prosecution, if the Plaintiff does not aver that he was then in the Gaol, or that the said Justices had Power ad audiend' & terminand' felonias, &c. yet it seems the Action lies; for (a) tho' they had not Power to take this Indictment, yet this is a great Slander and Defamation. Mich. 9 Car. B. R. between Palke and Dunning, after a Verdict for the Plaintiff upon such a Declaration, this Matter being moved in Arrest of Judgment, and the Postea staid per Curiam, and the Court seemed to incline that the Declaration was not good, but after the Parties agreed, and so no Judgment was given. Trin. 9 Car. Rot.

(*) In the Original this is B. and so appears to be misprinted.

(a) Yelv. 46. S. P. adjudged per 4 Judges against 1. 117. S. P. per Curiam. Cro. Eliz. 564. like Point appears, but no Judgment. Stile 372. S. P. per Roll 378. S. P. per Twisden. 1 Sid. S. P. per Curiam; but a Query is there made by the Report, Lovet and Falkner like Point. 2 Bulst. 270, 271. adjudged Con. Cro. Jac. 357. per Curiam. 1 Rol. Rep. 109. the Exception taken, but no Judgment.

8. In an Action upon the Case, if the Plaintiff declares, that the Defendant A. being a Woman to the Intent to defame him, &c. and to hinder his Marriage with any Woman, exhibited quendam famosum & Scandalosum libellum in the Consistory of Norwich against the Plaintiff, in which it was contained, That the Plaintiff did often in the Night resort to her, under Colour of being a Suitor to her, and lay with her, and had a Child by her, and after falso & malitiose published and affirmed all the said Matter, per quod all honest Persons Deum præ oculis habentes, have refused, and yet do refuse to give any of their Daughters or Relations in Marriage to him, and upon Not Guilty pleaded, the Jury find a Special Verdict scilicet that the Defendant did prefer the said Libel, and that after at the General Sessions of Peace (b) the Defendant being examined in open Sessions, Who was the Father of the said Child on her Body out of Wedlock begotten? She said and affirmed, That the Plaintiff was the Father of the said Child, and the Jury find that the Defendant said the Words of the Plaintiff falso & injuriose, and that by Reason thereof, all honest Persons Deum præ oculis habentes have refused huc usque to give in Marriage to the Plaintiff any of their Daughters or Relations. In this Case this Matter found is not sufficient to maintain the Action, for the Loss of his Marriage is too generally laid, inasmuch as he does not mention any Communication of Marriage with any Woman, or Loss of Marriage with any particular Woman, and it is not alledged or found that the Libel was preferr'd falso & malitiose, but only a legal Proceeding in the Spiritual Court, for which no Action lies; and the finding of the Jury that she said before the Justices that he was the Father of the Child, and that she said it falso & injuriose will not maintain the Action, because every Prosecution, tho' without Malice, if it be false is injurious, and yet no Action lies, and this is none of the Matters mentioned in the Declaration. Mich. 10 Car. in Camera Scaccarii, between (c) Norman and Symons adjudged, and the Judgment given in B. R. econtra reversed per Curiam, in a Writ of Error.

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(b) The Plaintiff declares that the Defendant conatus fuit to charge the Plaintiff at the Quarter-Sessions, as the reputed Father of a Bastard Child, et per totam Curiam the Action does not lie, this being an Ecclesiastical Scandal; otherways if it had been laid that he had procured an Order of Sessions to be there made against him as the reputed Father, for then an Action would have lain in respect of the Temporal Loss. 2 Bulst. 343.—An Indictment lies for a Conspiracy to charge. J. S. with the Keeping of a Bastard Child. Vide 1 Sid. 68. 1 Vent. 305. 1 Keb. 254. 3 Keb. 399.

(c) 1 Rol. Abr. 36. Pl. 12. S. C.

9. (d) An Action upon the Case lies against Churchwardens, for that they falsly and maliciously, to the Intent to draw the Plaintiff within the Censures of the Ecclesiastical Court for Adultery, presented him there upon a Fame of his living in Adultery with A. S. Pasch. 16 Car. B. R. between Damont Ruddock and Sherman adjudged per Curiam, this being moved in Arrest of Judgment, and tho' the Declaration was, that they two conspired to do this, and the one found Guilty and the other not Guilty; (e) yet this being but an Action upon the Case the false Presentment. Kercherval and Smith, S. P. Cro. Car. 285. appears. 1 Jon. 305. 1 Rol. Abr. 111. Pl. 5. S. P. with Notes.

(d) 1 Rol. Rep. 108. S. P. adjornat'. 1 Rol. Abr. 93. Pl. 18. like Point against a Sumner of the Ecclesiastical Court for a appears. (e)

Action lies, and adjudged accordingly, and tho' it was alledged that they made the Presentment before the Archdeacon of Sudbury, and did not aver that it was within the Jurisdiction of the Archdeacon, yet the Action lies, (f) for tho' it is not within his Jurisdiction, yet the Vexation is the greater.

(f) 1 Rol. Abr. 111. Pl. 7. and Margine several like Cases.

10. (g) A Writ of (h) Conspiracy lies for him that is indicted of a common Trespass and acquitted, notwithstanding it was not of Felony. (i) 3 Ass. 13. adjudged.

(g) 3 Leon. 140. S. P. arguend', and there cited. Fitz. Conspiracy 13. Raym. 176. S. P. arguend'. 1 Vent. 18. S. P. arguend'. 23. S. P. cited. (h) An Action upon the Case lies. 2 Mod. 51. adjudged 306. per Chief Justice. Stil. 424. per Roll. Con. 1 Vent. 86. said then lately to have been adjudged Con. (i) Br. Conspiracy 25. S. C. Br. Bill 17. S. C.

(k) Barns and Constantine. S. P. Cro. Jac. 32. appears. Yelv. 46. appears. 1 Bulst. 185. S. P. adjudged Con. Raym. 180. S. P. adjudged. 1 Vent. 23. S. P. said to have been often adjudged.—For maliciously indicting the Plaintiff for a Rescous scienter that he was not present, &c. Low and Berdmore. 1 Sid. 261. no Judgment. Raym. 135. adjornatur. 1 Keb. 881. adjornatur. And vide Raym. 135. Chamberlain and Prescot's Case there cited.

11. (k) If A. causes B. to be indicted for a common Barrator, upon which Indictment B. is acquitted, he may have an Action upon the Case against A. Mich. 10 Jac. B. R. between Messenger and Read admit.

(l) 1 Rol. Abr. 114. Pl. 3. like Point with References.

12. (l) So if a Man maliciously causes another to be indicted for a common Barretor without Colour, tho' he be not acquitted, yet an Action lies. vide Mich. 10 Jac. B. R.

13. So if a Man procures another falsly and maliciously to be indicted upon the Statute for a Recusant, by which he should be made a Traitor, &c. yet no Action upon the Case lies against him, for no (*) Conspiracy in such Case lay against 2, for Treason is secret in the Mind, and where no Conspiracy lies against 2, no Action upon the Case lies against 1. Mich. 12 Jac. B. R. between (n) Lovet and Fawkner, per Curiam, tho' this be Treason by Statute and not by Common Law, the which intratur Mich. 11 Jac. Rot. 464. Mich. 20 Jac. B. R. between (o) Smith and Crawshaw adjudged in Arrest, where it was for Treason in Words, and the same Case was after adjudged accordingly between the same Parties in a new Action, tho' it was there laid that it was done falsa conspiratione prehabita.

* Fol. 113.

(n) 2 Bulst. 270, 271. S. C. for a Fault in the Declaration adjudged pro Defendente, tho' as to this Point the Court inclined pro quer'. Cro. Jac. 357. S. C. adjornatur, and said, that no Judgment was ever given. 1 Rol. Rep. 109. S. C. and the better Opinion accordingly, but no Judgment. 2 Rol. Rep. 237. S. C. cited to be adjudged. Latch 80. S. C. cited, and said no Judgment was given for the Plaintiff, because of a Fault in the Declaration. Palm. 315. S. C. cited and said per Dod', that Judgment was staid for a Fault in the Declaration. (o) Cro. Car. 15. S. C. adjudged. Palm. 315, 316, 317. S. C. and there said that Judgment was arrested, because it did not appear that the Plaintiff was acquitted of the Offence. 2 Rol. Rep. 236, 237. S. C. 1 Judge against 1.

(p) Latch 79. S. C. adjudged. Cro. Car. 15. S. C. adjudged per totam Curiam. 1 Jon. 93, 94. S. C. adjudged. 2 Bulst. 271. S. C. adjudged.

14. But Pasch. 1 Car. between the same Parties scilicet (p) Smith Plaintiff, and Crawshaw, Spurle and Ward Defendants, per Curiam an Action lies where laid that they maliciously and by Conspiracy, among them before-hand, had preferr'd a Bill of Indictment against him for speaking treasonable Words, and this found by Verdict, and after this Matter moved in Arrest of Judgment, the which is entered Trin. 21 Jac. B. R. Rot. 651. and this was after scilicet Mich. 1 Car. at Reading, Term adjudged per totam Curiam that the Action lies.

(a) If a Justice of Peace procures some Witnesses to appear and give Evidence upon an Indictment; this is but his Duty, and tho' his Name was endorsed upon the Indictment to give Evidence, yet this made him not a Prosecutor, and so no Action lies against him for a malicious

15. If a Justice of Peace *malitiose & invide machinans* J. S. *de bonis, nomine, fama & vita deprivare*, directs his Warrant to several Constables to apprehend *J. S.* alledging in his said Warrant, that *J. S.* was accused before him for the Stealing of an Horse, whereupon he is arrested and detained till he enters into Bond for his Appearance, whereas he was not accused nor stole such Horse, an Action will lie, for tho' the (a) Justice is excused when upon a false Accusation he sends out his Warrant; yet it is otherways where he makes it out without any Accusation at all. *Trin.* 31 *Eliz.* between (b) *Windham* and Sir *Edward Cleer.* 1 *Leon.* 187. adjudged.

malicious Prosecution. Girlington and Pitfield. 1 Vent. 47. adjudged. 2 Keb. 572. adjudged, (b) Cro. Eliz. 130. S. C. adjudged by 2 Judges.

16. A Merchant-Denizen imports a Pack of Linen-Cloth, and pays Custom for it as for the Goods of a Denizen; yet *J. S.* knowing this, and intending unjustly to deceive the said Merchant, and to cause him to lose his Goods, seizes the said Goods to the King's Use, as the Goods of a Merchant Alien, imported and entered as the Goods of a Denizen, and after *tam pro domino*, &c. *quam pro seipso* informs in the Court of Exchequer, setting forth that they were the Goods of Merchants unknown, and were Customed as Denizens, whereas they were the Goods of Aliens, whereby the King lost his Customs, and thereupon the said Goods are condemned, and by the Judgment of the said Court forfeited; and whether an Action upon the Case will lie against *J. S.* this Condemnation being by Judgment of the Court, which the Party by coming in upon the Proclamation might have prevented. *Trin.* 13 *Car.* 2. *Hard.* 194, 195. &c. *dubitatur*, but at last Judgment was given for the Defendant, but whether upon the Point of Law, or upon an Exception there taken to the Pleading, does not appear by the Report.

17. If one maliciously indicts a Justice of Peace for delivering a Vagrant out of Custody without Examination contrary to Law, an Action will lie, for that the Indictment contains Matter of Imputation and Slander, as well as Crime, and 'tis not like an Indictment of Forcible Entry, *&c. Pasch.* 21 *Car.* 2. between (c) Sir *Andrew Henly* and Dr. *Burstal. Raym.* 180. adjudged.

(c) 1 Vent. 23, 24. S. C. adjudged, the Indictment there, being for rescuing a Vagabond out of the Constable's Hands. 2 Keb. 486, 494. S. C. adjudged nisi.

18. If *A.* was Churchwarden of *B.* and at the End of the Year gave up his Accounts to his Successor, and yet *A.* is falsly and maliciously cited by *D.* into the Ecclesiastical Court, to render an Account, and at the Request of *D.* he is excommunicated for not rendring up his Account, an Action lies against *D.* (d) notwithstanding this Sentence was given by the Judge. *Mich.* 32 *Car.* 2. between (e) *Gray* and *Day. Raym.* 418.

(d) As to this Matter. Hard. 194, 195, &c. vide a long Argument. (e) 2 Jon. 132. S. C. adjudged, the Plaintiff declaring, That the Defendant knowing the Plaintiff had before made up his Accounts, which were approved by the Parish, &c. but it does not appear by the Report of the Case in Jones, that the Plaintiff was excommunicated, or how far proceeded against.

Pleader.

Declaration in a Writ of Conspiracy, or an Action upon the Case in Nature of a Conspiracy.

1. (f) In Conspiracy the Plaintiff declares, that the Defendants *Conspiratione habita* did cause the Plaintiff to be indicted for a common Barrator, and *ea occasione* did cause him to be taken and in Prison detained *quousq; &c. secundum legem & consuetudinem Angliæ acquietatus fuit ad damnum*, &c. This is a good Declaration, tho' not said that he was *inde acquietatus* or *de præmissis acquietat'* for it cannot otherways be intended, and the Writ never hath the Word *inde*, and the Precedents are both ways. *Mich.* 7 *Jac.* between (g) *Bell* against *Fox* and *Gamble. Yelv.* 161. adjudged *per totam Curiam*, upon a Motion in Arrest of Judgment after a Verdict for the Plaintiff.

(f) Cro. Car. 286, 315, 419. S. P. in an Action upon the Case in Nature of, &c. adjudged and affirmed upon Error. Cro. Jac. 131. S. P. in an Action upon the Case in the Nature of a Conspiracy, &c. adjudged and affirmed upon Error, but said it was otherways in Conspiracy. —Whether of Necessity to be shewn that the Plaintiff was acquitted, or not. Q. Et vide 1 Rol. Abr. 114. Pl. 1. 3. and the several References in the Margin. (g) Cro. Jac. 230. S. C. adjornatur.

2. If the Plaintiff declares that the Defendant caused him to be indicted, *&c. Et quod juratores dixerunt quod ignorabant*, &c. This is a good Declaration,

ration, and it need not be *Ignoramus*, for it was agreed by the Prothonotaries to be the common Form, either to say *quod ignorabant* or *fuerunt ignorantes*, between *Pawlin* and *Shaw*. 2 *Jones* 20. adjudged.

(Q) In what Cases it lies.

Where no Felony is committed.

1. (a) If a Man hath good (b) Cause of Suspicion that a Felony is committed, and that J. S. is guilty thereof, and thereupon takes the ordinary Course of Law, and causes him to be indicted, tho' no Felony was in Truth committed, yet no Action upon the Case lies against him, because he did it in Prosecution of Justice, for otherwise every one will be deterr'd from prosecuting in such Manner. (c) Hy Rep. 14 Jac. B. R. Wells and Wells.

(a) Moor 6. Pl. 22. like Point per Mountague, Chief Justice. Cro. Jac. 191. vide.

(b) What shall be said a good Cause of Suspicion, and where and how it must be pleaded, and what shall be said a taking the ordinary Course of Law, &c. vide. Cro. Eliz. 70. 134. 1 Leon. 107, 108. Kelw. 81. b. Moor 600. Pl. 828. Cro. Eliz. 871. Palm. 316. Cro. Jac. 130, 131, 190, 191. 3 Leon. 100, 101. 12 Co. 91, 92. 2 Bulst. 331. 1 Bulst. 149, 150, 151. 3 Bulst. 284, 285, &c. Ley 60, 61, &c. Winch 28, 29. Godb. 406. 3 Mod. 166. — A probable Cause will not excuse a Man for indicting another of a Trespass, for since he might have brought an Action, the Indictment will be intended malicious. 2 Mod. 306. said —Where the Defendant was bound over to prosecute, vide. Cro. Eliz. 901. Winch 73. 1 Rol. Rep. 438, 439. 3 Leon. 107. Ley 61, 63. vide. (c) 1 Rol. Rep. 438, 439. S. C. 3 Bulst. 284, 285. S. C. Ley 60, 61, &c. S. C.

2. As if the Daughter of J. S. complains to him that J. D. hath ravished her, upon which he complains to a Justice of Peace, and upon his binding him over indicts him, tho' no Rape was committed, yet no Action upon the Case lies against him, in as much as he being the Father, had good Cause of Suspicion upon the Complaint of his Daughter. (d) Hy Rep. 14 Jac. is cited. Hill. 14 Jac. B. R. (e) Cox and Wirral. Rot. 886. adjudged.

(d) 1 Rol. Rep. 439. S. C. and S. C. cited. 3 Bulst. 286. S. C. and S. C. cited. (e) Yelv. 105, 106. S. C. adjudged. Cro. Jac. 193, 194. S. C. adjudged. 1 Bulst. 150. S. C. cited.

3. If a Man takes my Goods and sells them to a Broker in London, and I supposing them to be stolen, and finding them in the Possession of the Broaker, demand of him how he came by them; if he gives an uncertain Answer, which gives me good Cause of Suspicion, for which I complain of him to a Justice, and upon his binding of him over indict him, tho' the Goods were not stole and so no Felony committed, yet no Action lies against me. Hy (f) Rep. 14 Jac. cited 44 Eliz. B. R. (g) Chambers and Taylor adjudged.

(f) 1 Rol. Rep. 439. S. C. and S. C. cited. 3 Bulst. 286. S. C. and S. C. cited. (g) Cro. Eliz. 900, 901. S. C. adjudged.

4. If a Man casually loses 2 Sheep, and after he finds J. S. driving 20 Sheep by the Highway, marked with 12 several Marks, and upon this suspects him to have stole them, and that his 2 Sheep were among them, and procures the Constable of the Town to Arrest him, an Action upon the Case lies for J. S. against him, if he does not aver that his 2 Sheep were stolen; for if no Felony was committed the Arrest was not lawful, or at least a greater Cause of Suspicion that the 2 Sheep were stolen, than the casual Losing of them. Mich. 10 Jac. B. R. between Ley and Webb adjudged.

5. (h) If A. imposes the Crime of Felony upon B. where no Felony is committed, and maliciously causes him to be Arrested for it, (*) an Action upon the Case lies upon such a Declaration, without alledging any particular Felony of which he was accused. Hill. 11 Jac B. R. between Best and Aier adjudged.

(h) 1 Rol. * Fol. 114. Abr. 43. Pl. 3. like Point, Sanders and Edwards. S. P. Raym. 61. appears. 1 Sid. 95. appears, and there said that it had been adjudged that such a general Declaration quod crimen felonie imposuit is good; but a Query is there made by the Reporter, because the Charge not being particular, the Defendant would not know how to defend himself. 1 Keb. 388. appears. 1 Vent. 264. S. P. adjudged. 1 Rol. Abr. 115. Pl. 7.

(R) In what Cases it lies, tho' a Felony was committed.

For Prosecution upon Malice.

1. (a) NO Action lies for procuring one to be indicted of Felony without more, as without Averment, that this was maliciously done, or without shewing that he was (b) acquitted thereupon, for it may be that he is guilty, and an Indictment is the ordinary Proceeding of the Law. Mich. 5 Jac. B. R. between Nyn & Taylor adjudged.

(a) 1 Jon. 94. S. P. per Jones.
(b) Goulst. 51. Pl. 14. vide. 12 Co. 91. vide.

2. If my Cattle are stole, and I find them in the Hands of a Butcher, and I knowing that he bought them lawfully in a Market, and yet of Malice I impose on him the Crime of Felony, and cause him to be arrested and indicted, upon which an Ignoramus is found, an Action upon the Case lies against me for my false and malicious Prosecution. (c) My Rep. 14 Jac. Wells & Wells adjudged.

(c) Bridg. 60, 61, &c. S. C. adjudged pro S. P. per Curiam

Defendente, perhaps for a Fault in the Pleadings, vide 1 Rol. Rep. 438, 439. S. C. and Exception to the Pleading adjornatur. 3 Bulst. 284. S. C. by reason of an Exception to the Pleading ended by Award.

3. (d) If one Man falso & malitiose procures another to be arrested and indicted for Felony, tho' he was never (e) acquitted thereof, yet this Action lies, for a malicious Prosecution (f) without an Acquittal is sufficient to maintain this Action, tho' no Writ of Conspiracy lies without an Acquittal. Mich. 4 Jac. B. R. between (g) Marsham & Pescodd adjudged. 29 Eliz. B. between (h) Knight & Jerom adjudged. Pasch. 11 Jac. B. R. between (i) Horwood & Corders adjudged, an Ignoramus being found.

(d) Skinner and Gunter like Point. 1 Vent. 12. 18, 19. adjudged. Raym. 176. adjudged. 1 Sand. 229. vide. 2 Keb. 476. vide. 1 Rol. Abr. 112. Pl. 12. like Point. 1 Rol. Abr. 112. Pl. 13. Margine like Point Con. 1 Jon. 94. S. P. per Jones. 9 Co. 56 b. vide. Winch. 54. S. P. and said that he hath heard that Judgment was given for the Plaintiff. (e) The Word acquitted is wanting in the Original. (f) The Plaintiff did not shew that he was acquitted or arraigned, upon the Indictment, and for this Cause. Yelv. 117. nil cap' per Billam entered; but 1 Sid. 15. it being found for the Plaintiff to have been done falso & malitiose adjudged pro Quer'. (g) Cro. Jac. 130. S. C. adjudged and affirmed upon Error. (h) Cro. Jac. 131. S. C. cited. 1 Leon. 107, 108. S. C. but S. P. does not appear. Cro. Eliz. 70. 134. S. C. but S. P. does not appear. Palm. 315. S. C. cited. (i) Latch. 49. S C. adjudged, and Error brought in Camera Scaccarii. Winch. 54. S. C. cited and said to have been affirmed upon Error in Camera Scaccarii. Hut. 49. S. C. adjudged, and S. P. appears.

4. If one falso & malitiose (k) imposes the Crime of Felony upon another, upon which he is committed to Gaol and indicted, and after also falso & malitiose swears and gives Evidence against him to the petit Jury that he stole a certain Thing, and yet he is acquitted; an Action upon the Case lies against him for this malicious Prosecution. Mich. 12 Jac. B. between Philips & Shale, per Curiam.

(k) 1 Rol. Abr. 113. Pl. 5. Infra Pl. 6. 115. Pl. 7. vide.

5. If a Man falso & malitiose prefers an Indictment of Felony against J. S. to the Grand Jury, and gives Evidence thereupon to the Grand Jury upon Oath, that the Matter of the Bill was true, and (l) yet the Jury find an Ignoramus, an Action upon the Case lies against him shewing all this Matter, how he gave Evidence upon his Oath, this being falsly and maliciously done. Mich. 9 Car. in a Writ of Error in Camera Scaccarii adjudged, and the first Judgment given in B. R. affirmed between Blackman & Trunket.

(l) For this vide Lat. 81, 82. Palm. 315, 317. Winch. 28. 54. Stil. 10, 11. 372.

6. In an Action upon the Case, if the Plaintiff declares, That the Defendant falsely and maliciously (m) charged him with the Crime of Suspicion of Felony for the felonious stealing of certain Goods; and thereupon did procure him to be brought before a Justice of Peace, who did bind him over to the next Assizes, where he also did falsely and

2 Jon. 20. Lat. 80.
(m) 1 Rol. Abr. 113. Pl. 5. Ante Pl. 4 Post. Pl. 7.

maliciously prefer a Bill of Indictment against him to the Grand Jury who found an Ignoramus, and the Defendant pleads to this Declaration, and justifies that the Plaintiff did steal the Goods, and thereupon he prosecuted him and preferr'd the Bill as in the Declaration, upon which the Plaintiff replied, De injuria sua propria sine tali causa, and this was found for the Plaintiff, the Action lies, for the Crime of Suspicion of Felony is intended according to common Parlance that he accused him of Suspicion of Felony, and he explains this by the Words for the felonious taking of Goods; and the (*) Defendant has justified this also, and if a Man might accuse and prosecute others for Suspicion of Felony maliciously and falsely without Punishment, any Man might be scandalized, and the Maintenance of such Actions for malicious Prosecutions, will not hinder any Man from prosecuting without Malice. Mich. 9 Car. B. R. between Palke & Dunnyng per Curiam, in 2 Actions; in one of which the Defendant pleaded Not Guilty and was found Guilty, and in the other he justified as before, but no Judgment was given, but the Parties agreed. Pasch. 10 Car. B. R. between Shapcott & Rowe. Intratur Trin. 9 Car. Rot. 1312. in which the Defendant upon such a Declaration justified, and such an Issue de injuria sua propria, and this was moved in Arrest of Judgment, and Judgment was given by all the Court for the Plaintiff.

* Fol. 115.

7. In an Action upon the Case, if the Plaintiff declares that the Defendant intending ex malitia sua propria to take away his good Name and Fame falso & invidiose (n) crimen feloniæ ei imposuit, (and it is not malitiose) but after it is alledged that he maliciously caused him to be indicted, and upon this to be tried, and then maliciously gave Evidence against him to the Grand Jury, and an Ignoramus was thereupon found, tho' it is that he invidiose crimen feloniæ ei imposuit, and not malitiose, yet all the Declaration being laid together, it is well alledged that the Prosecution was maliciously. Mich. 14 Car. B. R. between Moore & Rock, this being moved in Arrest of Judgment. But Hill. 14 Car. adjudged a good Declaration.

(n) 1 Rol. Abr. 113. Pl. 5. Ante. Pl. 4. 6.

Pleader.

(h) Declarations in Actions sur Case in General.

1. (i) If in an Action upon the Case the Plaintiff declares that Q. *Elizabeth* did grant to him the (k) Office of Steward of the Manor of *D.* and that the Defendants *eundem* the Plaintiff *ad exercend' dictum officium & vadia feoda commoda & proficua* thereto belonging *habere & percipere vi & armis impediverunt*, &c. This is a good Delaration notwithstanding the *Causa causans, viz.* the Interruption of the Plaintiff to exercise the Office is laid to be done (l) *vi & armis* for the *causa causata*, viz. the Loss of the Fees, *&c.* is the Point of the Action. *Trin.* 8 *Jac.* 9 *Co.* 50 b. the (m) Earl of *Shrewsbury's* Case adjudged.

(h) Vide plus in the Subdivisions of Declarations, Title, Pleader.

(i) Hob. 180. S. P. adjudged and affirmed upon Error.

(k) But perhaps it may be otherways where the Plaintiff claims a Liberty only as to sit in such a Seat, &c. Dawtry & Dee, 2 Rol. Rep. 139. 2 Judges against 1. Palm. 46, 47, 48. dubitatur.—Perhaps where the causa causans is some Act done in the Defendant's own Land, it shall not be laid vi & armis. Surry & Piggot. Poph. 170, 171. per 2 Judges. Palm. 44. per 2 Judges. Cro. Car. 377, 378. vide. (l) But as to these Words vide plus in the Subdivisions of Declaration, Title, Pleader. (m) 2 Brownl. 332, 333, 337, 341. S. C. adjudged per totam Curiam. 4 Leon. 243, 244. S. C. adjornatur. Yelv. 208. part of the S. C. but S. P. does not appear.

2. But in a Declaration for a Negligence or Non-feasance it shall never be laid *vi & armis*, for this would be *oppositum in objecto*. *Trin.* 8 *Jac.* in the Case of the Earl of *Shrewsbury*. 9 *Co.* 50 b. resolved *per Curiam*.

3. (n) If a Declaration begins *Queritur in placito transgressionis pro eo quod*, &c. yet it may be a Declaration in Case notwithstanding the Recital of the Bill be *in placito transgressionis*, for that will serve indifferently for Trespass or Case. *Mich.* 9 *Car.* between *Tyffyn* and *Wingfield*. *Cro. Car.* 325. adjudged.

(n) Cro. Car. 254. S. P. adjudged. Hob. 180. S. P. said. All. 84. vide.

4. If the Plaintiff declares in Treſpaſs *quod cum* he was ſeized of 2 Cloſes next adjoining to a Common, the Defendant *decem perticatas ſepium Claus' pred' proſtravit & ſic proſtrat'* for ſuch a Time *cuſtodivit per quod* the Cattle depaſturing in the Common, came into the ſaid Cloſes and eat his Graſs *ad damnum, &c.* This is a good Declaration notwithſtanding the Treſpaſs is laid to have been done in the Plaintiff's (o) own Soil; for it beginning *quod cum*, and concluding (p) *per quod*, it appears to be an Action upon the Caſe, and the *cauſa cauſans* of the Damages may be laid *vi & armis*, or without. *Trin.* 24 *Car.* between (q) Sir *Anthony Aſhly Cooper* and *St. John. All.* 84 adjudged upon a Motion in Arreſt of Judgment, after a Verdict for the Plaintiff; and (r) 13 *H.* 7. 26. is there cited, and ſaid to be no Law.

(o) 1 Rol. Abr. 104. Pl. 3. vide. (p) All. 84. A Quære is made by the Reporter, if in falſe Imprisonment there is not a Diverſity where the Concluſion is per quod, &c. and where quouſq; &c. (q) Stile 130. S. C. intended, but the Reporter ſeems to have miſtaken the principal Caſe, and in lieu thereof to have put a Caſe cited, which vide in All. (r) 1 Rol. Abr. 105. Pl. 6. S. C.

Account.

Fol. 116.

(A) For what (a) Things it lies.

(a) It lies not for a Thing certain, as if a Man delivers 10 l. to B. to merchandize with, he ſhall not have Account of the 10 l. but of the Profits, for that is uncertain. Br. Account 35. 2 Brownl. 76.——And this is one Reaſon why it lies not for the Arrears of Rent. Br. Accompt. 81. and vide 1 Rol. Abr. 9. Pl. 11. (b) F. N. B. 118. G. like Point. (c) Fitz. Accompt. 24. S. C. Br. 11. S. C. Dier 20. a. S. C. cited.

1. (b) **If a Man delivers Money to another, upon Condition that if the Defendant makes an Aſſurance of certain Lands by a certain Day, that then he ſhall have the Money, and if not, that he ſhall redeliver it to the Deliverer, if he does not make the Aſſurance, the Deliverer may have** a Writ of Account againſt him for the Money. (c) 41 Edw. 3. 10. **adjudged.**

2. (d) **If Money is delivered to deliver over, if it is not delivered,** Account lies. (e) 41 Ed. 3. 31. 1 E. 5. 2. b. (f) 2 H. 4. 12 b. 20 H. 6. 35. (d) 2 Rol. Rep. 441. S. P. per Dod'. vide. (e) Fitz. Accompt. 25. S. C. (f) Br. Accompt. 24. S. C.

3. **But if it is delivered over,** no Account lies. 1 E. 5. 2 b.

4. **If I deliver Money to B. to deliver over to C. to my Uſe, and he gives it to C.** Account lies againſt B. (g) 2 H. 4. 12 b. (g) 1 Rol. Abr. 118. Pl. 6. S. C.

5. **If a Man by Obligation acknowledges that he hath received a Sum** ad proficiendum & computandum, **the Obligee** may have Account for it, if he will. (h) 42 E. 3. 9. **adjudged.** (h) Fitz. Debt. 123. S. C. Br. 32. S. C. Dyer 20 b. S. C. cited.

6. (i) **If a Man delivers Money to** (k) **you to pay me,** I ſhall have Account for this againſt you. 6 H. 4. 8. (l) 41 E. 3. 10. 2 R. 2. Account 45. **tho' he be but a Meſſenger.** (i) Godb. 210. Pl. 209. S. P. per Curiam. 1 Rol. Rep. 391. S. P. admit arguend' 2 Rol. Rep. 441. S. P. admit per Curiam. Stile 287. S. P. per Holl, Ch. Juſtice. F. N. B. 177. Q. S. P. (k) In this Caſe the Bailiff is liable to 2 Actions of Account conditionally. Hob. 36. admit. But his Action that is firſt brought ſhall proceed and not both. 1 Bulſ. 68. vide. (l) Fitz. Accompt. 24. S. C.

7. (m) If

(m) New Diger 172. a. Margin'. S.P. F. N. B. 116. P.S.P.

7. (m) If a Man receives my Rent of my Tenant by (n) my Command, Account lies againſt him for this. 6 H. 4. 8.

(n) So if without my Command. Stil. 287. per Roll, Chief Juſtice 407. per Roll, for he ſhall be a Diſſeiſor at my Election only, Co. Lit. 323. a. and b. 3 Leon. 24. per Manwood. Hob. 322. arguend'. Ow. 36. per Manwood.

(o) Br. Debt. 287. S. C. and the Word Debt in the latter End of the Caſe in the ſmall Edition, I conceive ought to be Account, and ſo is miſprinted.

8. If a Man by Deed acknowledges that he hath in his Hands ſo much of the Money of J. S. due to him, Account lies for this by J. S. (o) 11 H. 8. 39.

(p) Fitz. Ley 9. S. C.

9. If the Bailiff of Goods to deliver over waſtes them, no Account lies againſt him but Detinue. (p) 20 H. 6. 16 b.

10. If the Bailiff of Goods waſtes them, as a Tun of Wine, Account lies. 20 H. 6. 16.

(q) Dyer 264 b. S. P. per 3 Judges Con. 1 Bulſ. 153, 154. vide.

11. (q) If a Man by Writing deviſes that his Executor ſhall ſell his Land, and deviſes certain Legacies out of the Money to be received, if the Executor ſells, the Legatees may have Accounts, if he will not pay the Legacies. D. 4, 5. Mar. 152. 5.

2 Rol. Abr. 285. Pl. 32. vide with the Notes thereupon.

12. No Account lies for Rent reſerved upon a Leaſe for Years, 20 H. 6. 16.

(r) Br. Detinue 8.

13. If a Leſſee of Goods waſtes them, no Account lies againſt him for them. (r) 20 H. 6. 16.

(s) For therein he is a meer Tort-feaſor, Fitz. Scire facias 111.

14. If Tenant by Elegit of Lands ſells Trees, the Conuſor in Reverſion cannot have a Writ of Account againſt him, (s) for Want of Privity of Bailment. 21 E. 3. 26 b. Contra. (t) 21 E. 3. 31 b.

(t) This is miſprinted, for there is no ſuch Opinion there; but I ſuppoſe it ſhould be 30 b. which vide Br. Accompt 36.

(u) Dyer 20 b. like Point dubitatur. Aſton Ent. 105, 106. like Precedent.

(w) 1 Rol. Rep. 52. S. C. adjudged per

15. (u) If A. acknowledges by Deed that he has received 100l. from B. to be adventured to the Weſt Indies, and thence to England back again, and covenants to render a true Account thereof upon his Return, tho' B. may have a Writ of Covenant upon this Deed, yet he may alſo have a Writ of Account thereupon at his Election. Trin. 12 Jac. B. R. between (w) Hawkins & Parke adjudged.

3 Judges. 2 Bulſ. 256. S. C. adjudged.

(a) 3 Leon. 149. S. C. adjudged, the

16. If *A.* delivers Money to *B.* for the Relief of *C.* this is to the Uſe of *C.* and he may have Account for it. *Hil.* 30 *Eliz.* (a) *Robſert* and *Andrews*, *Cro. Eliz.* 83. adjudged and affirmed upon a Writ of Error.

Count being that it was delivered pro relevamine of the Plaintiff. 2 Leon. 118. S. C. affirmed upon Error, and it appears there that the Writ of Account was general.

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(B) (a) Againſt whom it lies in reſpect of his Perſon.

Fol. 117.

(a) Reg. 135. a. vide the Rule there.

1. (b) A Writ of Account **does not lie againſt a Man upon a Receipt by him when he was under Age.** (c) 21 Ed. 3. 8. admit per Iſſue. (d) 16 E. 3. Accompt 52.

(b) F. N. B. 118. D. S. P.
(c) Br. Accompt 38. S.C.
(d) 1 Rol. Abr. 122. Pl. 12. S. C.

2. **The ſame Law** of Account **as Bailiff of a Manor.** 17 E. 2. Accompt 121. admit per Iſſue.

3. (e) **An Infant ſhall not be compelled to** Account **becauſe he is not of Diſcretion to** Account. 19 H. 6. (f) 7. b. 16 E. 3. Accompt 52. 17 E. 2. Accompt 121.

(e) F. N. B. 118. D. S. P. Co.Lit. 172 a.

S. P. 1 Brownl. 25. S. P. ſaid. (f) This is miſprinted, and ought to be 5. b. Fitz. Accompt 3. S. C. Br. Coverture 24. S. C.

4. (g) **A Feme ſole as well as a Man ſhall be compelled to** Account **in a** Writ of Account, (h) **as** receptrix denariorum (i) 19 H. 6. 4 b. **adjudged.**

(g) F. N. B. 118. D.S. P.
(h) Againſt Baron and Feme, becauſe the Wife dum ſola was receptrix denar' vel balliva, &c. and the Baron and Feme ſhall Account for the Feme contra Danby ideo quere Br. Accompt 68. and vide Dier 202. Pl. 69. where the Writ was not dum ſola fuit, but thoſe Words were in the Count. (i) Fitz. Accompt 3. S. C. Br. 43. S. C.

5. **So ſhe ſhall be ſued by** Writ of Account **as Bailiff, for ſhe may well intend the Duty of a Bailiff.** 19 H. 6. 5. b. Acc.

6. (k) **A** Writ of Account **lies againſt a Prieſt.** (l) 19 H. 6. 5. b.

(k) F. N. B. 118. D. S. P.

7. **If a Monk is my Bailiff of my Manor, and after is made an Abbot, he may be charged in** Account, **becauſe he was my Bailiff when he was a Monk.** 20 E. 3. Accompt 78.

(l) Br. Accompt 43. S.C.

(C) In what Caſes it lies.

For want of Privity of Bailment or Receipt.

1. **If there be 2 Jointenants for Years of a Parſonage, and one receives Money of certain Men for Offerings ariſing from Corn and other Things, to the common Profit of them both, the other ſhall have** a Writ of Account againſt him, **for he receives the one Moiety to his Uſe, and ſo his Receiver.** (a) 39 E. 3. 27 b.

(a) Br. Accompt 58. S. C. but miſprinted in the firſt Line, viz. Recover, for Receive.

2. (b) **If there are 2 Jointenants in Fee of Lands, and** (c) **the one takes all the** (d) **Profits to his own Uſe, the other ſhall not have an** Action againſt him for want of Privity. Contra (e) 39 E. 3. 28.

(b) 2 Co. 68. a. S. P. Cro. Eliz. 803. S. P. per Poph.

(c) If one Jointenant or Tenant in Common of Lands, makes the other his Bailiff, Account lies, elſe not. Co. Lit. 172. a. 186. a. 200. b. and there ſaid, that ſo the Books muſt be intended, and if he made him not his Bailiff, never his Bailiff to render Account, is a good Plea. Mayn. Ed. 2. 552. vide. (d) But if one Tenant in Common of an Ox, &c. ſells the Whole, the other may have an Account againſt him. Br. Accompt 20. (e) Br. Accompt 58. S. C.

3. (f) **If 2 have a Ward in Common and one takes all the Profit, the other ſhall not have a** Writ of Account againſt him, Contra (g) 39 E. 3. 28.

(f) F. N. B. 118. J. S. P. Con.
(g) Br. Accompt 58. S.C.

4. **If there are 2 Executors, and the one receives all the Debts of the Teſtator, the other ſhall not have** a Writ of Account againſt him, **becauſe he had Power to diſpoſe of the Whole, and there is no** Privity of Receipt **between them.** (h) 39 E. 3. 28.

(h) Br. Accompt 58. S. C.

(D) Againſt whom it lies.

(a) Co. Lit. 172. a. S. P. (b) If the King appoints J. S.

1. (a) NO Man is bound to Account unleſs by the Act of Law as Guardian in Soccage, (b) or by his own Act as of his own Will where he is Bailiff or Receiver. 2 H. 4. 12. b.

or he of his own Head takes upon himſelf the Charge and Care of the Eſtate of a Lunatick, he is but in Nature of a Bailiff, and accountable to the Lunatick, his Executors or Adminiſtrators. 4 Co. 127 b.

(c) Co. Lit. 90 b. S. P. F. N. B. 117.

2. (c) It lies not (d) againſt Executors upon a Receipt by their Teſtator. 48 E. 3. 2.

c. S. P. Reg. 135. S. P.—But the King by his Prerogative may have Account againſt Executors. 11 Co. 90. a. Co. Lit. 89. b. Godb. 291. 2 Rol. Rep. 296. 2 Rol. Abr. 161. Pl. 1, 2, 3, &c. (d) Account in reſpect of the Privity, lay not by the Common Law for or againſt Executors. Co. Lit. 89. b. 2 Inſt. 404. but per legem mercatoriam it did lie for Executors of a Merchant. 2 Inſt. 404. F. N. B. 117. D. tho' not againſt Executors of a Merchant. F. N. B. 117. D. but 13 Ed. 3. cap. 23. hath given it to Executors. 25 Ed. 3. cap. 5. to Executors of Executors, and 31 Ed. 3. cap. 11. to Adminiſtrators, which vide. Co. Lit. 89.—It hath been attempted to give Account againſt Executors of Guardian in Soccage, but not done. Co. Lit. 90. b.

(e) Fitz. Action ſur Caſe 29. S. C.

3. If the King grants the Land of a Ward to another, and a Stranger enters upon his Poſſeſſion, and levies the Profits of the Land, the Grantee may have Account againſt him. (e) 11 H. 4. 65.

(f) Co. Lit. 89. a. like Point. 172. a. like Point. F. N. B. 117. b. like Point. 118. b. like Point.

4. (f) If a Man ſeiſes Lands (g) as Guardian in Chivalry, where the Heir holds of him in Soccage, he ſhall have a Writ of Account againſt him for the Profits. (h) 49 E. 3. 10. (i) 10 H. 6. 7.

Mayn. Edw. 2. 24. S. P. Cro. Car. 229. like Point vide. 1 Rol. Rep. 104. like Point vide. Br. Accompt 65, 76. Fitz. 107.—But it ſeems otherways where a Man enters and takes the Profits of a Copyhold of an Infant, per Cro. Car. 229. 1 Rol. Rep. 104. But vide 2 Rol. Abr. 40. Pl. 1. (g) So if a Man enters upon my Land to my Uſe, and receives the Profit thereof, I may have Account againſt him as my Bailiff. F. N. B. 117. a. Br. Accompt 8. 89. (h) Fitz. Accompt 44. S. C. Br. 22. S. C. (i) Fitz. Accompt 2. S. C. Br. 80. S. C.

* Fol. 118.

5. If A. ſeiſes B. for his Ward in Chivalry, and C. by the Command of A. receives the Rents from the Tenants of B. to the Uſe of the Plaintiff, (*) tho' he was not of Right in Ward to A. yet he ſhall not have any Writ of Account againſt C. for the Rents received by him, becauſe there is no Privity between them, (l) in as much as he received them as Servant to A. dubitatur. Paſch. 11 Jac. B. R. Morly's Caſe.

(l) If a Diſſeiſor appoints J. S. to receive his Rents, the Diſſeiſee cannot have a Writ of Account againſt J. S. 3 Leon. 24. agreed. Dal. 99. agreed.

(m) Br. Accompt 24. S. C. 1 Rol. Abr. 116. Pl. 4.

6. If I deliver Money to B. to deliver to C. to my Uſe, if B. gives it to C. no Account lies againſt C. for he is not privy to the Uſe, but it lies againſt B. (m) 2 H. 4. 12. b.

7. If *A.* hath a Term for Years in a Rectory, and Tithes being ſet forth and ſevered from the 9 Parts, *B.* without any Pretence of Title, carries them away and ſells them, yet *A.* ſhall not have a Writ of Account againſt *B.* for after Severance the Tithes immediately veſted in *A.* and the Taking by *B.* was (a) meerly wrongful, and therefore without Privity. *Mich.* 15 *Eliz.* between (b) *Tottenham* and *Bedingfield.* 3 *Leon.* 24. by *Dyer* and *Manwood*, *contra Harper.*

(a) It lies not againſt a Diſſeiſor or other Wrongdoer. Co. Lit. 172. a. unleſs he claims as Bailiff. 4 Leon. 24. per Dier. Dal. 99. per Dier. F. N. B. 117. a. Br. Accompt 89.—So where a Man held Land for a long Time under a void Deviſe. 3 Leon. 24. Ow. 36, 84. Dal. 99. (b) Owen 35, 36, 83, 84. S. C. 2 Judges againſt 1. Dal. 90. S. C. 2 Judges againſt 1.

(E) (a) Againſt whom it lies, and (b) by whom.

(a) Not againſt the Pariſh Prieſt for Offerings, if there be no Agreement between them, &c. for the Clerk

If one Executor receives a Debt of the Teſtator, the other cannot have Account againſt him. (c) 11 H. 4. 79.

holds the Veſſel in which they are put, &c. F. N. B. 119. E. (b) A Prior, Abbot, or Maſter of an Hoſpital may have it againſt him that was Bailiff or Receiver in the Time of his Predeceſſor. F. N. B. 117. P. Reg. 135. b. —The Pariſhioners ſhall not againſt Churchwardens, but they may make other Churchwardens, and they may againſt their Predeceſſors. Br. Accompt 71. (c) Fitz. Accompt 20. S. C.

2. **If 2 Merchants have Goods in common, the one ſhall** (d) **not have** Account **againſt the other.** 11 H. 4. 79.

(d) But if 2 Joint-merchants occupy in common to their common Profit, one of them naming himſelf Merchant ſhall have Account againſt the other, naming him Merchant. Co. Lit. 172. a. and the Writ is præcipe, &c. quod juſte reddat compotum, &c. Sicut per legem Mercatoriam rationabiliter monſtrari poterit, &c. F. N. B. 117. D. vide. Raſt. Ent. 19.

3. (e) **If one receives Money to the common Profit of himſelf and** J. S. **J. S. ſhall not have** a Writ of Account againſt him. Vide 14 E. 3. Account 70. Contra (f) 20 E. 1. Itinere Cornubiæ, Account 127.

(e) Maynard Ed. 2. 626. vide.

4. **If a General Receiver of** J. S. **throughout** England, **makes** J. D **his Deputy-Receiver in one County, and the Deputy receives ſeveral Things by Force thereof, and the General Receiver makes up his** Account **thereof with** J. S. **he may after have** a Writ of Account againſt his Deputy for the ſaid Things, (g) **tho' before the** Account **was made by the General Receiver, the Deputy was in a manner the Receiver to** J. S. 11 Rich. 2. Accompt 48.

(f) This is miſprinted, and ſhould be 30 E. 1.

(g) If my Bailiff or Receiver makes a Deputy, I ſhall have Account againſt the Bailiff or Receiver himſelf, and not againſt the Deputy, for the Receipt of the Deputy was to the Uſe of his Maſter. F. N. B. 119. B. 4 Leon. 32.

5. **So a Sheriff may have** Account **againſt his Deputy, for he himſelf is accountable over to the King.** 11 R. 2. Accompt 48.

6. If the Plaintiff as Executor of *A.* declares and demands an Account from the Time the Defendant was Bailiff to the ſaid *A. ex quacunq; cauſa & contractu ad communem utilitatem* of the ſaid *A.* and of the Defendant, and of one *B. de quibuſdam merchandizis*, viz. 38 Tun of Wine, *&c.* which the ſaid *A.* (the Teſtator) the Defendant, and the ſaid *B.* had and occupied in common *ad communem utilitatem eorum, ac eadem* to the Hands of the Defendant, to Merchandize for their common Profit *commiſſa fuerunt*, &c. this is a good Declaration, notwithſtanding the Account is Special, being betwixt Merchants and Tenants in common; and tho' the Account is demanded by the Plaintiff alone, and of a third Part only, (a) for it may be that *A.* ſolely committed his Part. *Mich.* 14 *Jac.* (b) Dr. *Hackwell* and his Wife againſt *Euſtman. Cro. Jac.* 410. adjudged without Argument, upon a Motion in Arreſt of Judgment after a Verdict for the Plaintiff.

(a) F. N. B. 118. H. S. P. 1 Brownl. 25. S. P. ſaid. Godb. 90.

vide. (b) 1 Rol. Rep. 421. S. C. adjudged, the Plaintiff there ſhewing, that with the Product of the Goods by A. and B. delivered, and of others for the Defendant's Part added, the Wine of which the Account was demanded was bought, &c.

(F) How

(F) How it ſhall be Brought.

By what Name as Bailiff.

(a) Co. Lit. 172. a. S. P. & Inſt. 379.

1. (a) None ſhall be charged in Account, but (b) as Guardian in Soccage, Bailiff or Receiver. Co. 11. Earl of Devon. 89. b.

S. P. Ow. 36. per Dyer S. P. 84. per Dyer S. P. Dal. 99. S. P. per Dyer.—But the King may alledge generally, that the Defendant ad compotum domino regi tenetur, &c. 2 Rol. Abr. 161. Pl. 1. (b) If the Guardian in Soccage occupies the Land after the Infant is 14. he ſhall be charged for this as Bailiff. Co. Lit. 90. a. 1 Rol. Rep. 104.

(*) Maynards Ed. 2. 45. S. P. adjudged Con.

2. If a Man delivers Goods to another to ſell, and he ſells them accordingly and receives the Money, the Bailor ought to charge him as Bailiff, and (*) not as Receiver. (c) 46 E. 3. 3. b. 9. (d) for he ought to be allowed his Coſts. (e) 43 E. 3. 21. b. 13 R. 2. Accompt 50. Quære (f) 4 H. 6. 27.

(c) Br. Accompt 17. S. C. (d) But if one of his own Wrong, and without my Appointment becomes my Bailiff, he ſhall have no Allowance for his Expences about my Buſineſs. 1 Leon. 219. per Periam. (e) Fitz. Account 29. S. C. Br. 14. S. C. (f) Br. Accompt 53. S. C.

(g) Br. Accompt 17. S. C.

3. If a Man hath a Taverner to ſell his Goods, he ought to charge him as Bailiff. (g) 46 E. 3. 3. b.

4. If a Man makes another Bailiff of his Manor, he ought to be charged as Bailiff and not as Receiver, becauſe he ought to approve. 9 E. 4. 40. b.

(h) F. N. B. 116. P. S. P. (i) Fitz. Accompt 12. S. C. Br. 56. S. C. (k) Kelw. 76. S. P. adjudged.

5. (h) If a Man makes another Receiver of all the Rents of his Tenants, the Writ ſhall be againſt him as Receiver, and not as Bailiff, for he cannot approve. (i) 9 E. 4. 40. b.

6. (k) If a Man alledges a ſpecial Preſcription that a Bailiff ought to be found for him, as that there is a Borough within his Manor, within which he hath Part of the Market and a Court of Pipowders, &c. and that the Defendant is Bailiff thereof, and received the Profits, &c. tho' it appears that he ought to do nothing but collect the Fee-farms, Iſſues, Fines and Amerciaments, which are certain; yet becauſe he is named Bailiff, he ought to be named according to the Name he had by Preſcription. (l) 9 E. 4. 40 b.

(l) Fitz. Accompt 12. S. C. Br. 56. S. C.

Fol. 119.

(m) F. N. B. 118. E. (n) Fitz. Accompt 12. S. C. Br. 56. S. C.

7. (m) If one Man makes another Bailiff of his Hundred, he ſhall be charged by the Name of Bailiff, becauſe he hath the Name and may approve as to ſee that all Things are preſented, &c. (n) 9 E. 4. 40 b.

8. If one Leaſes his Manor rendring a Rent, and after makes one Bailiff of the ſaid Manor, and he receives the Rent, yet he ſhall not be charged as Bailiff but as Receiver. Mich. 3 Jac. B. R. between Cage and Peacock agreed.

(o) 2 Lev. 126. S. P. per Curiam. (p) 1 Rol. Abr. 119. Pl. 3. S. C.

9. A Receiver that never takes upon im to be a Bailiff, cannot be charged as Bailiff, (o) becauſe then he might be twice charged (p) 21 E. 3. 60. 41 E. 3. Accompt 34. admit per (q) Iſſue, and alſo becauſe that in an Account as Bailiff, he ſhall have Allowance of his Coſts and Expenſes, which he ſhall not be allowed where he is charged as Receiver. Co. Lit. 179.

(q) For this muſt be ſpecially pleaded, and ſo I ſuppoſe. 2 Lev. 126. muſt be intended, tho' ſaid the Advantage muſt be taken by Demurrer to the Declaration.

(r) F. N. B. 116. P. like Point. 118. H. like Point. Reg. 137. like Point. Mayn. Ed. 2. 151. S. P. 514. S. P. (s) But in Account as Bailiff and Receiver, the Plaintiff ſhews nothing againſt him as Receiver, yet well enough becauſe for the Defendant's Advantage. Cro. Car. 240. adjudged after Verdict, pro quer'. (t) This is miſprinted, and perhaps ſhould be 44 E. 3. 1. b. Fitz. Accompt 30. S. C. Br. 15. S. C. (u) Fitz. Accompt 30. S. C. Br. 15. S. C. (w) This is miſprinted, and ſhould be 60.

10. (r) A Man may be charged as Bailiff and (s) Receiver of ſeveral Things in one Action. (t) 43 E. 3. 1 b. 27 E. 3. 79. 44 E. 3. Accompt 31. (u) 44 E. 3. 1. 41 E. 3. Accompt 34. 32 E. 3. Accompt (w) 6.

(G) By what Name.

1. A (a) Surveyor of a Manor cannot be charged as Bailiff, where there is another that is chief, and hath the Government and Administration of all. 12 E. 3. Accompt. 75. (a) F. N. B. 119. C. S. P.

2. If a Man makes another his Bailiff to expose to Sale his Woods, he may be charged as Bailiff tho' he hath not sold them. 34 E. 3. Accompt 131.

3. (b) An Apprentice by the Name of (c) Apprentice is not chargeable in Account. Co. 11. Earl of Devon, 89 b. (b) F. N. B. 118. D. S. P.

(c) Tho' an Apprentice in an Action of Accounct cannot be charged for ordinary Receipts upon his Master's Trade, yet upon collateral Receipts which concern not the ordinary Trade of his Master, he is chargeable as well as another. 3 Leon. 63. Fitz. Accompt 94. —And then he must be charged as Bailiff or Receiver. 2 Inf. 379, 380.

(H) How it shall be brought.

By what Name he shall be charged as Receiver.

1. If J S. is bound to me in an Obligation with Condition for the Payment of a small Sum, and I deliver this to another to receive what he can get of J. S. if the Bailiff delivers the Obligation to J. S. without the Receipt of any Money, I cannot charge the Bailiff as Receiver, for he did not receive any Money; and also a certain Sum cannot be set forth as in that Action it ought to be, and therefore I shall be put to my Writ of Detinue. 2 R. 2. Accompt. 46.

2. If a Man receives the Rent due from my Lessee for Life, or my Tenants, Account lies against him as Receiver. 11 R. 2. Accompt 49. 6 R. 2. Accompt 47. per Brough & Belknap is not against this.

3. A Bailiff cannot be charged as Receiver, because if he be charged as Bailiff upon his Account, he shall have Allowance of his Charges and Expences, of which he should not have Allowance where charged as Receiver, and also because there is so material a Difference between a Bailiff and a Receiver, that when he is charged as Bailiff, he cannot plead that at another Time he was charged as Receiver; therefore if this Writ to charge a Bailiff as Receiver should be allowed, he should be twice charged for the same Thing. (a) 21 E. 3. 60. 41 E. 3. Accompt 34 admit per Issue. (a) 1 Rol. Abr. 119. Pl. 9. S. C.

4. If B. is indebted to A. in 200 l. and A. appoints C. to demand and receive of B. the said 200 l. and B. also appoints C. to borrow it, and to pay it (*) to A, and after C. borrows it of a Stranger for B. to pay to A. and he orders his Wife to pay it to A. and after B. gives Bond for the Money to the Stranger, in this Case A. may have a Writ of Account against C. as his Receiver by the Hands of B. for C. was a Servant as well to A. as to B. and he received the Money as the Money of B. to pay over to A. tho' it does not appear that the Stranger paid it to C. to the Intent to pay it over to A. Hob. Reports 50. between (b) Harrington and Deane adjudged upon a Special Verdict, 10 Jac. B. for in as much as C. was appointed by A. to receive the Money of B. and he received it by the Appointment for A. it was the Money of A. and the Property in him, and B. cannot charge him in Account for it.

* Fol. 120.

(b) Hob. fol. 36. S. C. Moor 862. Pl. 1184. S. C. adjudged 1 Brownl. 26. S. C. it appearing there that B. gave Bond for the 200 l. to the Stranger, before this Action brought.

(I) (a) How it ſhall be brought by another's Hand.

What ſhall be ſaid by another's Hand.

(a) The Writ ſhall be general de tempore quo fuit receptor denariorum, without ſaying by whoſe Hands, but that ſhall be ſhewn in the Count. F. N. B. 118. F. Co. Lit. 126 a. When againſt a Receiver the Plaintiff muſt declare by whoſe Hand, not ſo if againſt a Bailiff. Co. Lit. 172 a. But perhaps this is Form only, vide 3 Keb. 425. and after Judgment by Default no Advantage can be taken of the want thereof. 2 Lev. 126.— But if the Plaintiff declares of a Receipt of Part by the Hand of J. S. and of the Reſidue by the Hands of Perſons unknown, it is well for what received of J. S. and the Defendant muſt anſwer to that Br. Accompt 17. vide the Pleadings after Title Account. (b) Fitz. Account 28. S. C. 50. S. C.

1. If the Defendant received by the Hands of his Wife, this is by another Hand. (b) 43 E. 3. 33.

(c) F. N. B. 118. F. S. P. (d) Fitz. Accompt 28. S. C.

2. (c) But if the Defendant received by the Hands of the Plaintiff's Wife, this is not by another's Hand but by the Hand of the Plaintiff himſelf. (d) 43 E. 3. 33.

(e) F. N. B. 118. F. S. P.

3. (e) So if ſhe received by the Hand of the Commoigne of the Plaintiff. 47 E 3. 16.

(f) Co. Ent. 47. n. 4. Dier 183. Pl. 60. S. P.

4. If an Executor brings Account of a Receipt by the Hands of his Teſtator, (f) this is by another's Hands. 43 E. 3. 33.

(g) Br. Accompt 49. S. C. tho' S. P. ſeems Con. as abridged there.

5. A Man may count of a Receipt by the Hands of the Wife of the Defendant. (g) 14 E. 4. 16.

(h) Fitz. Accompt 41. S. C. Br. 19. S. C.

6. A Man may count of a Receipt by the Hands of the Wife of the Plaintiff. (h) 47 E. 3. 16. 13 H. 4. 8.

(i) Fitz. Accompt 41. S. C. Br. 19. S. C.

7. So a Man may count of a Receipt by the Hands of the Commoign of the Plaintiff. (i) 47 E. 3. 16. 13 H. 4. 8.

(k) Fitz. Accompt 41. S. C. Br. 19. S. C.

8. So a Man may declare of a Receipt by the Hands of a Wife or Commoign of a Stranger. (k) 47 E. 3. 16.

9. In Account a Man may declare of a Receipt by the Hands of 2 Strangers. 43 E. 3. 33.

10. But he cannot declare of a Receipt by the Hands of the Plaintiff himſelf and a Stranger, for this requires 2 Iſſues. 43. E. 3. 33.

(l) Fitz. Accompt 28. S. C.

11. So for the ſame Reaſon he cannot declare of a Receipt by the Defendant himſelf, and a Stranger. (l) 43 E. 3. 33.

(a) Cro. Eliz. 614. like Point dubitatur. where the Servant by his Maſter's Order fetched his Money, and poured it upon the Table in the Preſence of the Maſter, who willed the Bailiff to take it, &c. (b) 3 Leon. 149. S. C. adjudged, the Declaration being, that A. by the Hand of B. had delivered to C. &c. 2 Leon. 118. S. C. affirmed upon Error.

12. (a) If *A.* delivers 100 *l.* to *B.* his Servant to deliver over to *C.* for the Relief of *D.* and *B.* does accordingly deliver it to *C*; now *D.* may have Account againſt *C.* and declare upon a Receipt by the Hands of *B.* for a Poſſeſſion only, and no Intereſt is thereby conveyed. *Hill.* 30 *Eliz.* between (b) *Robſert* and *Andrews*, *Cro. Eliz.* 82. adjudged and affirmed upon a Writ of Error.

(K) By what Name.

(a) Fitz. Accompt 41. S. C. Br. 19. S. C.

1. If he declares of a Deceit by the Hands of A. S. if ſhe be the Wife of a Stranger, he ought to alledge that ſhe is his Wife, otherways it is if ſhe be the Wife of the Plaintiff. (a) 47 E. 2. 16.

(b) Fitz. Accompt 41. S. C. Br. 19. S. C.

2. The ſame Law if he declares of one that is Commoign to a Stranger, and where to the Plaintiff. (b) 47 E. 3. 16. But vide Brook Accompt 19. where he ſays, that this is ill reported, and that he thinks it ought to be alledged in both Caſes.

(L) What Pleas ſhall be in (a) Bar of the Account.

Fol. 121.

(a) If an Infant recovers in an Action againſt his Guardian for Money, and the Guardian brings it into Court, and there depoſits it, he ſhall not anſwer for the ſame again in an Account. Godb. 214. agreed per Curiam.

1. IN an Account againſt one as Bailiff, it is a good Plea that he was never his Bailiff. 21 E. 3. 60.

2. (b) In Account againſt a Bailiff of his Houſe, and declares that he had the Care of certain Goods, it is not any Plea in Bar that the Plaintiff ſold him the Goods, without ſaying that he was never his Briliff, for if he was his Bailiff he ought to account for the Houſe; (c) and the Account had been good without alledging theſe Particulars. (d) 49 E. 3. 7.

(b) Somerſal and Somerſal, like Point. 2 Leon. 194, 195. dubitatur. Godb. 55, 56, 57. dubitatur. (c) 2 Leon. 193. S. P. cited. (d) Fitz. Accompt. 45. S. C. Br. 21. S. C. 2 Leon. 195. S. C. cited. Godb. 57. S. C. cited and deny'd arguend'.

3. (e) But it is a good Plea in Bar of all, that he was never the Bailiff of his Houſe. (f) 14 H. 4. 21.

(e) Kelw. 114 a. b. like Point adjudged Con. (f) Fitz. Accompt 22. S. C. Br. 34. S. C. 2 Leon. 195. S. C. cited and denied arguend'. Godb. 57. S. C. cited and denied arguend'.

4. So in Account againſt a Bailiff of a Manor, and that he had the Adminiſtration of certain Oxen there, never his Bailiff of the Manor is a good Plea in Bar of all. (g) 14 H. 4. 21.

(g) Fitz. Accompt 22. S. C. Br. 34. S. C.

5. In Account againſt a Bailiff, it is a good Plea that he was the Plaintiff's Servant to drive his Plough, and kept his Cattle for the drawing of his Plough, abſq; hoc that he was his Bailiff in other Manner, becauſe he is not accountable for this Occupation. (h) 7 H. 4. 14 b.

(h) Fitz. Accompt 19 S. C. Br. Action ſur Caſe 34.

6. In Account againſt a Bailiff, it is a good Plea in Bar that the Plaintiff leaſed to him for Life, &c. the Thing of which he is ſuppoſed Bailiff. 29 E. 3. 47.

7. It is no Plea in Bar of an Account, that the Plaintiff was indebted to the Defendant in the ſame Sum, and that the Plaintiff granted that the Defendant ſhould retain it in Satisfaction of his Debt, for he acknowledges the Receipt, and ſo once accountable. (i) 12 H. 4. 18. 14 H. 4, 20 b.

(i) Fitz. 21. S. C. Br. 31. S. C.

8. (k) So it is no Plea that he delivered the Money to a Stranger by the Command of the Plaintiff. (l) 12 H. 4. 18. (m) 19 H. 6. 5 b.

(k) 2 Bulſ. 277. S. P. agreed per Curiam. (l) Fitz. 21. S. S. Br. 31. S. C. (m) Br. Accompt 3. S. C. Br. 43. S. C.

9. (n) In an Account of the Church-wardens of a Pariſh againſt their Predeceſſors to render an Account of a Bell received, and of certain Bars----it is no Plea in Bar that they took the Bell (being decayed) by the Conſent of the Pariſhioners and carried it to a Bell-Founder's, and further, that it was agreed that he ſhould have 4 l. for the Caſting thereof, and ſhould retain the Bell till Satisfaction of the 4 l. which he is not yet ſatisfied, (and that (o) they took the Bars, and with part of them repaired a ruinous Window of the Church, and the reſt they retained to themſelves by Agreement between them and the Pariſhioners in Satisfaction of their Expences in the Reparation of the ſaid Window; for they were once accountable, tho' it was before theſe Church-wardens were made, and then this Plea is but in Diſcharge before Auditors. Mich. 37, 38. Eliz. B. R. between (p) Method & Winn adjudged.

(n) Taylor and Houſe, S. P. 1 Mod. 65. dubitatur. 2 Keb. 675. 704. adjudged. 1 Vent. 88. per Curiam. (o) This in the Original is, He, &c. in the Singular Number to the End of the Caſe, and ſo appears plainly to be miſprinted. (p) 1 Rol. Abr. 393. Pl. 3, 4.

10. But

10. But if the Defendant by his Plea does not confess himself ever Accountable, this will be a good Plea in Bar. (q) 12 H. 4. 18.

(q) Br. Accompt 31. S. C.

11. It is a good Plea that the Plaintiff gave him the Money, and so he received it as his own proper Money. (r) 30 H. 6. 6. (s) 12 H. 4. 18.

(r) Fitz. Accompt 7. S. C.

12. So in Account for Goods it is a good Plea that he assigned to him the Goods in Satisfaction of a Debt due to him from the Plaintiff, for the Assignment thereof was made upon the first Delivery, and so he was never accountable for them. (t) 14 H. 4. 20 b.

(s) Br. Accompt 31. S. C.

(t) Fitz. Accompt 22. S. C. Br. 34. S C.

13. So in Account as Receiver by the Hands of A. it is a good Plea that A. owed the Money to the Plaintiff, and the Plaintiff was indebted in so much to him, and the Plaintiff assigned to him the said Sum in Satisfaction of his Debt, and so he received it of A. and not to render Account. 16 E. 3. Accompt 53.

Fol. 122.

(M) What Pleas bar an Account, and (a) what not.

(a) Where the Matter of the Plea confesses the Defendant accountable, it cannot be pleaded in Bar, for they are Judges

1. If A. delivers Money to B. to deliver over to C. ex dono or ex accommodato, and after A. brings an Account against B. if he pleads never his Receiver, &c. he cannot give in Evidence the Delivery over, &c. for he ought to plead it specially. Mich. 13 Jac. B. D. 3 Eliz. 196. 43.

of the Action, and not of the Account; but the Auditors are Judges of the Account. Br. Accompt 48. (b) Willoughby and Small. 1 Brownl. 24. seems to be S. C. adjudged.

(c) Stil. 410. S. P. per Curiam 430. S. P. but the Case seems to be ill reported, vide. Stil. 255. S. P. per Holl Ch. Justice.

2. (c) It is a good Plea that it was delivered to deliver over, to whom he hath delivered it accordingly, because he was never accountable for it but conditionally, scilicet if he did not deliver it over. D. 3 Eliz. 196. 43. (d) 22 H. 6. 49. per Curiam. 1 E. 5. 2 b. (e) 21 H. 7. 34. 21 E. 4. 55 b. 41 E. 3. 31. 21 E. 4. 67. (f) 19 H. 6. 5 b. adjudged. (g) 9 E. 4. 15 b. per Curiam. H. (h) 7 Jac. B. per Curiam contra, 14 E. 3. Account 68.

1 Keb. 491. and vide Br. Accompt 69. (d) Br. Accompt 47. S. C. Bar. 33. S. C. (e) Br. 59. S. C. (f) Fitz. Accompt. 3. S. C. Br. 43. S. C. (g) Fitz. Accompt 10. S. C. Br. 54. S. C. Br. Traverse 125. S. C. (h) Rutlage and Clerk. Godb. 308 seems to be the S. C. and S. P. appears.

3. So it is a good Plea in Bar, that it was delivered to him to get the King's Patent of the Custom of certain Goods to the Plaintiff, which he had done before the Writ purchased, for he was accountable but conditionally. (i) 30 H. 6. 5 b.

(i) Fitz. Accompt 7.

4. In Account against another as Receiver by the Hands of J. S. it is no good Plea in Bar that he was the Plaintiff's Servant, and received the Money of J. S. to deliver to the Plaintiff, which he did accordingly. 29 E. 3. 20.

(k) 2 Leon. 31. S. P. arguend'. 1 Keb. 491. vide.

5. (k) If one Man delivers Money to another to deliver to him again, and after he commands the Bailiff to deliver it to a Stranger, and he does it accordingly, yet this Matter shall not be any Bar in Account. 1 E. 5. 2 b. (l) because he was accountable at first. H. 7. Jac. B.

(l) And the Auditors are Judges of the Account. Br. Accompt 48.

6. In a Writ of Account as Receiver by the Hands of J S. it is not any Plea in Bar that he received it of J. S. to deliver to the Plaintiff, to whom he had delivered it accordingly, for this is but Payment. (m) 9 E. 4. (n) 16 b. per Coke contra. 2 R. 2. Accompt 45.

(m) Fitz. Accompt 10. S. C. Br. 54. S. C.

7. In Account as Receiver, it is a good Plea in Bar that it was delivered to him to carry to London to a Banker to return and to receive Bills of Exchange, and them to send to the Plaintiff, which he had done accordingly, &c. for this is tantamount that he never was his Receiver to render an Account, for this was delivered to him to exchange, and not to render Account. (o) 5 H. 5. 5. Curia.

(n) This is misprinted and should be 15 b.

(o) Fitz. Accompt 18. S. C.

8. **In Account as Receiver, it is a good Plea that** he hath accounted before Auditors aſſigned by the Plaintiff. 30 E. 3. 1. b. Iſſue ſur ceo. 5. b. **adjuſtged.** (o) 29 E. 3. 28. 26 E. 3. 76.

9. **So it is in Account as** Bailiff. 30 E. 3. 1. b.

10. (p) **In Account as Receiver it is a good** (q) **Bar, that** he before hath accounted (r) to the Plaintiff himſelf, **for thereupon he may have an** Action of Debt. (s) 45 E. 3. 14. b. (t) 7 H. 4. 14. b. 30 E. 3. 5. b. **adjudged.** 39 E. 3. 5. b. (u) 34 H. 6. 44. Curia. (x) 21 E. 4. 66. b. 16 E. 3. Accompt 52. Contra (y) 22 E. 3. 13. b. **adjudged.**

(o) This is miſprinted, for there is no ſuch Opinion in the Book.

(p) 1 Sand. 50. S. P. per Curiam.

Latch. 59. vide Aſt. Ent. 106. Raſt. Ent. 18. (q) So 'tis a good Plea before Auditors. Latch 59. per Curiam. Raym. 57. vid. yet Q. (r) Tho' the Law will not compel the Defendant to Accompt before the Plaintiff himſelf, yet may the Defendant by Covenant bind himſelf thereto. 1 Sand. 49, 50. (s) Fitz. Accompt 37. S. C. Br. 16. S. C. (t) Br. Accompt 28. S. C. (u) Br. Accompt 9. Fitz. Barre 69. (x) Br. Accompt 75. S. C. (y) Fitz. Accompt 83. S. C.

11. **In Account againſt the Husband it is a good Plea in Bar for him to ſay,** That his Wife was a common Vintner, and that the Plaintiff delivered the Tuns of Wine (for which the Account is now brought) to his Wife to ſell for him without the Conſent and Agreement of the Husband, **and ſhe ſold them accordingly, and delivered the Money to the Plaintiff; (it ſeems as if this muſt be intended that ſhe was not a Vintner by the Conſent of her Husband.)** 13 R. 2. Accompt 50.

12. **In Accompt againſt a Man as Receiver, it is a good Plea** that he was within Age at the Time of the Receipt. (z) 21 E. 3. 8. admit per Iſſue. 16 E. 3. Accompt 52.

(z) 1 Rol. Abr. 117. Pl. 1. S. C.

13. **In Account againſt one as** Bailiff of his Manor, **it is a good Bar of the Account,** that the Plaintiff was a Diſſeiſor, and the Diſſeiſee hath re-entered. (a) 21 H. 7. 34. per Brudnel.

(a) Br. Accompt 59. S. C.

(N) What ſhall be a good Plea in Bar.

Fol. 123.

1. IN an Account it is a (a) **good Plea in Bar of the Account,** that the Plaintiff hath releaſed to him all Actions. (b) 22 H. 6. 55. b. agreed. 14 E. 3. Accompt 72. 33 E. 3. Accompt 130.

(a) If he pleads ne unq; receiver he loſes the Accompt 4.

Benefit thereof. 1 Brownl. 24. adjudged. Vide 1 Rol. Abr. 122. Pl. 126. Pl. 22. (b) Fitz.

2. **So it is a good Plea in Bar** that the Plaintiff hath releaſed to him all the Advantage and Profit that he might have by the Account. (c) 9 E. 4. 46. **ſaid by** Moyle **to have been adjudged.**

(c) Fitz. Accompt 13. S. C.

3. (d) **So it is a good Plea in Bar** that they have ſubmitted to the Award of J. S. **who awarded, that** the Defendant ought to be acquitted againſt the Plaintiff. (e) 22 H. 6. 55. b. **for this is as ſtrong as a releaſe.**

(d) Taylor and Page, S.P. Cro. Car. 116. per Curiam. Hetl. 114. per Curiam.

(e) Fitz. Accompt 4. S. C. Br. 48. S. C.

4. **So it is a good Plea in Bar,** That after the Receipt of the Sum of which the Account is demanded by the Mediation of their Friends, it was agreed between them, That the Defendant ſhould make an Obligation of 100 l. for the 100 l received, and the Profit thence to ariſe, **which Obligation of 100 l. he did make and deliver accordingly to the Plaintiff, for the Acceptance of the Obligation deſtroys the Duty, and ſo the Sum in Demand is as ſtrongly thereby releaſed as by a releaſe of all Actions.** (f) 22 H. 6. 55. b. Curia.

(f) Fitz. Accompt 4. S. C. Br. 48. S. C.

5. **But it is no good Plea that it was agreed** that he ſhould make an Obligation of 100 l. for the 100 l. received, which he did accordingly, **becauſe the Accord is not** that the Obligation ſhall be made for the 100 l. and the Profits thence to ariſe, **for the Acceptance of the Obligation is no**

(g) And Yelv. 202. vide a Plea quoad the Money, but nothing ſaid as to the Produce, and therefore naught. (h) Fitz. Accompt 4. S. C.

Diſcharge of the Profits thence ariſing as well as of the Principal, (g) but he is accountable for the Profit. (h) 22 H. 6. 55. b. per Newton.

6. So it is no good Plea in Bar of an Account, that the Plaintiff hath accepted a Statute Merchant from him of the ſame Sum in Demand, in Satisfaction of the ſaid Sum, and a Pipe of Wine in Satisfaction of the Damages; for here it is expreſſed, that the Statute ſhall not be in Diſcharge of the Whole. (i) 39 E. 3. 4. b. 23. admit for there it is pleaded before Auditors.

(i) This is miſprinted, and ſhould be 30 E. 3. 4. b. 23. admit, &c. 1 Rol. Abr. 125. Pl. 11. S. C.

7. It is a good Plea in Bar, that the Plaintiff by Indenture granted, That if the Defendant did ſuch a Day acknowledge a Statute Merchant to the Plaintiff, that the Writ of Account ſhould be taken as void, &c. and that he did acknowledge a Statute to him, &c. accordingly, for thereby the Account is releaſed. 20 E. 3. Account 79. agreed.

8. But if he ſays he did acknowledge the Statute, the Plaintiff being abſent, and that he did deliver it to the Clerk of the Recognizances, and after did carry it away with him, this is no good Plea, for the Plaintiff is not ſure of the Statute till Delivery thereof to him. 20 E. 3. Accompt. 79. adjudged.

9. If the Defendant pleads the Plaintiff's Acquittance of the Sum in Demand, this is no Plea in Bar of the Account, for by this Plea he acknowledges that there was a Duty once, and a Diſcharge ſubſequent by Payment. 22 H. 6. 55. b. (k) 21 H. 7. 34. 14 E. 3. Accompt 74. admit' for this is pleaded before Auditors contra. 29 E. 3. 47. 27 E. 3. 79. b.

(k) Br. Accompt 59. S. C.

10. So in Account for 100 l. it is no good Bar that he delivered to the Plaintiff 20 Pieces of Cloth, in full Satisfaction of the 100 l. and two Pipes of Wine, in Satisfaction of the Profits of the ſaid 100 l. which Things the Plaintiff did accept in Satisfaction of the 100 l. and the Profits thereof, for this is but Payment. (l) 22 H. 6. 55. b.

(l) Br. Accompt 48. S. C.

11. So in Account for 100 l. it is no good Plea in Bar, that ſuch a Day, &c. he put the Money into a Bag, and being tied, offered it to the Plaintiff, and he agreeing thereto, did Will and Grant, That he ſhould retain the ſaid Money as his own proper Money, in Satisfaction of ſuch a Sum in (*) which he was indebted to the Defendant, and therefore he took the Bag with the Money in Satisfaction as before, &c. for this is but Payment. (m) 28 H. 6. 7. adjudged per Curiam, but a Writ of Error was brought. (n) 12 H. 4. 18.

* Fol. 124.

(m) Br. Accompt 7. S. C. Fitz. Barre 49. S. C.

(n) Fitz. Accompt 21. S. C. Br. 31. S. C.

12. So in Account for certain Tin received, it is no Plea in Bar that he ſold the Tin to J. S. and took an Obligation for it in the Name of the Plaintiff; for this is but in Diſcharge. D. 28 H. 8. 29, 193.

13. (o) So it is not any Plea in Bar of the Account, that after the Receipt of the Money the Plaintiff did give him the Money; for he acknowledges himſelf once Accountable. (it ſeems if this Gift had been by Deed it would have amounted to a Releaſe of the Duty, and then it ſhould be a good Plea, but without Deed it cannot be any Releaſe, and therefore it is no good Bar) 21 E. 4. 67. adjudged.

(o) Winch 9. S. P. per Warburton, Juſt' Con.

14. So it is not any Plea in Bar, that after the Receipt the Plaintiff commanded him to carry the Money to London to a Banker, to make Exchange thereof, and to receive Bills of Exchange to ſend them to the Plaintiff, the which he had done accordingly, &c. for this is but in Diſcharge of the Accompt. (p) 5 H. 5. 5.

(p) Fitz. Accompt 18. S. C.

15. It is no good Plea in Bar of the Account, that he was rob'd of the Money by certain Felons; for if this ſhould excuſe him it ought to be pleaded before the Auditors. (q) 9 E. 4. 40. b. Curia.

(q) Fitz. Accompt 11. S. C. Br. 55. S. C.

16. So it is no good Plea that he received it to carry, and was rob'd of that and other Goods. Contra 22 E. 3. Accompt 111.

(O) (a) What ſhall be a good (b) Diſcharge before Auditors.

(a) In Account againſt J.S. as Bailiff, the Defendant before Auditors prays Allowance of a third Part, for that his Wife had Title of Dower, and entered as Guardian in Soccage, &c. Palm. 512. no Judgment. (b) Where and what Allowances a Bailiff of a Manor ſhall have vide. 1 Leon. 219. (c) 1 Rol. Abr. 2. Pl. 5. like Point. 2 Rol. Abr. 567. Pl. 2. (d) Br. Accompt 10. S. C.

1. **It is a good Diſcharge before Auditors for a Factor to ſay,** that in a Tempeſt, becauſe the Ship was Surcharged, the Goods were caſt over-board into the Sea. Dubitatur (d) 41 E. 3. 4.

2. **It is no good Diſcharge before Auditors,** that he was rob'd of the Goods by certain Felons dubitatur. (e) 9 E. 4. 40 b.

(e) Br. Accompt 55. S. C. Fitz. 11. S. C.

3. (f) **It is a good Diſcharge before Auditors,** that (g) he was rob'd of the Goods without his Default or Negligence. Co. Lit. 89.

(f) 2 Mod. 100. S. P. like Point arguend'. Co. Lit. 89. S. P. Moor 46. 2. S. P. per Poph. 4 Co. 84. a. 2 Keb. 761. vide. (g) But this will not excuſe a common Carrier. 1 Rol. Abr. 2. Pl. 4.

4. (h) **It is a good Diſcharge before Auditors in Account, as Receiver of 10 l. if he tenders the 10 l. and** (i) **ſwears upon a Book,** That after the Time that the Money was delivered to him, that he found nothing that he durſt buy for fear of Loſs; **for he is not bound to buy leaſt he ſhould loſe, for he himſelf ſhall bear the Loſs and not the Plaintiff.** 46 E. 3. Accompt 40.

(h) Infra Pl. 17. like Point. (i) But perhaps in this Caſe the Defendant need not ſwear his Plea, unleſs the Plaintiff require it. 2 Mod. 101. per Chief Juſtice. 1 Bulſt. 104. vide.

5. (It ſeems a Receiver is not bound to buy and ſell, and therefore it ſeems it is intended that he was a Receiver to Merchandize.)

6. And in this Caſe the Plaintiff ſhall not be received to aver contrary to his Oath. 46 E. 3. Accompt 40.

7. If Goods and Merchandizes are put aboard a Ship to be ſold in Barbary, and delivered into the Cuſtody of a Bailiff, ad merchandizandum & vendendum according to his Diſcretion, and thereupon he goes with the Ship and Merchandizes to Algiers in Barbary, and there deſires Leave to Trade, but before he can obtain it, the ſaid Town ſurprizes them with Ships of War, upon Pretence of Damages received by them and the Engliſh before, upon which for the Redemption of the Ship and Merchandizes in the ſame Ship, by Compoſition between the Merchants of the ſaid Ship and the ſaid Town, he and all the other Merchants were forced to pay ſo much, &c. and ſo the Average upon the Goods of the whole Ship did amount unto (*) 67 l. per Cent. for their Redemption, and according to this Rate, the Average for theſe Goods did amount to ſo much, &c. for which he prays Allowance; This is a good Diſcharge before Auditors, becauſe this was done for the Preſervation of the Reſt. Mich. 9 Car. B. R. between Brown and Robinſon, per Curiam: But Judgment was given againſt the Defendant for another Matter. Intratur Mich. 8. Rot. 186.

* Fol. 125.

8. If the Bailiff of a Manor pays the Relief of his Maſter to the Lord to whom it is due, he ſhall be allowed this upon his Account, tho' he had no Warrant from his Maſter ſo to do, becauſe this is a caſual Thing of common Courſe. 41 E. 3. Accompt 33. Curia.

9. (k) **But if a Bailiff pays a Thing that is not caſual of common Courſe without Warrant from his Lord, he ſhall not have Allowance thereof upon his Account.** 41 E. 3. Accompt 33. Curia.

(k) 1 Leon. 219. S. P. per Anderſon.

10. (l) If

(l) 1 Brownl. 25. like Point Con. said. (m) Fitz. Accompt 23. S. C. Br. 10. S. C. (n) Br. Accompt 66. S. C. and S. P. seems contrary.

10. (l) If a Factor buys certain Things for 20 l. that are not worth 12 d. tho' all be done as well as he could, yet he shall not be allowed for so much upon his Account. (m) 41 E. 3. 9. b. (n) 46 E. 3. Accompt 40.

11. It is a good Discharge before Auditors, that he acknowledged a Statute Merchant to the Plaintiff, in which he was bound to the Plaintiff in a certain Sum, which is as much as the Plaintiff demands, and that he gave another Thing in Satisfaction of the Profit thereof. (o) 30 E. 3. 4. b. 23. adjudged.

(o) 1 Rol. Abr. 123. Pl. 3. S. C.

12. If a Man receives Money of J. S. to deliver to J. D. as a Messenger, in Account against the Bailiff he shall be discharged before Auditors, by Tender in Court of the principal Sum; for he is not to Account for the Profit thereof in the mean Time, tho' he had detained it for a long Time, for he did not receive the Money to Merchandize, but only to deliver over. 2 Rich. 2. Accompt 45. for he had no Warrant to Merchandize with it to Gain or Lose.

13. So if my Bailiff of my Manor receives the Rents of my Tenants, and retains them for 2 or 3 Years, yet in a Writ of Account he is not to Account for the Profits thence arising in the mean Time, for he had not any Warrant to Merchandize with the Money to Gain or Lose. 2 Rich. 2. Accompt 45.

(*) Therefore there is a Diversity where charged as Bailiff of Goods ad merchandizand', and where ad computandum. 2 Leon. 196. arguend' God b. 58. arguend'.

14. So in Account as Receiver (*) where he is not to Merchandize, he is not to Account before Auditors for the Profit after the Receipt.

(p) Dier 21. b. S. P. per Luke Just'.

15. (p) But otherways where the Receipt was to Merchandize, for there he had a Warrant to Gain or Lose. 2 Rich. 2. Accompt 45. 6 Rich. 2. Accompt 47.

16. So tho' the Receiver keeps the Money in his Hands without any Imployment, if he might have imployed the same with Profit. 2 Rich. 2. Accompt 45.

(q) 1 Rol. Abr. 124. Pl. 4. like Point. (r) Br. Accompt 66. S. C. (s) Br. Accompt 66. S. C.

17. (q) But he shall be discharged of the Profit in this Case by his Oath, that he could not find any Thing to buy by which he might gain. 2 Rich. 2. Accompt 45. (r) 46 E. 3. Accompt 40.

18. And the Plaintiff shall not be received to aver contrary to his Oath. (s) 46 E. 3. Accompt 40.

19. In Account as Bailiff curam habens & administrationem de quibusdam bonis & merchandizis scilicet Cloves ad merchandizandum & proficuum inde faciendum & compotum inde reddendum, he ought before Auditors to render an Account of the Profits made thereof. Mich. 9 Car. B. R. between Brown and Robinson, adjudged upon Demurrer, where it appeared by the Plea of the Defendant, that he had made Profit thereof by Sale, and yet he had accounted but for the Value only at the Receipt thereof. Intratur Mich. 8 Car. B. R. Rot. 186.

Fol. 126.

(t) 1 Brownl. 25. like Point Con. said.

20. (t) In Account upon Merchandizing, the Defendant shall be charged if he might have gained more in such or such a Thing, &c. 6 Rich. 2. Accompt 47.

(u) Hut. 133. like Point adjudged. Stil. 410. S. P. adjudged 430. S. P. but the Case seems ill reported. vide. (x) The Defendant before Auditors pleaded that the Money by the Plaintiff and J. S. was deposited in the Hands of the Defendant upon a Wager, and that he hath delivered it to J. S. the Winner, and whether it should not have been

21. So my Bailiff shall be charged if he sells a Quarter of Corn for 40 d. when he might have sold it for half a Mark. 6 Rich. 2. Accompt 47.

22. (u) If a Man delivers Money to another to deliver over to J. S. and he does it accordingly, and after the Bailor brings a Writ of Account against him, and he pleads never his Receiver, &c. and this is found against him, because he cannot give this special Matter in Evidence, because he was once accountable conditionally if he did not deliver it over, (x) he shall not after be received to plead this Matter in Discharge before Auditors, because this Plea proves him not to be accountable, which is found and adjudged against him. D. 3 Eliz. 196. b. 43. agreed by several.

been pleaded in Bar. Stil. 353. dubitatur; but if it is a good Plea before Auditors, the Plaintiff may reply and ſhew that J. S. was guilty of foul Play, &c. vide.

23. **In Account if the Plaintiff declares of a Receipt of 1000 Dollars** monetæ Venetiæ, **the Value of each Dollar being** 4s. monetæ Angliæ quæ in toto ſe attingunt ad valorem ſo much, &c. **to which the Defendant pleads** never his Receiver to render Account **upon which they are at Iſſue, and it is found for the Plaintiff,** (y) **for which the Defendant is adjudged to account, the Defendant is not bound to render an Account of the Dollars as valued in the Declaration according to the Value there ſhewn, but he may before Auditors ſhew of what Value they were at the Time of the Receipt, and according to this he ſhall attempt.** Trin. 39 Eliz. B. R. **between** Beecher & Smith per Curiam.

(y) Br. Accompt. 79. vide.

24. (z) **He cannot allege a Diſcharge by Matter done** (*) **beyond Sea, which is not triable here.** 41 E. 3. 4.

(z) 2 Mod. 100 like Point per Curiam. Latch. 59. vide. (*) The Defendant pleads he ſold the Goods (of which the Account is demanded) apud B. in partibus tranſmarinis, and held no good Plea. Sadock and Burton. Yelv. 202 adjudged. 1 Bulſ. 103, 104.

25. If in Account upon a Receipt by the Hands of *J. S.* the Defendant pleads *never his Receiver, &c.* and the Jury find that he was his Receiver of ſuch a Sum, *&c.* and the Defendant pleads before the Auditors that he was poſſeſſed of ſeveral Obligations in which the Son of the Plaintiff was bound to the Defendant, and that *J. S.* paid him this Money in Satisfaction of thoſe Bonds, and that thereupon he delivered unto him the ſaid Bonds to the Uſe of the Plaintiff, which he after accepted; this is no good Plea, for 'tis no more then *not his Receiver*, which is found and adjudged againſt h m. *Paſch.* 40 *Eliz.* between *Treſham* and *Ford*, *Cro. Eliz.* 830. adjudged.

26. If in Account the Defendant pleads *never his Receiver, &c.* and this being found againſt him, he is adjudged to account, and before the Auditors pleads a Submiſſion of all Debts, Account, *&c.* to *J. S.* who awarded that the Defefendant ſhould pay 10*l.* only in Diſcharge of all Debts, Accounts, *&c.* which he paid accordingly, this is no good Plea, (a) for this Award made (b) before the Action brought, ought to have been pleaded in (c) Bar thereof; which being omitted he hath loſt the Advantage thereof, and ſhall not plead it before Auditors. *Trin.* 4 *Car.* between (d) *Taylor* and *Page*, *Cro. Car.* 116. adjudged.

(a) So an Accord with Satisfaction may be pleaded in Bar, not in Diſcharge.

Hetl. 114. per Croke. (b) If after, it could not be pleaded, but he ought to bring an audita Querela. Hetl. 114, 115. per Richardſon. (c) 1 Rol. Abr. 123. Pl. 3. S. P. (d) Hetl. 114. S. C. adjudged.

27. If in Account for 20 *l.* the Defendant pleads that the ſame was to him delivered by the Plaintiff to pay over to ſuch Perſons as Sir *G. M.* &c. ſhould think fit, and that they did appoint that he ſhould deliver it over to *J. S. &c.* which he had done *abſq; hoc*, that he was his Receiver *aliter vel alio modo* &c. and thereupon a Verdict is given for the Plaintiff, *&c.* and the Defendant before Auditors pleads the Act of Oblivion; This is a good Plea and need not be pleaded in Bar. *Mich.* 14 *Car.* 2. between (e) *Southcot* and *Rider*, *Raym.* 57. *per Curiam*, tho' for a Fault in the Pleading, Judgment was given for the Plaintiff.

(e) 1 Keb. 354, 395. S. C. the Defendant pleading that the Money was ordered by Sir G. M. &c. Commiſſioners, &c. and by him diſpoſed to publick Uſes, and ſo ſhews the Act of Oblivion, &c.

28 If in Account the Defendant pleads before Auditors, that the Goods for which he is to account were *bona peritura*, and notwithſtanding his Care in keeping them were worſe, and that they remained in his Hands for want of Buyers, and were in Danger of growing worſe; and that therefore he ſold them upon Credit to a Man beyond Sea. This is no good Plea, for a Factor cannot ſell even *bona peritura* (f) upon Credit without a particular Commiſſion ſo to do. *Trin.* 28 *Car.* 2. *Anonymous* 2 *Mod.* 100. adjudged.

(f) 1 Bulſ. 102. S. P. per Fleming, Chief Juſtice. But 1 Bulſ. 101. per Williams Juſtice, it is the common Practice to give Factors Power to ſell upon Credit.

(P) What will be a good Discharge without Deed.

(a) Ow. 28. S. P. argu= end'. Cro. Jac. 178. S.P. arguend'. 2 Leon. 46. S. P. argu= end'.

1. If a Bailiff (a) does a Thing that belongs to the Bailiff, as pay Rents, or such Things which of right are due out of the Manor, he shall aver this without writing. (b) 42 Edw. 3. 6 b. 25.

2. So it seems he may aver a Payment by Command, which of Right does not belong to the Bailiff, as that he by Command paid 6 l. for the Maintenance of the Plaintiff's Brother. (c) 42 Edw. 3. 6. b. 25.

(b) Br. Accompt 26. S. C.

3. So if a Man appoints a Stranger or his Servant to receive Money in his Name, and he does receive and pay it over by his Command, he may aver this without Deed, for the Stranger is his Servant for the Time. (d) 42 Edw. 3. 24.

(c) Fitz. Accompt 27. S. C. Br. 26. S. C.

4. It is a good Discharge that the Plaintiff was indebted to him in the same Sum, and did grant without Deed that the Defendant should retain it in Satisfaction of his Debt. (e) 12 Hen. 4. 18.

(d) Fitz. Accompt 27. S. C.

5. So it is a good Discharge that he delivered the Money to a Stranger by the Plaintiff's Command. (f) 12 Hen. 4. 18.

(e) Fitz. Accompt 21. S. C.

6. The Accountant being charged as Bailiff of a Manor, may without shewing a Deed or Acquittance aver, that as to a certain Sum of Money he paid it by the Plaintiff's Command to T. the Plaintiff's Receiver of the same Manor, for he cannot oblige him to give a Tally or Acquittance. 13 Rich. 2. Accompt 51. adjudged.

(f) Fitz. Accompt 21. S. C. Br. 31. 8. C.

Fol. 127.

7. (g) So such a Bailiff may without shewing a Letter, Tally, &c. aver that he paid a certain Sum to the Plaintiff himself, for he cannot oblige his Lord to give Acquittance. 13 Rich. 2. Accompt 51. adjudged.

(g) Br. Accompt 13. S. P.

8. But in Account against a Bailiff, the Defendant cannot aver a Delivery over to another, &c. without Writing or Tally. 6 Rich. 2. Accompt 7. per Belknap. It seems as if this is intended of a voluntary Delivery upon a Bargain between them without the Command of the Plaintiff.

(Q) Discharge before Auditors, who ought to Plead it.

(a) 1 Brownl. 25. S. P. said.

1. (a) If two in a Writ of Account are adjudged to Account, and one is after (b) Outlawed in the Suit, and the other appears, he shall account alone. (c) 41 Edw. 3. 3.

(b) But if sued by Bill upon which no Outlawry can be; What Proceedings shall be. Q. and vide. 1 Sid. 159. 1 Keb. 577.

(c) Fitz. Accompt 23. S. C. Br. 10. S. C.

(d) 1 Brownl. 25. S. P. said.

2. (d) So if he that is Outlawed be dead, (e) 41 Edw. 3. 3. So if after two are adjudged to Account one dies, the other shall account alone. 41 Edw. 3. 3.

(e) Br. Accompt 10. S. C.

3. When two are adjudged to Account, and one is Outlawed, (f) and Accounts, if he discharges himself upon the Account, (g) this shall be a Discharge to the other when he sues a Scire facias upon a Charter of Pardon, and if he be charged by the Account, this shall be a Charge upon the other, because they were adjudged to Account jointly. (h) 41 Edw. 3. 13 b.

(f) Here these Words the other are wanting, as appears by the Sense.

(g) Moor 188. Pl. 335. vide. 2 Leon. 76. vide. (h) Fitz. Accompt. 23. S. C. Br. 10. S. C.

Auditors.

Assigned by the Party.

1. By the Statute of *Westm.* 2. *cap.* 11. concerning (a) Servants, Bailiffs, Chamberlains, and all Manner of Receivers, it is Enacted, *Where Masters of such Servants* (b) *assign* (c) *Auditors* (d) *to take their Account, and they are found in Arrearages upon the Account* (e) allocatis (f) allocandis, (g) *their Bodies shall be arrested, and by the* (h) *Testimony of the Auditors of the same Account,* (i) *sent or delivered unto the* (k) *next Gaol of the King in those Parts, and* (l) *received by the Sheriff or Gaoler, and imprisoned in Iron, and at their own Costs remain there till Satisfaction,* &c.

(a) This extends not to Guardian in Socage, for he is no Servant, nor the Heir his Master; and it is said, when Masters of such Servants assign Auditors; and therefore Guardian in Socage cannot be committed to Prison by Force of this Act. 2 Inst. 380. (b) Such Auditor to take the Account hac vice may be assigned without Deed. 1 Leon. 219. per Periam & Anderson. Godb. 24. (c) In the plural Number, so that an Account before one is not within the Purview of this Act, for being in Nature of a Commission to two, it cannot be executed by one only. 2 Inst. 380. (d) By this Act tho' Auditors are Judges of Record. 2 Inst. 380. (e) By Force of these Words, the Lord may be found in Surplusage upon the Account, and this is within their Authority, and Parcel of their Record. 2 Inst. 380.—but he cannot be committed to Prison by Force of this Act. 2 Inst. 380. (f) And if such Surplusage be found, the Auditors upon the Foot of the Account ought to enter Allocatur super determinationem computi in Surplusagiis, so much for such and such Expences, &c. for such Allowance is a Judgment, &c. 1 Leon. 219. (g) But this must be done immediately after the Account stated. 2 Inst. 380. Br. Accompt 6. (h) If they disallow a just Demand, he shall have no Averment against the Record of their Judgment, but his only Remedy is by Writ of ex parte talis. 2 Inst. 380. (i) The Auditors upon the special Matter, must make a Warrant in Writing under their Seals to the Sheriff, and thereupon the Sheriff ought to receive the Accountant in Execution. 2 Inst. 381. (k) Tho' in another County, for their Commission must be strictly pursued. 2 Inst. 381. (l) And hereupon the Lord may have a Writ, commanding the Sheriff to receive him; which vide Reg. 137 b, and vide F. N. B. 118. c.

Assigned by the Court.

1. Where a Man is adjudged to Account, the Court (a) may assign him Auditors. *Fitz. Accompt* 73.

2. Before the Auditors the Plaintiff or Defendant may join Issue, or demur upon the Pleadings before them, which shall be certified to the Court, and (b) there tried or argued. Between *Willoughby* and *Small.* 1 *Brownl.* 24, 25.

3. (c) If Auditors are assigned, and (d) a Day given to the Defendant to Account before them, if the Defendant would pray a further Day to give in his Account, the Auditors themselves, before whom the Matter is, must grant it, and (e) not the Court. *Hill.* 21 and 22 *Car.* 2. between *Williams* and *Lee.* 1 *Mod.* 42. per *Twisden.*

4. But if the (f) Defendant is remiss and negligent, they must certify to the Court that he will not account. *Hill.* 21 and 22 *Car.* 2. between *Williams* and *Lee.* 1 *Mod.* 42. said *per Keeling.*

(a) In such Case they usually assign two of the Officers belonging to the Court. Fitz. Respond. 29. Mainprise 29. (b) Rast. Ent. 14. N. 3. 15. N. 6. (c) A farther Day given by the Auditors. Rast. Ent. 15. b. 16 a. (d) He must appear de die in diem before the Auditors, at every Day and Place assigned by them, till the Account is determined. 1 Brownl. 24. Co. Ent. 46. N. 1. Rast. Ent. 14. N. 2. (e) But if the Account is so confused and long, that it cannot be settled by the Time prefix for the Auditors to bring it in, they must certify this to the Court, and the Court will give longer Time. Rast. Ent. 14. N. 4. 15. N. 7. (f) So if any of the Parties make Default, it must be certified to the Court. 1 Brownl. 25.

Allowance de Surpluſage.

1. If in a Writ of Account the Defendant is charged as Receiver of 204 *l.* and before Auditors the Defendant ſhews that by the particular Command of the Plaintiff, he hath diſburſed that Money, and 600 *l.* more, and ſo (a) *petit allocari* this Surpluſage, yet he ſhall not be allowed it, (b) becauſe he is charged (c) as Receiver and not as Bailiff, for a Receiver ſhall not have any Reward for his Labour, otherways of a Bailiff. *Mich.* 12 *Jac.* between (d) the Earl of *Suffolk* and *Floyd*, 1 *Rol. Rep.* 87. adjudged, and tho' it was found by the Iſſue that 30 *l.* of the 204 *l.* was not paid by his Command, and the Plaintiff prayed it might be ſatisfied out of the Surpluſage, yet it was adjudged that it ſhould not, but the Plaintiff ſhould recover 30 *l.*

(a) Per 5 Keb. 362. he ſhould pray Judgment de reſiduo.

(b) A Bailiff ſhall have an Action for the Surpluſage, otherways of a Receiver or Guardian. Palm. 512. Br. Account 62. (c) If I retain one to follow my Buſineſs, and deliver him Money to diſburſe therein, he is accountable; but if he expends more than he received, he does it without Authority, and no Allowance ſhall be made him thereof. 1 Leon. 219. (d) 2 Bulſ. 277, 278. S. C. adjudged. 1 Rol. Abr. 599. Pl. 11. S. C.

How the Accountant ſhall be relieved when the Auditors will not make him juſt Allowances.

1. (a) If the Court aſſigns Auditors, who refuſe to make the juſt and reaſonable Allowances, he muſt complain to the Court. Defendant 2 *Inſ.* 381.

(a) Br. Accompt. 26. S. P. F. N. B. 129 F. S. P.

(a) Ex parte talis.

This Writ is given by the Statute of (b) *Weſtminſter*, 2 *Cap.* 11. by which it is enacted, That (c) if the Maſter aſſign Auditors, and the Servant *allocatis allocandis* be found in Arrear, his Body ſhall be arreſted, *&c.* and by the Teſtimony of the Auditors ſent to the next Gaol. Nevertheleſs, if any Perſon ſo committed to Priſon complain he is grieved, *&c.* and can find Friends that will undertake to bring him before the (d) Barons of the Exchequer, he ſhall be delivered unto them, and the Sheriff in whoſe Cuſtody he is, ſhall give Notice to his Maſter to appear before the ſaid Barons, before whom, or Auditors by them aſſigned, the Account ſhall be rehearſed, and Juſtice done; ſo that if he be found in Arrear, he ſhall be committed to the *Fleet*.

(a) This Writ is in nature of a Commiſſion to the Barons of the Exchequer, the Sovereign Auditors of England to hear and audit the Account. 2 Inſ. 381. Reg. 137. b. 4 Inſ. 115.

(b) 13 Ed. 1. which vide. 2 Inſ. 311. explained. F. N. B. 129. (c) So that this extends not to ſuch Caſes where Auditors are aſſigned by the Court. 2 Inſ. 381. Reg. 137 b. (d) The Writ in the Regiſter, and F. N. B. is Coram Theſaurario & Baronibus, &c. but it ought to be Coram baronibus only, according to the Words of the Act. 2 Inſ. 381. F. N. B. 129. G. H. Reg. 137 b.

(a) Againſt Guardian in Soccage.

1. By the Statute of (b) *Marlebridge* it is (c) provided *quod* (d) *cum* the Infant *ad* (e) *legitimam ætatem pervenerit* the Guardian ſhall anſwer the Iſſues of his Land *per legalem Computationem ſalvis rationabilibus miſis ſuis*, &c.

(a) 1 Rol. Abr. 117. Pl. 1. 4. 118. Pl. 1.

(b) 52 H. 3. cap. 17. which vide 2 Inſ. 135, 136. explained.

(c) But this is in Affirmance of the Common Law; ſo that legitima ætas muſt be intended ſecundum ſubjectam materiam, viz. 14. when he is out of the Cuſtody of his Guardian; So that the Heir at any Time after 14 may have Account againſt his Guardian in Soccage. Co. Lit. 89. a. contra. F. N. B. 118 b. Br. Account 86. Fitz. Accompt. 120. by which Books the Heir before 21. cannot have Account againſt the rightful Guardian in Soccage, tho' againſt him that Occupies by Wrong he may at any Time charging him as Bailiff, and Vide Kelw. 131 a. b. Fitz. Age 151. (d) Yet if

if he dies before 14. his Executors or Adminiſtrators ſhall have a Writ of Account preſently; for the Stat' of Weſt. 2. cap. 23, &c. gives Eandem actionem qualem habuit mortuus & haberet ſi vixiſſet, but ſays not ad idem tempus. 2 Inſt. 404. Kelw. 131. (e) In the Writ againſt Guardian in Soccage, it is called Plena ætas. Co. Lit. 89. a. F. N. B. 118. A. Co. Ent. 47. N. 3. Raſt. Ent. 21.

2. By the Statute of (f) *Weſtminſter* 1. *Cap.* 47. it was enacted, That if Guardian in Chivalry made a Feoffment, the Heir might immediately have an Aſſiſe, and the Seiſin, if recovered, ſhould be delivered to the next Friend of the Heir to whom the Inheritance could not deſcend, who ſhould anſwer the Iſſues to the Heir at his full Age.

(f) 13 Ed. 1. cap. 47. which vide. 2 Inſt. 259, 260. explained.

3. If the Guardian in Soccage occupies the Lands of the Heir after he comes to the Age of 14, for this Occupation he may at any Time be charged as Bailiff. *Co. Lit.* 90. a.

Account.

Proceſs.

(a) Before Judgment to Account.

1. (b) At Common Law the Proceſs was Summons, Attachment and Diſtreſs Infinite. 2 *Inſt.* 380.

2. But by the (c) Statute of *Marlebridge* it is enacted, That (d) Bailiffs that withdraw themſelves, and have not (e) Lands or Tenements (f) whereby they may be diſtrained, (g) ſhall be attached by their Bodies; ſo that the Sheriff in whoſe Bailiwick they are found, ſhall cauſe them to come and make their Account.

3. And *per* (h) *Weſt.* 2. *Cap.* 11. concerning Bailiffs, Chamberlains, and all manner of Receivers it is enacted, That if one flies, and it is returned by the Sheriff *quod non eſt inventus*, Exigents ſhall go againſt him from County to County until he be Outlawed, and being (i) impriſoned, he ſhall not be repleviable without the Aſſent of his Maſter.

(a) If the King grants to a Town certain Toll for Things ſold there to ſupport the Walls of the Town, and other Neceſſaries, and they make Collectors to receive it, who refuſe to Account, they may have a Commiſſion out of Chancery, to inquire who hath received the Toll, and to Hear and Determine their Account, and another Writ to the Sheriff, to attend and return an Inqueſt before the Commiſſioners. F. N. B. 114. C. 119. F. which Writ vide Reg. 138. (b) 3 Co. 12. a. S. P. and vide Godb. 24. (c) 52 H. 3. cap. 23. which vide 2 Inſt. 144. explained. (d) This extends not only to Bailiffs, but to Guardians in Soccage, Receivers, and other Accountants, per 2 Inſt. 144. But Co. Lit. 89. a. 'tis ſaid, tho' Britton was of that Opinion, later Books have over-ruled this Point, and no Capias lies againſt Guardian in Soccage, and this Statute extends to Bailiffs only.—Vet Q. if it extends not to Receivers, according to F. N. B. 117. H. and Reg. 137. a. it is laid down as a Rule quod ballivi & receptores poſſunt poni in uno brevi. (e) Thoſe that have Lands or Tenements, tho' not to the Value of the Account, are not within the Act. 2 Inſt. 144. (f) Of an Eſtate of Freehold in his own, but not in the Right of his Wife. 2 Inſt. 144. (g) Upon this Statute the Monſtravit de Computo is founded, which ought not to be granted but per fidem quam præſtare debet in Cancellaria prout moris eſt, &c. 2 Inſt. 144. Reg. 136, 137. F. N. B. 117. H.—But if this Writ is ſued out in deceptionem curiæ, when the Accountant hath Lands by which he might be diſtrained, he ſhall have a Writ for his Relief, upon which the Lord ſhall be ſummoned to appear, and he ſhall be bailed in the mean Time. 2 Inſt. 144. Reg. 137. a. (h) 13 Ed. 3. cap. 11. which vide. 2 Inſt. 379, 380. explained. (i) Reg. 138. Vide a Writ to take him when he is outlawed in one County, and after latitando vagat & diſcurrit in another

Proceſs.

After Judgment to Account.

1. If after Judgment to Account the Plaintiff is (a) Nonſuit, yet he may have a *Scire facias ad computandum* upon the firſt Judgment. *Fitz. Accompt* 65.

2. (b) So if after Judgment to Account the Plaintiff dies before the Account is ended, (c) his Executors may have a *Scire facias & Capias ad Computand'*, &c. thereupon. *Br. Exigent* 21.

(a) But whether a Man can be Nonſuit in the Original Action after Judgment given to Account. Q. And vide 1 Rol. Abr. 131. Pl. 4. and the Notes there, but whatever Effect the Non-appearance

Non-appearance of the Plaintiff hath, if he will after proceed upon this Account, he may have a Scire facias upon this Record ad computandum. Cro. Eliz. 19. 1 Rol. Rep. 84. Br. Account 27, 37, 63. (b) Cro. Eliz. 636. S. P. cited. And Br. Accompt 33, 40. (c) Yet vide 1 Brownl. 25.

3. If in Accompt the second Judgment only is reversed, a *Capias ad Computandum* shall issue against the Defendant to bring him to Account upon the first Judgment. *Hill.* 43 *Eliz.* between *Williams* and *White*. *Cro. Eliz.* 806. *per Curiam.*

Pleader.

Declaration.

1. The Plaintiff may declare that his Father was seised in Fee of certain Lands, and died seised, and that the Lands descended to him, and the Defendant hath occupied them as Guardian in Soccage, without any Recital of the Statute of *Marlebridge*, according to the (a) usual Course; for being a general Law the Statute need not be recited, and the Statute gives not the Action, but is only in Affirmance of the Common Law. *Mich.* 7 *Car.* between *Hughs* and *Harris*. *Cro. Car.* 219. adjudged.

(a) For the Writ recites it. Reg. 136. F.N.B. 118. A. Palm. 512. Co. Ent. 47. N. 3.

Plea.

1. If in Account *ex quo fuit receptor* of a certain Jewel *ad merchandizand*, the Defendant before Auditors pleads that he sold it to *B.* for 40 *l.* this is no good Plea; for it is not shew'd how the Plaintiff shall come at his Money, *viz.* That he took Bond or other Security for it. *Hill.* 8 *Jac.* between (a) *Sadock* and *Burton*. *Yelv.* 202. adjudged.

2. If the Plaintiff charges the Defendant as Receiver from such a Time to such a Time, the Defendant (b) must answer as to the Time precisely. *Mich.* 14 *Car.* between (c) *Southcot* and *Rider*. *Raym.* 57. adjudged.

(a) 1 Bulst. 103. S. C. adjudged, the Plea being, that he had sold it for 45 l. to the King of Barbary, which Money was to be returned to the Plaintiff, but he hath not yet done it, vide 104. where Fleming said, that the Defendant pleaded he sold it to the King of Barbary, and had a Bill of him for Payment of Money, &c. and yet held no good Plea. (b) Br. Accompt 41, 42, 75.—But if it be found that the Defendant was not the Plaintiff's Receiver for so long Time as he hath counted, yet this shall not abate the Count. Fitz. Accompt 58.—It is no Plea to say that 2 Apr. he accounted to the Plaintiff for the same Receipt absq; hoc that he was his Receiver after, but he must answer to the Time laid. per Br. Accompt 75. But vide Rast. Ent. 18. (c) 1 Keb. 354, 395 S. C. and S. P. per Curiam, it appearing there that the Defendant pleaded a Discharge before the first Day. 1 Keb. 425. vide.

Where the Suppolal of the Writ shall be traversed or not.

1. If the Defendant is charged upon a Receipt by the Hands of *J. S.* he may traverse the Receipt by his Hands; for if the Receipt was by the Hands of the Plaintiff himself, the Defendant might wage his Law. *Bro. Accompt* 50.

2. So if he is charged upon a Receipt by the Hands of *A.* and *B.* he may plead that he received it by the Hands of *A. tantum absq; hoc*, that he received by the Hands of both. *Fitz. Accompt* 14.

3. In Account against two as Receivers, one may plead never his Receiver without a Traverse *absq; hoc*, that he and his Companion were Receivers. *Mich.* 28 *Eliz. Anonymus*, *Godb.* 43. *Pl.* 50.

4. If *A.* delivers Money to *B.* to deliver over to *C.* and after *A.* brings a Writ of Account againſt *B.* (a) he may plead he hath delivered it over accordingly, without taking a *Traverſe abſq; hoc*, that he was accountable in other Manner. *Hill.* 7 *Jac.* between *Rutlage* and *Clerk.* 2 *Brownl.* 308. adjudged, and (b) that ſuch a Traverſe makes the Plea ill.

(a) Fitz. Barr. 33. S. P. Bro. Account 75. Bro. Traverſe 296. S. P.

(b) Tho' the Plea is good without a Traverſe; yet Q. if it makes it ill. Fitz. Accompt. 7, 10, 18. Bro. Accompt 69, 75.

Iſſue therein.

1. If the Plaintiff declares upon a *Receipt ad Merchandizandum*, and the Defendant pleads he was never his Receiver *ad computandum prout*, &c. this is no good Iſſue. *Mich.* 29 *Eliz.* between (a) *Gomerſal* and *Gomerſal.* 2 *Leon.* 195. admit' *per Curiam.*

(a) Godb. 56. S. C. and S. P. per Curiam.

2. If in Account the Plaintiff declares, that the Defendant the 1ſt *March*, the 22 *Car.* 2. *& abinde* to the 1 *May*, 27 *Car.* 2. was his Bailiff, and the Defendant pleads, that from the ſaid 1 *March* to the ſaid 1 *May*, he was not the Plaintiff's Bailiff, *&c.* becauſe the 1 *March* is excluded, the Plea is nought, and the Time ought not to be made Parcel of the Iſſue. *Hill.* 28 and 29 *Car.* 2. between *Brown* and *Johnſon.* 2 *Mod.* 145. adjudged.

3. If in Account for 80 Pigs of Lead the Defendant pleads never his Receiver thereof, (b) but ſays not, nor of any Part thereof, this is a bad Plea, but if he pleads never his Receiver, it is well enough. *Hill.* 28 and 29 *Car.* 2. between *Brown* and *Johnſon.* 2 *Mod.* 145. adjudged.

(b) Raſt. Ent. 18. a.

Additions.

Where and in what Caſes they ſhall be given.

1. By the Common Law a Man that had no Name of Dignity in all Originals and other Suits regularly, (a) was to be named by his Chriſtian and Sirname, and that was ſufficient. 2 *Inſt.* 665.

(a) But by what Name a Man ſhall ſue or be ſued vide the Diviſions, Title Name.

2. But he that had an inferior Name of Dignity, as Knight or Banneret, by the Common Law ought to be named by his Chriſtian and Sirname, with the Addition of his Name of Dignity. 2 *Inſt.* 666.

3. But a Duke, *&c.* by the Common Law might be ſued by his Chriſtian Name and by the Name of his Dignity, which ſtandeth in Lieu of his Sirname, and is incorporated to him. 2 *Inſt.* 666.

4. (b) And by the (c) 1 *H.* 5. *cap.* 5. It is enacted, that in (d) Originals in (e) perſonal Actions, Appeals and Indictments, (f) where an Exigent ſhall be awarded againſt the Defendant's Additions, ſhall be made of their (g) (h) Eſtate, Degree or Myſtery, (i) and of the Towns, Hamlets or Places, and Counties of, or in which they be or were converſant, otherways Outlawries thereupon ſhall (k) be void, and before Outlawry the Writs or Indictments ſhall be abated by Exception of the (l) Parties for want thereof: And tho' the Writs therein vary from the Records, Deeds, *&c.* they ſhall not abate, *&c.*

(b) Latch 169. Cro. Jac. 616. Stil. 394. Lat. 109. 4 Leon. 121.

(c) The Intent of this Act was, that the Defendant ſhould be ſo certainly deſcribed, that one Man ſhould not be troubled for another. 2 Rol. Rep. 225. 2 Inſt. 670. which vide explained. 2 Inſt 665, &c. (d) But where the Plea is not upon the Original it is not within this Act, as where a Plaint of Replevin is removed by recordare into the Common Pleas, becauſe the Plea is holden upon the Plaint. 2 Inſt. 665. Br. Additions 4, 45. Fitz. Brief 201. Fitz. Recordare 2.—So in a Return of a Reſcous, tho' Proceſs of Outlawry lies thereupon, for the Act ſpeaks only of Originals. 2 Inſt. 605. Fitz. Nonability 15. Br. Additions 67.—but yet where it was preſented before the Coroner that J. S. was felo de ſe, and that certain of his Goods were in the Poſſeſſion of J. N. and this was removed in B. R. and he was outlawed thereupon. 2 Leon. 200. it was reverſed becauſe J. N. had no Addition. (e) In an Aſſiſe, if the Diſſeiſin be found with Force, ſo that a Capias pro fine & exigent lies for the King; yet becauſe the Original is in the Realty, the Defendant ſhall have no Addition within this Act. 2 Inſt. 665. (f) So that there needs none in an inferior Court, becauſe Proceſs of Outlawry lies not. Moor 354. Pl. 478. adjudged; beſides, Pleas are there held by Plaint, and not by Original.—Nor does there need any in ſuch Actions where an Outlawry lies not. Br. Additions 2

(g) As

(g) As it was at the Time of the Writ purchased, and not with a nuper, as nuper armiger, &c. tho' a nuper may be of the Town, &c. because Men often remove their Habitation, and the Words of the Act as to the Town, &c. are be or were Conversant. 2 Inst. 670. Br. Additions 32, 41, 62. (h) This extends not to Dignities created after the Stat' as Baronet, per Latch. 169. But Q. and vide Hob. 129. (i) But it is well without, where the Law presumes them resident at a certain Place, as precipe J. S. rectori Ecclesiæ de T. —So precipe J. S. Cancellario Universitat' Oxon' —So in a Writ against Husband and Wife, or an Abbot and his Commoign, it need not be shewed where the Wife or Commoign dwelt. 2 Inst. 669. Cro. Eliz. 198. (k) That is, may be avoided by Writ of Error, or Plea of the Party coming in upon the Capias utlegat'. 2 Inst. 670. 1 And. 36.—But how an Outlawry shall be avoided by Writ of Error or without, Vide 1 Rol. Abr. 743. (l) But one Defendant shall not plead the Falsity, or want of Addition of the other. Fitz. Coron. 43, 64.

5. By the 5 *Eliz. cap.* 23. If in an *Excommunicato capiendo* the Excommunicate hath not a sufficient Addition according to the 1 *H.* 5. *cap.* 5. he shall not incur the (m) Penalties of the said Act of the 5 *Eliz.*

(m) 3 Mod. 42, 43. 1 Jon. 226. 2 Jon. 90.

6. By 27 *Eliz. cap.* 7. No Juror shall be returned without the Addition of his Place of Abode at that Time, or within a Year before, or other Addition by which he may be known, and no Extract of Issues shall be delivered out, received, or put in Use without such Addition as in the Original Panel or Tales upon Pain, *&c.*

What shall be a good Addition in respect of it self.

Of the (a) Estate or Degree.

(a) For the Derivation of which, and of the Word Degree, and how these 2 Words are of one Signification, and extend to Persons of Nobility and Dignity, and under that Degree, as Yeomen, &c. to Clergy as well as Temporalty, and to Graduates and Degrees in Universities in any kind of Profession, vide 2 Inst. 666.

1. *Generosa* is a good Addition, and if a Gentlewoman be named Spinster in any Original Writ, *&c.* Appeal, or Indictment, she may abate and quash it; for she hath as good Right to that Addition as a Dutchess, Marchioness, *&c.* have to theirs. 2 *Inst.* 668.

2. A Gentleman by Office (tho' not by Birth) as many of the King's, and Lord's Houshold, may have the Addition of Gentlemen while they continue in their Office, tho' if out of their Office they are but Yeomen. 2 *Inst.* 668.

(b) 6 Co. 67. S. P.

3. (b) So a Gentleman by Reputation, that is not so by Birth, Office, or Creation, may have this Addition, if commonly called so, and known by that Name. 2 *Inst.* 668.

4. A Man may be named by any Degree he hath taken in either University, for this is within the direct Letter and Meaning of the Act. 2 *Inst.* 668.

(c) Br. Additions 15. Fitz. Brief 236.

5. (c) And he that hath taken any Degree in Divinity, may have the Addition of Clerk. 2 *Inst.* 668.

(d) Dier 47. Pl. 4.

6 Yeoman is a good Addition for a Man (d) but not for a Woman. 2 *Inst.* 668.

(e) Yet Widow or single Woman are good Additions. Fitz. Additions 5.

7. But Citizens or Burgesses are no good Additions, being (e) too general. 2 *Inst.* 668.

8. If one Man be a Duke, Marques, Earl, Viscount and Baron, he shall have the Addition of the more worthy Dignity, *viz.* of a Duke. 2 *Inst.* 669.

Br. Additions 56, 64, 66.

Of the (a) Myſtery.

1. By this Word in the 1 *H.* 5. *cap.* 5. All lawful Trades and Occupations, as (b) Merchants, Mercers, Taylors, (c) Husbandmen, Labourers, *&c.* are intended. 2 *Inſ.* 668.

2. (d) But (e) Extortioner, Maintainer, Abettor, Heretick, *&c.* are no good Additions. 2 *Inſ.* 668.

3. (f) Servant, Groom, or (g) Farmer are no good Additions, becauſe they are not of any Myſtery. 2 *Inſ.* 668.

4. So (h) Chamberer, Butler, Pantler, *&c.* are Additions of Offices, and not of any Myſtery or Occupation. 2 *Inſ.* 668.

5. If a Man hath ſeveral Occupations, he may be named of any of them. 2 *Inſ.* 668.

6. But if a Gentleman by Birth be a Mercer, or other Trade, (i) yet he ought to be named by the Degree of a Gentleman, becauſe more worthy than the Addition of any Myſtery, and if he be named Mercer, *&c.* he may abate the Writ. 2 *Inſ.* 669.

7. Schoolmaſter or Scrivener are good Additions, for they are Myſteries. *Mich.* 32 *Eliz.* in *Farnam*'s Caſe. 2 *Leon.* 186. *per Curiam.*

(a) For the Derivation and Signification thereof. Vide 2 Inſ. 668. Br. Additions 39.

(b) Br. Additions 40. Fitz. Additions 3.

(c) Fitz. Additions 1. Br. Additions 44. 50. Dier 244. Pl. 58. Fitz. Utlegary 21.

(d) Br. Additions 8. 60.

(e) So Common Informer is no good Addition. 1 Rol. Rep. 190. by 2 Judges.

(f) Br. Additions 5, 50, 55, 56. Fitz. Additions 1, 6. Dier 46. Pl. 2.

(g) Br. Additions 10.

(h) Br. Additions 50.

(i) But Q. for the Statute ſays, He ſhall be named of his Eſtate, Degree, or Myſtery. Br. Additions 44.

Of the Town, Hamlet or Place.

1. If there be *D. major* and *minor*, but not *D. tantum*, he cannot be named of *D.* (a) for there is no ſuch Town. 2 *Inſ.* 669.

2. (b) So he cannot be named of a Pariſh, if two or more Towns are in it, otherways if but one Town, but a Plurality of Towns ſhall not be intended, if not pleaded. 2 *Inſ.* 669.

3. A Man may be named of a Place known lying out of any Town or Hamlet; for ſo is the word *Place* in the Statute to be intended. 2 *Inſ.* 669.

4. If a City be a County of its ſelf, wherein are ſeveral Pariſhes, yet the Addition thereof as *de London* is ſufficient; for ancient Boroughs were firſt Towns and Cities formerly Boroughs. 2 *Inſ.* 669.

(a) For Parcel of the Name is not the Name. Br. Additions 1. 23.

(b) 2 And. 125. Fitz. Additions 14. 49, 54, 61.

Of the (b) County.

(b) Stil. 26. 3 Mod. 139.

1. If a Man be indicted by the Name of *J. S. de Parochia de Algate*, and it is not ſhewed in what County *Algate* lies, it ſhall be quaſhed. *Trin.* 5 *Jac. Leech*'s Caſe, *Cro. Jac.* 167. An Indictment quaſhed accordingly, notwithſtanding *Middleſex* was in the Margin, and it was objected the Pariſh ſhould be intended to refer thereto, for an Indictment ſhall not be made good by Intendment, and the County in the Margin referred to the Place where the Fact was committed.

What ſhall be a good Addition.

In reſpect of the Manner of its Inſertion.

In Engliſh.

1. The Addition of the Parties indicted may be in Engliſh, as Weaver, Confectioner, *&c. Hill.* 14 and 15 *Car.* 2. 1 *Sid.* 101. between the (a) King and *March* and others.

(a) 1 Keb. 438. S. C. adjudged.

In reſpect of the (a) Place of its Inſertion.

(a) 18 by Name, & J. S. de H. Yeoman, were indicted, and becauſe there was no Addition where the 18 dwelt, the Indictment was quaſhed; for tho' Yeoman might go to all, yet it was held that H. extended only to J. S. 1 Bulſ. 183.

After the alias dict' or other Matter.

1. If *J. S.* is indicted for the Death of *A. S.* his Wife, and the Indictment is, that the ſaid *A. S.* his Wife *fuit in pace domini regis quouſque præd'* J. S. *vir præfat'* A. S. *de* H. *in Com' præd'* Yeoman, *&c.* This Edition is well enough; for tho' by the Rule of Conſtruction *ad ultimum antecedens fiat relatio*, yet it cannot be ſo here, for the Yeoman cannot refer to the Woman but to the Man. *Paſch.* 31 and 32 *H.* 8. *Dier* 47. *Pl.* 2, 3, 4.

2. But if *A. S.* be indicted by the Name of *A. S. nuper de* T. *in Com'* E. *uxor J. S.* Spinſter, this is no good Addition, (b) for a Man may be a Spinſter; ſo that by the Rule *ad ultimum antecedens*, &c. Spinſter refers to the Husband and not to the Wife. *Paſch.* 31 and 32 *H.* 8. *Dier* 47. *Pl.* 3. cited and admit *per Curiam.*

3. The Addition as well of the Eſtate, Degree, or Myſtery as of the Town, *&c.* ought to be alledged in (c) *primo nomine*, (d) for the proper Uſe of an *alias dict'* is only to agree with the Record or Specialty upon which the Writ is founded, and is not traverſable. 2 *Inſ.* 669.

(b) Vide 1 Sid. 247.

(c) And if it is alledged after the alias dict' it is void, and as no Addition. Hooper's Caſe, 2 Leon. 183. Cro. Eliz. 198. And vide Moor 354. Pl. 478. Cro. Eliz. 249, 583. 1 Vent. 13. Fitz. Brief 151. Br. Additions 42, 48, 51. —So in an Action againſt an Heir or Executor, he ought to be named ſo in the Premiſſes of the Addition, and not in the alias dict'. Br. Additions 65. (d) 1 Bulſ. 216. S. P. per Curiam.

Where a Man ſhall be (a) eſtopped, or hath loſt the Advantage of alledging the Want of an Addition.

(a) For this, Vide Fitz. Eſtoppel 77. Br. Eſtoppel 16. and the ſeveral Diviſions and Learning under title Eſtoppel.

1. If the Defendant hath no ſuch Addition as the Act requires, and yet appears upon Proceſs, and pleads taking no Advantage thereof by Exception, (b) he hath loſt the Benefit of the Act. 2 *Inſ.* 670.

——Where by the Purchaſe of a Superſedeas by the Name of the Addition given, the Defendant ſhall after be eſtopped to plead the Falſity of the Addition. Dier 88. Pl. 107, 108. (b) By pleading to Iſſue, he admits it, and hath paſſed by the Advantage of Exception for want of Addition. Johnſon's Caſe, Cro. Jac. 610. adjudged. 2 Rol. Rep. 225. adjudged, for by the Common Law it is good without Addition, and the Statute gives Remedy only by Exception. 1 Rol. Abr. 780. Pl. 80. Fitz. Additions 13.——And 1 Sid. 247. 1 Keb. 885. it is ſaid, a bad or no Addition is cured by the Appearance of the Parties. And vide Fitz. Brief. 122.

Accord.

Accord.

Fol. 128.

(A) What (a) Accord ſhall be a Bar of Actions.

1. AN Accord whereas the Marriage of the Son of J. S. (one of the Parties) was worth 500 l. the other ſhould give but 400 l. with his Daughter, per quod 100 l. was abated in Satisfaction of all Treſpaſſes, is a good Bar, dubitatur. 16 Edw. 4. 2.

(a) In Treſpaſs for trampling his Graſs, the Defendant pleads that he was amerced in the Court Baron of the Plaintiff for the ſame Treſpaſs, which was affeered to 2 s. for which he hath agreed with the Plaintiff, and held a good Plea by the Acceptance thereof, tho' the Amercement in the Court Baron was Extortion. Br. Treſpaſs 66. Fitz. Barr. 222. and vide Treſpaſs 61. Fitz. Barr. 187.

2. In an Action it is no good Plea in Bar that it was agreed between him and the Plaintiff, That if he did his Endeavour ſo that he made an Accord between the Plaintiff and J. S. for a Treſpaſs which the Plaintiff had done to J. S. (b) and alledges that he did his Endeavour, ſo that they were agreed, for this is not any Satisfaction. (c) 15 H. 6. Accord 1.

(b) The Senſe ſeems imperfect, and theſe Words wanting, that then, &c.

3. But it is a good Bar if he ſays, that he did his Endeavour per quod they did accord at his own Coſt. (d) 15 H. 6. Accord 1.

4. (e) In an Action upon the Statute of Rich. 2. if the Defendant ſaith, that after the Entry an Accord was made between them, that the Plaintiff ſhould re-enter into the Land, and that the Defendant ſhould deliver the Evidences of the Plaintiff to the Plaintiff; this is not any Bar of the Action for the Delivery of the (f) Plaintiff's own Evidences, can be no Satisfaction of the tortious Entry. (g) 9 Edw. 4. 19 Curia.

(c) Fitz. Accord 1. S. C.
(d) Fitz. Accord 1. S. C.
(e) Dier 556. like Point per 2 Judges againſt 1.
(f) But the Delivery of the Deed by the Feoffee to ceſtuy que uſe may be, &c. becauſe it belongs to the Feoffee. Cro. Eliz. 357. per Curiam. (g) Fitz. Accord 3. S. C. Br. 1. S. C. Cro. Eliz. 194. S. C. cited. Dier 356. a. S. C. cited.

5. But it is otherways, if he ſays that it was agreed that he ſhould deliver certain Evidences concerning the Land to the Plaintiff, and that he did deliver them accordingly; for this is a good Bar, if he makes Title to the Evidences. (h) 9 Edw. 4 19.

6. But the Delivery of the Evidences ought to be after the Plaintiff's Entry into the Land, otherways it is not any Advantage to him. (i) 9 Edw. 4. 19.

(h) Fitz. Accord 3. S. C. Br. 1. S. C.
(i) Fitz. Accord 3. S. C. Br. 1. S. C.

7. In an Action of Treſpaſs for taking his Cattle, it is not any Plea that there was an Accord that the Plaintiff (k) ſhould have his Cattle again, (l) for this is not any Satisfaction. 9 Edw. 4. 19.

(k) But if he was to drive them to a certain Place, ſo that it would be a Charge to him to do it; this would make it a good Accord. 2 Rol. Rep. 96. (l) In Covenant againſt the Executor of Tenant for Life, &c. he pleads an Accord that he ſhould quietly depart, and leave the Poſſeſſion, &c. and held good, tho' after the Death of Tenant for Life he had no Intereſt, but a Licenſe in Law, only to carry away his Goods. Yelv. 124, 125. per 3 Judges againſt 1.

8. An Accord that each of them ſhould be quit of Actions againſt the other is not good, becauſe it is not any Satisfaction. (m) 16 Ed. 4. 8. b. 11. b. per Curiam. Hill. 1650. between (n) Davies & Oakekam, adjudged upon a Demurrer in an Action upon the Caſe for Words, and ſuch an Accord pleaded in Bar. Intratur Mich. 1650. Rot. 557.

(m) Br. Accord 6. S. C.
(n) Stil. 245. S. C. adjudged niſi.

9 (o) But it ſeems to be a good Accord that each ſhould give the other a Quart of Wine in Satisfaction of Actions. Contra 16 Edw. 4. 8 b. 11 b. Curia.

(o) Vide 19 H. 6. 29 b.

10. In an Action upon the Caſe for Scandalous Words, the Defendant pleads, that after the Words ſpoken, the Plaintiff ſued the Defendant in the Military Court before the Lord Marſhal, where it was ordered by that Court, with the Conſent of the Plaintiff and Defendant, in Diſcharge

Diſcharge of this Suit and all other Differences between them, that the Defendant ſhould make a Submiſſion in Writing in a Place appointed, and before certain Perſons, &c. and avers that he did ſo accordingly. Mich. 14 Car. B. R. between Jeſop & Pegham adjudged upon Demurrer. But nota, the Plaintiff traverſed the ſaid Order, and the Defendant demurred, but the Court gave not the (*) Judgment upon this, but becauſe (p) this Order is not any Satisfaction as to the Damages, but in point of Honour. Intratur Trin. 14 Car. Rot. 728.

* Fol. 129.

(p) So where the Defendant pleaded that it was agreed the Defendant ſhould confeſs to the Plaintiff he had done him wrong, and ſhould ask Forgiveneſs upon his Knees, 2 Rol. 96. dubitatur, for the asking Forgiveneſs is not a ſufficient Conſideration or Satisfaction of the Damage.

11. An Accord is not any Bar of an Action, unleſs it be executed, becauſe the Plaintiff hath not any (q) Means to recover that which he ought to have by the Accord.

(q) Of late it hath been held, that upon mutual Promiſes an Action lies, and conſequently there being equal Remedy on both Sides, an Accord may be pleaded without Execution as well as an Arbitrament. Raym. 450. urged by the Counſel, and agreed per Curiam. 2 Jon. 158. 2 Keb. 332. And vide 2 Jon. 168.

12. In an Action it is not any Plea that there was an Accord between them, that the Defendant ſhould give a certain Sum to the Plaintiff at a Day which is not yet come in Satisfaction, becauſe the Plaintiff hath not any Remedy for it. (r) 6 H. 7. 11 b. Curia D. 6. Ed. 75. 26. D. 19 Eliz. 356. 39. 16 Edw. 4. 9. (s) 17 Edw. 4. 3.

(r) Fitz. Accord 4. S. C. Br. 3. S. C.

(s) Br. Accord 7. S. C.

13. So if an Accord be to do two Things, and he doth one and not the other; yet this is no Bar of the Action, becauſe the Plaintiff hath not any Remedy for that which is not performed. (t) 6 Hen. 7. 10 b. Curia. 10 Hen. 7. 23. (u) Coke 5. 11 b. D. 19 Eliz. 356. 39. Coke 9. Peyto 79 b.

(t) Br. Accord 3. S. C. Fitz. Barr. 150. S. C.

(u) This is miſprinted, for there is no ſuch Opinion in that Book or Fol. but perhaps it ought to be Com. 5. 11 b.

14. If an Accord be, that the Defendant ſhall do a certain Thing at a Day to come in Satisfaction of an Action, if he doth perform it at the Day, this is a good Bar of the Action, tho' it was executory at the Time of the Accord made, in as much as he hath accepted it in Satisfaction. (w) 6 H. 7. 11 b.

(w) Fitz. Accord 4. S. C.

15. (x) If by any Accord Money is to be paid to the Plaintiff in Satisfaction of a Treſpaſs, it is not any Plea in Bar of the Action that he tendered it to the Plaintiff accordingly, and he refuſed it. 17 Edw. 4. 8 Curia. 16 Edw. 4. 8 b. agreed.

(x) Cro. Eliz. 193. like Point adjudged. 2 Keb. 534. S. P. adjudged. 2 Jon. 6. S. P. adjudged.

16. (y) So it is not any Plea that he is ready to pay the Money, but he ought to ſay the Plaintiff is ſatisfied. 30 Hen. 6. 4.

(y) Cro. Eliz. 305, 306. S. P. adjudged. 2 Keb. 851. S. P. adjudged.

17. If in Covenant by the Heir of the Reverſioner, againſt the Executor of Tenant for Life, for not repairing, *&c.* the Defendant pleads that the Teſtator died 19 *Mar.* and that the 22 *Mar. concordat' & agreat' fuit* between the Plaintiff and Defendant, that the Defendant ſhould quietly depart and leave the Poſſeſſion to the Plaintiff, and that in *Conſideratione inde* the Plaintiff did agree to diſcharge him of the Breach in *non reparando*, and ſhews that the 25 *Mar.* he did depart, *&c.* this is no good Plea, becauſe the Concord is uncertain as to the Time of his Departure, and tho' he ſhews a Departure within 5 Days, yet he cannot help the original Inſufficiency of the Concord, which is the Foundation of all. *Hill.* 5 *Jac.* between (z) *Sandford* and *Cutcliffe*. *Yelv.* 124, 125 adjudged *per Yelv.* and *Crook*; and *Williams* ſaid, the Time being indefinite, the Departure ought to have been immediately.

(z) Noy 110. S. C. cited, but not clearly ſtated.

18. If in Treſpaſs the Defendant pleads a Concord between himſelf and the Plaintiff, that he ſhould pay the Plaintiff 3 *l.* in hand, and ſhould undertake to pay the Plaintiff's Attorney's Bill, and avers that he had paid the 3 *l.* and was always ready to have paid the Attorney's Bill,

(a) but he never ſhewed him any, this is no good Plea, becauſe the Accord is not ſhewn to be fully executed. *Mich.* 22 *Car.* 2. between (b) *Cock* and *Honychurch*. *Raym.* 203. adjudged, *per totam Curiam abſente Keeling*, Chief Juſtice.

(a) So where Part of the Accord was to give Counſel upon Requeſt, and the Plaintiff had not requeſted it. Br. Accord 7. (b) 2 Keb. 690. S. C. adjudged, it being there pleaded that he did promiſe to pay the Bill. 1 Mod, 69. a ſhort Note of the ſame Caſe but no Reſolution; and it is there put as if the Defendant had promiſed to pay, &c.

19. If in an *indebitatus Aſſumpſit*, &c. the Defendant pleads an Agreement between the Plaintiff and Defendant, and *J. S.* the Son of the Defendant, that the Plaintiff ſhould deliver to the Defendant certain Cloths, which the Plaintiff then had in his Cuſtody, and that the Plaintiff ſhould accept the ſaid Son her Debtor for 9 *l.* to be paid ſo ſoon as he received certain Pay from the King, due to him as Lieutenant of a certain Ship, in full Satisfaction, *&c.* and that after, ſo ſoon as the Son received his ſaid Pay, he was ready and offered to pay, *&c.* and that he yet is ready; this is no good Plea, for it doth not appear that there was any good Conſideration why the Son ſhould pay, but a (c) bare Agreement without Conſideration, and admit the Promiſe good, if not in Writing, by 29 *Car.* 2. no Action lies thereupon, and therefore it ought to have been ſhew'd that it was in Writing, for when ſuch Agreement is pleaded in Bar, it muſt appear to the Court that an Action will lie thereupon, for the Defendant ſhall not take away the Plaintiff's preſent Action, and not give him another upon the Agreement pleaded. *Trin.* 33 *Car.* 2. between (d) *Caſe* and *Barber*. *Raym.* 450. adjudged.

(c) Vide 2 Jon. 168.

(d) 2 Jon. 158. S. C. adjudged.

20. If in Covenant to permit the Plaintiff to receive 100 *l. per Annum* Rent, the Defendant pleads a Concord between the Plaintiff and Defendant, that each of them ſhould deliver his Part of the Indenture into the Hands of a third Perſon to be cancelled, and that each of them ſhould be diſcharged of all Actions upon the Indenture, and avers, that he had delivered his Part to the third Perſon; yet this is no good Plea, becauſe it does not appear to be executed on both Parts. *Trin.* 36 *Car.* 2. between *Ruſſel* ahd *Ruſſel.* 3 *Lev.* 189. adjudged.

Pleading.

The Form and Manner of Pleading (a) Accords.

(a) In Accord is properly between the Plaintiff and Defendant themſelves, but if another is Party thereto, it is an Award, and therefore in Pleading an Accord, he ſhall not ſay that by the Mediation of their Friends it was accorded, &c. Fitz. Accord 5. —But yet if A. does a Treſpaſs to B. &c. and C. gives Money in Satisfaction thereof, A. may take Advantage of this; for if B. is ſatisfied, there is no Reaſon he ſhould maintain his Action. Fitz. Barr 166. (b) Br. Accord 8. Fitz. Barre 26.

1. The beſt and ſafeſt Way to plead an Accord, is to plead it by way of Satisfaction, and not by way of Accord; for if it be pleaded by way of Accord, a preciſe Execution thereof in every Part muſt be pleaded, and if there be a Failure in any Part, the Plea is inſufficient: But if it be pleaded by way of Satisfaction, (b) the Defendant need plead no more, but that he paid the Plaintiff 10 *s.* in full Satisfaction of the Action which he received, *&c. Judgment ſi actio*, &c. 9 *Co.* 80. b. *quod nota* by the Reporter.

In what Actions an Accord is Pleadable.

Et e Converſo.

1. An Accord with Satisfaction is no good Plea in an Action (a) real, for a Right or Title to a Freehold cannot be barr'd by any collateral Satisfaction. 4 *Co.* 1. a. b. 9 *Co.* 79. b.

(a) But in Detinue for Charters concerning a Freehold and Inheritance, an Accord is a good Plea. per 7 E. 4. 23. b. cited 9 Co. 78. b. Fitz. Accord 2. —If an Accord be a good Plea in a Quar' impedit. Q. And vide 11 H. 7. 13. b. 6 Co. 44. a. 2 Brownl. 128, 129. 1 Brownl. 134.

2. An Accord with Satisfaction generally is a good Plea in all Actions where Damages only are to be recovered. 6 *Co.* 44. a. ſaid *Dier* 75. b. ſaid.

3. (b) In an Appeal of Mayhem an Accord with Satisfaction is a good Plea, notwithſtanding the Writ be *felonice per Trin.* 26 *Hen.* 6. *Rot.* 27. *Coram rege*, cited 9 *Co.* 78. b.

(b) 6 Co. 44. a. S. P. ſaid that it might be collected from 35 H. 6. 30. but vide & Q.

4. (c) In an Attaint upon a falſe Verdict againſt the Plaintiff and Jury in Treſpaſs, one of the Jury may plead an Accord; for the Attaint is not founded upon the Record only; but alſo upon the ſuppoſed falſe Oath, which is Matter in fait, *per* (d) 13 E. 4. 1. b. 5. a. b. cited 6 *Co.* 44. a.

(c) Cro. Eliz. 357. S. P. per Curiam arguend'. (d) Br. Accord 9. S. C. Attaint 91. S. C. Fitz. Barr. 111. S. C. Dier 75. b. S. C. cited.

5. In Waſte againſt Leſſee for Years, tho' in the *Tenet*, an Accord is a good Plea; (d) becauſe but a Chattel only is to be recovered. *Cro. Jac. per Daniel N. Bendl.* 35. *Pl.* 60. *Moor* 6. *Pl.* 19. 9 *Co.* 78. b. *Contra* 11 *H.* 7. 13. b. *Br. Accord* 13. 6 *Rep.* 44. a.

(d) So in ravishment de gard', & Quare ejecit infra terminum. 9 Co. 78. b.

6. (e) If in covenant againſt an Aſſignee a Breach is aſſigned in not repairing the Houſe, the Defendant may plead an Accord between himſelf and the Plaintiff, and Execution thereof in (f) *Satisfactione & exoneratione reparationum præd'*, for no certain Duty accrued by the Deed, but the Action is founded upon a Tort or (g) Default ſubſequent, together with the Deed and Damages only to be recovered, which are in the Perſonalty. *Mich.* 3 *Jac.* between (h) *Eden* and *Blake.* 6 *Co.* 43. b. adjudged.

(e) All. 39. S. P. arguend' Salmon and Bradſhaw S. P. 9 Co. 60. appears. Cro. Jac. 304. appears. Yelv. 123. S. P. per 3 Judges arguend'. 2 Keb. 51. like Point. Vide Kelw. 106. (f) Palm. 111. 2 Rol. Rep. 187, 188. vide. (g) So tho' the Accord was made before the Covenant broke. 1 Rol. Abr. 265. Pl. 8. which vide and the Notes there: (h) Noy 110. S. C. adjudged. Cro. Jac. 100. S. C. adjudged, and the Reaſon given becauſe it is not pleaded in Bar of the Covenant, but of the Damages only.

7. But when a Duty in certain accrues by the Deed *tempore confectionis Scripti*, as by Covenant, Bill, or Obligation to pay a certain Sum of Money; this certain Duty takes its Eſſence originally, and only by writing, and therefore ought to be avoided by Matter of as high a Nature, tho' the Duty be meerly in the Perſonalty. *Mich.* 3 *Jac.* between *Eden* and *Blake.* 6 *Co.* 43. *per Curiam.*

8. An Accord with Satisfaction is a good Plea in an *Ejectione firmæ*, for an Ejectment includes a Treſpaſs, and they are ſo interwoven they cannot be ſevered, and in all Actions which ſuppoſe a Wrong *vi & armis*, where a *Capias* and Exigent lay at Common Law, there an Accord is a good Plea. *Mich.* 19 *Jac.* between (i) *Peyto* and *Chetty.* 9 *Co.* 77. b. adjudged.

(i) 1 Brownl. 134. S. C. per 3 Judges. 2 Brownl. 128, 129, &c. S. C. adjudged per totam Curiam. Godb. 149. S. C. adjudged.

(a) Adjourn-

(a) Adjournment.

Fol. 130.

Adjournment of the (b) Term.

1. If the Term of St. Michael be adjourned in Octabis Mich. till Menſe Mich. (as it was in 3 Jac.) there can be no Continuance from Octabis Mich. to Octabis Hill. without a Continuance to Menſe Mich. But this will be a Diſcontinuance, for in as much as the Term was adjourned in Octab. Mich. to Menſe no Continuance can be to Octabis, for all Appearances and Continuances were adjourned to Menſe Mich. and then in as much as no Continuance was to Menſe, this is diſcontinued. Mich. 15 Jac. B. R. between (c) Osborn and Huntly, per Curiam, a Judgment reverſed for this Cauſe. (d) My Reports 10 Jac. 11 Jac. the ſame Caſe.

(a) The Common Pleas ſhall not be removed without Warning by Adjournment 2 Ed. 3. cap. 11. (b) By Adjournment of the Term the Chancery is not adjourned; for that C. adjudged.

Court is always open. Br. Juriſdiction 74. Br. Brief 353. (c) Cro. Jac. 445, 446. S. C. (d) His Reports of theſe Years are not printed.

2. Upon ſuch an Adjournment in Octabis, &c. an Infant that comes to be inſpected upon a Writ of Error upon a Fine, who will be of Age before the Time to which it is adjourned, cannot be inſpected, becauſe all Appearances alſo are adjourned Sir (e) Robert Poyne's Caſe, this was a great Queſtion, but he was inſpected by Conſent, and Errors releaſed.

(e) Cro. Jac. 230. S.C. ended by Compoſition, but

there is a Nota that Fleming after ſaid, that upon Conference with the Judges, it was reſolved the Inſpection was good notwithſtanding the Adjournment; but it does not appear by the Report whether the Adjournment was in or de Octavis. 2 Brownl. 278. S. C. dubitatur, but does not appear whether the Adjournment was de or in Octabis.

3. If the Writ of Adjournment of the Term be ab Octabis Mich. to Menſe Mich. the Adjournment ought not to be made till the Morrow after the 4th Day. (f) 21 Edw. 4. 37.

4. (g) If the Adjournment be de Octabis Mich. to Menſe Mich. there ought to be Appearances at Octabis, for this is not adjourned, but this is taken excluſive. Mich. 15 Jac. B. R. between Osburn and Huntley, agreed per Curiam, and Houghton ſaid, he once knew it ſo. (h) 21 E. 4. 37.

5. (i) But otherways it is where the Adjournment is in Octabis to Menſe. (k) 21 Edw. 4. 37. D. 5, 6 Eliz. 225. S. 35. (l) for there the Eſſoins cannot be kept at Octabis; for the Return of Octabis cannot begin, and be held, and be adjourned the ſame Day alſo.

(f) Br. Adjournment 28. S. C. Br. Expoſition 47. S. C. (g) New Dier 225. b. Margin, like Point. (h) Br. Adjournment 28. S. C. (i) New Dier

225. b. Margin, like Point, but vide Poph. 33. S. C. as in Dier, and if not miſprinted Con. but there ſeems to be ſome Words wanting. (k) Br. Expoſition 47. S. C. Br. Adjournment 28. S. C. 1 Keb. 273. 2 Keb. 76. 1 Sid. 295. vide the Nota there, and Cro. Car. 12. 1 Jon. 84. (l) Nor ſhall any Appearance be entered then, or Roll made but of the Adjournment only. Br. Brief 353.

6. If the Adjournment be of (m) all Writs, Pleas, &c. of one common Return to another common Return, as de Octabis Mich. ad 15 Mich. and ſuch like, this will not adjourn Pleas by Bill in Banco Regis; for upon theſe Pleas the Continuances are to certain Days, and not to common Returns; and therefore upon ſuch Adjournment all the Pleas upon Bills are diſcontinued. (n) 4 Edw. 4. 40.

(m) A Writ of Adjournment was of all Pleas, Writs, &c. pleadable before Quas'

animarum, to, &c. and becauſe Writs, Pleas, &c. returnable or pleadable after were not mentioned, the Judges thought a new Writ neceſſary, which iſſued accordingly. 1 And. 279. (n) Fitz. Diſcontinuance 27. S. C. Br. Diſcontinuance de Proceſs 36. Br. Amendment 70.

7. If upon an Arreſt the Defendant gives Bond for his Appearance at *Weſtminſter* ſuch a Day, to anſwer, *&c.* before which Day the Term is adjourned to *Hertford,* if he appears there he ſaves his Bond. *Hill.* 38 *Eliz.*

(o) *Corbet*

(o) Corbet and Cook, Cro. Eliz. 466. S. C. adjudged upon

(o) *Corbet* and *Downing*. *Moor* 430. Pl. 601. adjudged, and a Query made by the Reporter (p) if he had appeared at *Weſtminſter*, and not there, (q) if he had ſaved his Bond.

a Fault in the Pleading, but there ſaid it was held the Obligation ſhall always relate to the Day and Place compriſed in the Writ, for that ſhall not have regard to the Adjournment, and yet if the Term be adjourned, he ought to appear in B. R. elſe his Bond is forfeited as there ſaid, the 9 Ed. 4. is, which I ſuppoſe is miſprinted, and ſhould be 4 Ed. 4. fol. 21. which vid. Fitz. Debt. 7. Br. Condition 142. Br. Brief 353. and vide the Caſe in Cro. Eliz. But note, I have put down the very Words of the Book. (p) The Juſtices had no Power to receive his Appearance there, but only to adjourn the Term, and by the Adjournment that Day, and the Day to which in Law are become the ſame Day. Fitz. Det. 75. (q) 1 Lev. 176. It appears that before ſuch an Adjournment, there was a Proclamation, appointing all Perſons to keep their Day, at the Time and Place to which, &c. And this I take to be the uſual Courſe.

(r) Cro. Car. 200. S. P. appears. Dyer 225. b. S. P. Poph. 33. S. P. per Judges.

8. (r) If the Beginning of *Mich.* Term is adjourned till *Cras' animarum*, the (s) *Quarto die poſt* of that *return* is properly the Day for Sitting and not before, as it is where the Term begins without Adjournment. *Mich.* 1 *Car. Cro. Car.* 13. Reſolved by the Judges.

(s) But it was held otherways where the Beginning of Trinity Term was adjourned to Tres Trin', and the Writs were, that at Tres Trin. the Term ſhould be held thereafter as if no Adjournment had been. Poph. 33. reſolved by the Judges, by reaſon of theſe ſpecial Words in the Writ.—After a ſecond Adjournment the Courts may ſit before the Quarto die poſt. 1 Sid. 276. ſaid, but perhaps 'tis otherways generally. Vide 1 Jon. 85. Cro. Car. 13 and 14. Cro. Jac. 16, 17. 2 And. 279. And note, the Adjournment in Sid. was to Octabis Pur'; ſo that if they had not in that Caſe ſate the firſt Day, the Term would have ended before the Quarto die poſt.

9. If all except the 2 laſt Returns of *Hillary* Term are adjourned, which are appointed to be held at *Windſor*, the firſt of theſe 2 Returns cannot after be held at *Weſtminſter* by Vertue of any Adjournment to be made at *Windſor*; for upon the firſt Adjournment the Day in Court is the *Quarto die poſt* of *Cras' Pur'*, and then that Return cannot be adjourned in Part. *Hill.* 17 and 18 *Car.* 2. 1 *Sid.* 276. *per* Juſtices.

By what Authority the Term ſhall be Adjourned.

1. If the King puts out a Proclamation for the Adjournment of the Term, this is a ſufficient Warrant for the Keeper of the Great Seal to make out Writs of Adjournment accordingly. *Mich.* 34 and 35 *Eliz.* 1 *And.* 279.

How it ſhall be Adjourned.

1. Before a Writ of Adjournment is read in Court to adjourn the Term, (b) there ſhall be three Proclamations made. *Br. Proclamations* 6. *Br. Adjournment* 28.

(b) Cro. Car. 12. It was ſo done, and

after the Writ was read, the Crier rehearſed the Effect of the Writ in Engliſh, but for the Solemnities uſual upon an Adjournment, Vide Cro. Car. 11, 12, 13, 27. 200. Dier 225. b. 1 Jon. 84, 85. 1 Sid. 276. 1 Lev. 176.

(B) Adjournment.

(a) Trial of a Foreign Plea.

1. IN real Actions in London, if a (b) Foreign Plea be pleaded, it ſhall be ſent into the Common Pleas to be tried. (c) 3 Hen. 4. 12.
2. But otherways it is in (d) perſonal Actions. (e) 3 Hen. 4. 12.

(a) How Foreign Pleas in Wales ſhall be tried. Vide 34 and 35 H. 8. cap. 26. Paragr. 88.

(b) This is ſo within the Equity of the Statute of Glouc' cap. 12. which vide, and the Expoſition thereof. 2 Inſ. 224, 225. (c) Br. Juriſdiction 81. S. C. Br. Cauſe de remover. Plea 41. S. C. (d) The Statute of Glouc' extends to real Actions wherein Voucher lies, and not to perſonal. 2 Inſ. 325. 2 Leon. 37. 1 Sand. 98. (e) Br. Juriſdiction 81. S. C. Br. Cauſe de remover. Plea 41. S. C.

3. (f) Tho' the Statute of *Magna Charta*, *Cap.* 2. ſpeaks only of an Adjournment in an Aſſize, yet within the Equity of that Act, an Adjournment may be in a Certificate of an Aſſize. 2 *Inſ.* 26.

(f) 4 Co. 4. b. S. P. tho' the Certificate was given by Weſt. 2. cap. 25. being a ſubſequent Act, and ſo it ſeems to be within the Statute of Weſt. 2. cap. 30. which gave the Adjournment before Verdict, as vide 1 Rol. Abr. 131. Pl. 1 Margin. Vide 2 Inſ. 415.

(C) (a) At what Time it ſhall be made.

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1. IN an Aſſize againſt divers, if they ſeverally take the intire Tenancy upon them, and plead ſeveral Bars and Matter of Difficulty, the Aſſize (b) ſhall not be adjourned till it is inquired which of them is Tenant. (c) 35 Aſſ. 2, 3. per curiam.

(a) An Adjournment may be before as well as after Verdict by Weſt. 2. cap. 30. vide infra D. 1. Margin. (b) Yet vide 1 Rol. Abr. 135. Pl. 21. Where after Adjournment before themſelves at Weſtminſter, the Plaintiff did elect his Tenant, for by ſuch Adjournment they are as in the Country. (c) Fitz. Aſſize. 319, 320. S. C. B. R. 338. S. C.

(D) What ſhall be a good Cauſe of Adjournment of a Foreign Plea.

1. (a) AFter Verdict againſt the Plaintiff in an Aſſize, if the Parties are adjourned to another Day, at that Day the Plaintiff may be (b) Nonſuit. (c) 47 Edw. 3. 2.

(a) By Magna Charta, Cap. 12 Aſſizes are appointed to be taken in propria Comitatu, and thereupon an Adjournment in Banco propter difficultatem, &c. is given; but it was held no Adjournment could be made, by Vertue of this Act, unleſs the Jurors gave a Verdict, whereupon by Weſtm. 2. Cap. 30. an Adjournment is given in caſe of a foreign Voucher in an Aſſize of Mortdanceſter, within the Equity of which are all foreign Pleas, Demurrers, and other Pleas and Proceedings, either before or after Verdict in an Aſſize. 2 Inſ. 26. 423. (b) This is altered by Statute 2 M. 4. cap. 7. vide Co. Lit. 139 b. (c) Fitz. Nonſuit 12. S. C. Br. 6. S. C. Br. Aſſize 32. S. C.

2. In an Aſſize for a Rent-charge, if Iſſue be taken that he did not charge by the Deed, which bears Date in another County, the Aſſize ſhall not be adjourned, for the Deed is not denied. (d) 43 Ed. 3. 2.

(d) Fitz. Viſne 44. S. C.

3. But otherways it is if the Aſſize be brought againſt an Infant, and he ſays, he did not charge by the Deed, for there the Deed is in queſtion as it ſeems. (e) 26 Aſſ. (f) 2. adjudged.

(e) Br. Aſſ. 259. S. C. Br. Viſne 96. S. C. Br. re-attachment 31. S. C. and S. P. appears. (f) This is miſprinted, and ſhould be Aſſ. 3.

4. If in an Aſſize the Releaſe of the Plaintiff bearing Date in a foreign County is pleaded in Bar and denied, this is a good Cauſe of Ajournment in Banco; for they cannot try it where the Aſſize is brought. 22 Edw. 3. 12 b. 29 Aſſ. 70. 37 Aſſ. 16. adjudged. 6 Aſſ. (g).

(g) Pl. 4. is wanting in the Original.

5. In an Aſſize if the Tenant pleads 2 ſeveral Iſſues for 2 Summons, triable where the Aſſize is brought; and for the third for Summons Vouches in a foreign County, the whole Aſſize ſhall be adjourned, becauſe it (h) ſhall not be taken by Parcels. 17 Edw. 3. 28 b.

(h) In an Aſſize againſt ſeveral, ſome Plead to the Aſſize, and one in Bar, and whether he alone may be adjourned in B. or whether all ought not to be adjourned, or whether the Juſtices at their Election may adjourn him alone, or all. 1 And. 230. dubitatur fully argued, and the Judges differ in Opinion.

6. (i) In a Mort d'anceſter if the Tenant vouches two, and prays that one may be ſummoned in the ſame County, and the other in a foreign County, becauſe he hath nothing in the ſame County, this is a good Cauſe of Adjournment, becauſe otherways both ſhould not be ſummoned. (k) 29 Aſſ. 48. adjudged.

(i) 2 Inſ. 325, 326. like Point.

(k) Br. Mort-d'anceſter 37. S. C.

7. (l) If in an Aſſize it be pleaded that Part of the Land is in a Franchiſe which ought not to be tried by foreigners, this is no Cauſe of Adjournment, for it may be tried by the Aſſize. (m) 30 Aſſ. 13. adjudged.

(l) Co. Lit. 125 b. like Point.

(m) Br. Trial 76. S. C. ubi vide rationem, becauſe the Franchiſe lay in the ſame County, and the Jury may inquire thro' all the County, quod nota by Brook, yet vide infra. Pl. 8.

8. In an Aſſize if it be pleaded that the Land is in another County, the Aſſize ſhall not be adjourned upon this, but this ſhall be inquired by the Aſſize. (n) 29 Aſſ. 51.

(n) Br. Aſſize 300. S. C.

9. If in an Aſſize the Iſſue be whether the Land in Demand was put in view in another Aſſize, the Record of which is pleaded in Bar, and the Sheriff returns the Venire facias againſt the firſt Jurors that they have nothing to be ſummoned, upon which one of the Parties ſays they have Aſſets in a foreign County; this is not any Cauſe of Adjournment of the Aſſize to try it. 29 Aſſ. 70. adjudged, for the Aſſize is to be taken in the proper County.

10. In an Aſſize if the Deed bears Date in the ſame County where the Aſſize is brought, and the Witneſſes live in a foreign County, yet this is not any Cauſe of Adjournment, for the Aſſize is to be taken in the proper County. (o) 29 Aſſ. 70. (p) 5 Aſſ. 7. adjudged. (q) 6 Aſſ. 4.

(o) Vide & Q. And vide 12 Edw. 2. Cap. 2.

(p) Br. Aſſize 117. S. C. Br. Teſtmoigns 24. S. C. (q) Br. Aſſize 118. S. C. Br. Damages 155. S. C.

11. In an Aſſize by A. S. who was the Wife of J. S. if the Tenant ſays that J. S. is living in another County, this is no good Cauſe of Adjournment, for this ſhall be tried by Witneſſes. (r) 36 Aſſ. 5. Curia. But in this Caſe, if the Writ ſhould be brought by the Name of A. without ſuppoſing the Coverture before (*) it would be otherways, (t) 36 Aſſ. 5. It ſeems to be intended that he alledged Coverture in another County.

(r) Br. Trial. 79. S. C.

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(t) Br. Trial. 79. S. C.

12. In an Aſſize if the Deed of the Anceſtor with Warranty be (u) pleaded in Bar, and the Demandant ſays that the Anceſtor is living beyond the Seas, or in another County, this ſhall be tried by the Aſſize, and ſhall not be adjourned. (w) 36 Aſſ. 5. It ſeems the Life cannot be tried by Aſſize.

(u) This in the Original is miſprinted, for 'tis there Pledge, and not Plead.

(w) Br. Trial 79. S. C.

(E) What ſhall be ſaid to be a Foreign Plea, for which it ſhall be ſent in Banco.

Trial of a Foreign Plea.

1. IN a Formedon in London, if a Releaſe with Warranty be pleaded dated in a foreign County, if the Deed be denied, it ſhall be ſent in Banco. 3 Hen. 4. 12.

2. So if a Warranty and Aſſets be pleaded in a foreign County, and the Aſſets denied, it ſhall be ſent in Banco. 3 Hen. 4. 12.

3. In an Aſſize if a Releaſe be pleaded in a foreign County, the Aſſize ſhall be adjourned in Banco to try the Releaſe. 13 Hen. 4. 3 b. (a) 22 Edw. 3, 4 b.

(a) Fitz. Aſſize 125. S. C.

4. In Dower if the Tenant vouches another to Warranty, and prays that he be ſummoned in the County of York and Durham, which is a County Palatine; yet becauſe the Summons in York is ſufficient the Voucher ſhall ſtand. (b) 10 Hen. 6. 20.

(b) 4 Inſ. 219. S. C. cited.

5. If a Man be vouched in Banco, and it is prayed that the Vouchee be ſummoned in a County (c) Palatine, the Common Pleas ſhall immediately award Proceſs to them there. 19 Hen. 6. 12. (d) 52.

(c) 4 Inſ. 219. S. P. upon Prayer, &c. in Durham.

(d) Fitz. Trial 7. S. C. Br. 39. S. C. Br. Cinq; Ports 8. S. C.

6. If a Cauſe be removed out of a County Palatine into the Common Pleas, and the Plea is put without Day by Protection, and after a Reſummons is ſued, the Reſummons ſhall be directed (e) to the Sheriff of the County within which the County Palatine is, or to the Biſhop of Durham, for he ſhall not have Juriſdiction again being once diſabled. 17 Edw. 3. 36.

(e) The Original is, al vicount ou al eveſq; de Durham que eſt le County Palatine car il navera juriſdiction arere, &c. and ſo perhaps not truly tranſlated, yet it is according to the Year-Book, which vide.

7. (f) If there be a Recovery in Value in Banco againſt a Vouchee that is within the County Palatine, the Common Pleas ſhall award Proceſs there to execute it. (g) 19 Hen. 6. 52 b.

(f) 4 Inſ. 219. S. P. upon a Recovery againſt a Vouchee in Durham.

(g) Fitz. Trial 7. S. C.

8. In an Aſſize if the Tenant vouches J S. in the ſame County, and the Sheriff returns that he hath not Aſſets in this County, and it is averr'd that he hath Aſſets in another County, the Aſſize ſhall be adjourned in Banco to have him ſummoned in the County alledged. 36 Aſſ. 6.

(F) By (a) whom a Foreign (b) Plea may be tried.

(a) Foreign Pleas to an Indictment, where and how to be tried. Vide 3 Inſ. 27. 4 H. 8. cap. 2. 22 H. 8. cap. 2. cap. 14. 32 H. 8. cap. 3. and extends per Curiam.

1. (c) IF there be an Iſſue whether a Man was at large at B. at Cheſter at the Time of the Outlawry pronounced, it ſhall not be ſent to Cheſter to be tried, becauſe the King's Writ does not run there. 3 Hen. 4. 15.

(b) The Statute of Glouc' cap. 12. made 6 E. 1. is a beneficial Law, and taken by Equity, to all foreign Pleas in real Actions. 2 Inſ. 325. F. N. B. 6. b. (c) Dal. 101. like Point Con.

2. In an Aſſize at (d) York, if a Releaſe be pleaded dated at Lancaſter, (e) yet ſhall the Deed be tried by the Juſtices and thoſe of York. 3 H. 4. 15.

(d) In the Original this is Everwick.

(e) Per 9 Ed. 3. cap. 4. When a Deed dated in a Franchiſe where the King's Writ runs not is pleaded tho' the Witneſſes named in the Deed be of the Franchiſe, yet if the Deed is denied, Proceſs ſhall be awarded in the Court where the Plea depends, to cauſe the Witneſſes and Country to appear, and if the Witneſſes come not at the great Diſtreſs, the Court ſhall proceed to Trial without, &c.

3. (f) In

3. (f) In Debt upon a Leaſe for Years in B. if the Defendant pleads a Releaſe dated in Durham, this ſhall be tried in Banco. 11 Hen. 4. 40. Quære.

(f) I take this to be within the expreſs Words of the 9 E. 3. cap. 4. but that Statute extends only where Iſſue is joined upon a Deed pleaded in Bar, and not if upon other Matter triable in a County Palatine or Franchiſe per Coke. 4 Inſ. 205. tho' Opinions have been various.

4. If an Iſſue be joined in Banco which is to be tried in Durham or Lancaſter, as whether Land be Parcel of a Portion, &c. there, the Record ſhall be ſent there to be tried, and when it is tried it ſhall be remanded in Banco. (g) 11 Hen. 4. 40. b. (h) 19 H. 6. 12. It ſhall be tried there and not in the County next adjoining, for theſe Places were derived out of the Crown.

(g) Fitz. Debt. 112. S. C. Br. Juriſdiction 25. S. C. Br. Proceſs 134. S.C. Br. Trial 27.

5. (i) If an Iſſue be joined in Durham, which cannot be tried there; this ſhall be ſent in B. and they ſhall try it. (k) 11 Hen. 4. 40. b.

S. C. (h) Br. Trial 89. S. C. Br. Cinque Ports 8. S. C. (i) 4 Inſ. 218, 219. S. P. (k) Br. Cinque Ports 8. S. C. cited.

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6. If Iſſue be joined in B. of a Thing triable in London, this ſhall not be tried in Banco, becauſe the Londoners have a Privilege not to come out of London. Quære 19 H. 6. 52 b.

7. But the Court may try it there by Niſi prius. 19 H. 6. 52. b.

(l) Dier 69. Pl. 53.

8. (l) If there be a foreign Voucher upon a Plea in (m) ancient Demeſn, this ſhall be tried in B. and after Trial remanded. 19 H. 6. 53.

(m) The Words of the Statute of Glouc' cap. 12. are, Soit implead de Tenements, ſo that it extends to Tenants in ancient Demeſn, becauſe the Freehold is in them; otherways of Tenants by Copy. 2 Inſ. 325.

9. If an Iſſue be joined in Banco of a Matter triable in Ireland, (n) this ſhall be ſent into Ireland to be tried, and after Trial ſhall be remanded. 19 H. 6. 53. b.

(n) But where upon ſuch Iſſue there was a Trial in the next County, vide. 2 Rol. Abr. 597. Pl. 8.

10. (o) By the Common Law, all Things alledged (p) in Wales ſhall be tried by the Sheriff of the (q) next County of Enland, for elſe there would be a Failure of Right; for the Court here cannot try this in Wales. (r) 19 H. 6 12. b.

(o) This was firſt ordained by Parliament, tho' the Act be not extant now, and the contrary is an empty Opinion of ſuch who knew the Practice, but were Strangers to the Reaſon thereof, per Vaugh. Vaugh. 404. 407, 408. (p) In Covenant upon a Leaſe made at York, a Breach aſſigned at Berwick, and Trial in the next County to B. Criſp and the Major of B. Ray. 173. 1 Vent. 58, 59. 1 Sid. 381, 382. 1 Lev. 252. adjudged. (q) 2 Rol. Abr. 599. Pl. 5. vide. (r) Vaugh. 407. S. C. cited.

11. If an Iſſue be joined in B. of a Thing in Wales, which ſhould be tried there, yet ſhall not the Record be ſent there to be tried; but it ſhall be tried in the next County of England next adjoining thereto, (s) becauſe Wales was a Realm of it ſelf. (t) 19 H. 6. 12.

(s) For this Matter, vide Co. Lit. 97. a. Moor 669. Pl. 918. 1 Rol. Rep. 246. Vaugh. 300. 399, 400, &c. 418. 1 Vent. 59. (t) Br. Cinque Ports 8. S. C.

12. So if a Man vouches another, and prays that he may be ſummoned in Wales, the Proceſs ſhall not iſſue into Wales, but to the Sheriff of the next County adjoining. 19 H. 6. 12.

13. If a (u) Manor in Wales be in Demand here, the Writ ſhall iſſue to the Sheriff of the County adjoining, to ſummon him in the ſaid Manor. (w) 19 H. 6. 12. b (It ſeems not to be intended that he ſhall enter into Wales and ſummon him there, but in his own County.)

(u) This is intended of a Lordſhip Marcher. 2 Inſ. 25. but if Lands held of the ſaid Manor were demanded, the Trial ſhould have been in the Court of the ſaid Manor. Vaugh. 407. How and what Alterations have been by Statute, vide 27 H. cap. 26. explained. Vaugh. 416, 417. (w) Br. Cinque Ports 8. S. C. Vaugh. 407. S. C. cited.

14. (x) In a Writ of Dower in any Court real in Wales, if they are at Iſſue upon ne unq; accouple in lawful Matrimony, the Court there hath not Power to make out Proceſs to the Biſhop, but the King ſhall write to the Steward there, (y) to ſend the Record here in Bancum, and here Proceſs ſhall be awarded to the Biſhop. (z) 19 H. 6. 12.

(x) Co. Lit. 134. b. like Point. Vide Vaugh. 411. this Matter fully argued.

(y) For the Statute of Glouc' Cap. 12. extends by Equity not only to Foreign Pleas in real Actions, but alſo to Pleas not Foreign, when for Default of Power an inferior Court cannot proceed, as where ne unque accouple, &c. or Baſtardy is pleaded. 2 Inſt. 325. (z) Br. Cinque Ports 8. S. C. Vaugh 410. S. C. cited and ſaid to be againſt the Reſolution of all the Judges in Cro. Car. 34. which vide, et Q.

15. If in the Court of a Lord in Wales, a Deed is pleaded, bearing Date in another Seigniory Royal, in this Caſe (a) the one hath not Power to write to the other to try this Deed, and therefore it ſhall be ſent into the Common Pleas to be tried. (b) 19 H. 6. 12.

(a) Per 34, and 35 H. 8. cap. 26. Paragr. 88. If a Foreign Plea or Voucher between Party and Party be pleaded in Wales, triable in any other County in Wales, the Juſtices ſhall ſend the King's Writ, with a Tranſcript of the Record under the Seal to him committed, unto the Juſtice of the County where triable, commanding him to proceed to Trial, and after it ſhall be remanded, &c. —But per Paragr. 89. if triable in England, the Juſtices in Wales before whom ſuch Plea or Voucher is made, may proceed to Trial in ſuch County of Wales where made. (b) Br. Cinque Ports 8. S. C.

(G) After Adjournment what Plea may be pleaded.

1. When a Plea is pleaded to a certain Point, and an Adjournment thereupon, the Party ſhall not plead a new Plea not purſuant to the firſt. (a) 42 E. 3. 12. 44. Aſſ. 28.

2. The ſame Law, tho' it be pleaded by an Infant. (b) 44 E. 3. 10. b. 44 Aſſ. 28.

(a) Br. Adjournment 1. S. C.

(b) Fitz. Aſſiſe 56. S. C. Br. Adjournment 2. S. C. Br. Coverture and Infancy 8. S. C.

3. But after Adjournment he may plead a new Plea purſuant and proving the firſt. (c) 42 E. 3. 12. (d) 44 E. 3. 31. 42 Aſſ. 20.

4. As if an Aſſiſe was adjourned upon a ſpecial Plea to prove the other a Baſtard, which is but Evidence to convey him to the Iſſue that he is a Baſtard, and therefore in Banco he may ſay that he is a Baſtard. (e) 42 E. 3. 12.

(c) Br. Adjournment 1. S. C.

(d) Br. Adjournment 31. S. C.

5. So if the Plaintiff ſays the Tenant was born before the Marriage, upon which they are adjourned, whether he ſhall have the Plea without concluding fully that he is a Baſtard, he may in Banco ſay, that the Tenant pending this Action was certified a Baſtard by the Ordinary, in an Action between him and another, and upon which Judgment is given. 18 E. 3. 33. b.

(e) Br. Adjournment 1. S. C.

6. (f) In an Aſſiſe againſt Baron and Feme, if the Aſſiſe be adjourned in Bancum upon a ſpecial Point, and at the Day in Bank the Husband makes Default, and the Wife is there received, ſhe may plead the ſame Plea that was pleaded before. 2 H. 4. 18.

Fol. 134.

(f) Kelw. 110. S. P. argu-end'.

7. So ſhe may plead that the Releaſe before pleaded was made in another Place than was pleaded before. 3 H. 4. 18.

8. If an Aſſiſe be adjourned in Bancum upon a certain Point ſcilicet on a Challenge to a Plaint, if this be adjudged no Challenge, yet he may take another Challenge, and falſify the Plaint by as many Cauſes as he can. 17 E. 3. 34. b.

9. And the other may maintain the Plaint by as many Things as he can. 17 E. 3. 34. b.

10. In Aſſiſe if the Tenant pleads Baſtardy in the Plaintiff, to which the Plaintiff ſays, he was born during the Eſpouſals between his Father and Mother, upon which they are adjourned in Bank, whether the Plea be but Evidence that he is a mulier, the Tenant may ſay in

Bank, that there was a Divorce, &c. between the Father and Mother, for this is pursuant to his first Plea scilicet to prove him a Bastard in the Court Christian. 39 E. 3. 31. b. (g) 39 Ass. Pl. 10.

(g) Fitz. Bastardy 18. S. C. Br. Adjournment 23. S. C.

11. In an Assise for a Rent, if the Plaintiff makes Title thereto, that A. was seised in Fee, and granted this to B. in Fee, who devised it in Fee, and the Parties demur because the Plaintiff hath not shewn forth the Deed of Grant made by A. to B. upon which they are adjourned before themselves at Westminster, the Plaintiff may there shew forth the Deed; for this is pursuant and enforcing the Matter alledged before. (h) 38 Ass. 28. adjudged.

(h) Br. Adjournment 21. S. C.

12. In an Assise if the Tenant pleads that he is Heir to J. S. who died seised, and the Demandant pleads a Matter to prove him a Bastard, upon which they are adjourned in Bank, whether the Plea be but Evidence (Salvis partibus rationabilibus) the Demandant in Bank may say that the Tenant is a Bastard, for this is an Inforcement of his Plea before. 42 Ass. 20. adjudged.

13. So if in an Assise the Tenant pleads in Person or by Attorney in Abatement, a Plea triable by the Assise, upon which it is adjourned, he cannot plead in Bar afterwards. (i) 50 E. 3. 19. b. adjudged; But if the Party pleads a Matter of Record, or other Matter not triable by the Assise, and upon this it is adjourned, he may plead in Bar after. (k) 50 E. 3. 20.

(i) Br. Assise 41. S. C. Br. Trial 16. S. C.

(k) Br. Assise 41. S. C. Br. Trial 16. S. C.

14. So if the Tenant in an Assise pleads by Bailiff, after Adjournment he may plead in Bar. (l) 50 E. 3. 20.

(l) Br. Assise 41. S. C. Br. Trial 16. S. C.

15. If the Adjournment be for Difficulty upon the Issue by what County the Issue shall be tried, if it appears to the Court that the Issue is mistaken, (m) yet the Court hath not Power to make them replead. 14 H. 4. 10.

(m) Per Br. Adjournment 7. Fitz. Repleader 16. if there be a Jeofail the Court may award a Repleader, and the Case of H. 4. seems to be upon a special Reason, which vide in the Book.

16. In an Assise if the Tenant makes Title as Heir to J. S. and the Plaintiff says the Tenant was born before Marriage, upon which the Parties are adjourned, whether the Plaintiff ought to conclude fully that he is a Bastard, he may after plead a Release in Bar. 18 E. 3. 33. b.

17. If an Assise for Difficulty be adjourned in Bank, the Defendant may plead the Release of the Plaintiff after.

18. So if an Assise be for Difficulty adjourned from one Session to another, the Defendant may plead the Release of the Plaintiff after. 21 E. 3. 27. 21 Ass. Pl. 9.

Fol. 135.

19. In an Assise if it be pleaded, that in an Assise by the Plaintiff he pleaded the Release of the Plaintiff, and the plaintiff did deny his Deed, and it was found by Verdict his Deed, and after the Plaintiff was Nonsuit; if this Plea be adjourned, whether it be sufficient to bar the Plaintiff in this Assise to deny his Deed, the Defendant in B. may aver that this is the Deed of the Plaintiff, and waive the Estoppel. (n) 18 E. 3. 35. 17 Ass. 28. adjudged.

(n) Fitz. Estoppel. 223. S. C.

20. In an Assise, if the Tenant pleads in Bar a Recovery against the Plaintiff, who makes Title before the Recovery, and the Tenant pleads a Matter to oust him from his general Title, without shewing how, &c. upon which the Parties demur, and this is adjourned in Bank, the Plaintiff may make Title and shew how, &c. in Bank. (o) 32 Ass. 9.

(o) Br. Estoppel 140. S. C. Vid. 1 Rol. Abr. 131. Pl. 1.

21. In an Assise against two, if each takes upon himself the intire Tenancy, and pleads several Bars, upon which the Plaintiff eleans his Tenant, demurs upon the Pleas that they should not bar him, upon which the Justices of Assise adjourn them before themselves at Westminster (not in Bank) the Plaintiff may there elect his Tenant, for upon this Adjournment they are as they were in the Country. (p) 22 E. 3. 5. b. (q) 23 Ass. 16. adjudged.

(p) Fitz. Assise 126. S. C.

(q) Br. Adjournment 19. S. C. Br. Assise 254. S. C.

22. And the Plaintiff may say after he hath elected one for his Tenant, that the others are named as Disseisors; and therefore he may pray to be discharged of their Pleas in Bar. (r) 23 Ass. 16. adjudged.

(r) Br. Assise 254. S. C.

23. **In an Aſſiſe, if the Tenant pleads the Releaſe of the Anceſtor of the Plaintiff with Warranty, to which the Plaintiff ſays,** That the Anceſtor was ſeiſed for Life, the Remainder to the Plaintiff in Tail, the Remainder to the Right Heirs of the Leſſee, and after the Leſſee granted all his Eſtate to the Tenant, and after releaſed to him in Fee with Warranty, **upon which the Parties demur, whether the Plaintiff ſhall be barr'd by this, and it is adjourned for Difficulty to** Weſtminſter, **the Tenant cannot there ſay,** that he to whom the Releaſe was made was ſeiſed in Fee, **for this is not an Inforcement of his firſt Plea.** 44 Aſſ. 28. (s) 44 E. 3. 10. b. **adjudged.**

(s) Fitz. Aſſiſe 56. S. C. Br. 21. S. C. Br. Adjournment 2. S. C.

24. **If in an Aſſiſe it is pleaded** that Baron and Feme were ſeiſed by Force of a ſecond Fine, and not by Force of a Fine before; **ſhewing the Matter ſpecially, upon which the Parties are adjourned to** Weſtminſter **before themſelves, he may there alledge an Office to prove him to be in by the ſecond Fine; for this is Purſuing the firſt Plea, and Enforcing it.** (t) 44 Aſſ. 35. (u) 44 E. 3. 31. **adjudged.**

(t) Br. Adjournment 24. S. C. (u) Br. Adjournment 30. S. C.

25. **In an Aſſiſe, if the Tenant pleads in Bar a Fine and Non-claim, to which the Plaintiff ſays,** he was within Age at the Time of the Non claim; **upon which the Tenant pleads a ſecond Fine and Non-claim when he was of full Age, upon which the Parties are adjourned, whether this be a Departure, the Tenant in Bank may ſay** that the Plaintiff was of full Age at the Time of the firſt Fine, notwithſtanding the Adjournment. (w) 1 Aſſ. 6.

(w) This is miſprinted in the Original, and perhaps ſhould be 2 Aſſ. Pl. 6. which vide Br. Adjournment 8. Br. Departure 17. Br. Continual Claim 7.

26. **In an Aſſiſe againſt A. and B. if A. pleads in Abatement** that B is his Wife, and not named his Wife, **and B. pleads in Bar, upon which Plea it is adjourned in Bank, A. the Husband may there relinquiſh his Plea in Abatement, and plead in Bar.** (x) 23 Aſſ. 4. **adjudged** per Curiam.

(x) Br. Aſſiſe 249. S. C.

Br. Waiver de Choſes 29. S. C. Br. Adjourument 17. S. C. 1 And. 231. S. C. cited.

27. **In an Aſſiſe of his Freehold in E. if the Tenant pleads the Fine of the Anceſtor of the Plaintiff, proving the Lands to be in C. in abatement of the Writ, upon which Plea the Parties are adjourned in Bank, and adjudged no Plea in Abatement, the Tenant may after there plead in Bar, tho' the Adjournment was upon a certain Point.** (y) 6 Aſſ. 1. **adjudged.**

(y) Br. Adjournment 9. S. C. Br. Peremptory 28. S. C.

28. **If upon a** Foreign Plea **the Parties are adjourned in Bank, if the Tenant in Bank pleads a Plea in Abatement of the Writ** Puis d' (*) arrain Continuance, (z) **the Court there hath not Power to abate the Writ, nor to put the Parties in Iſſue thereupon, becauſe they have only Power to try the Iſſue,** &c. **upon which the Record was ſent there.** (a) 49 E. 3. 21. b.

* Fol. 136.

(z) But if in an Aſſiſe the Parties are adjourned in Dier 132. Pl. 78.

Bank propter difficultatem a Plea puis darrain Continuance may be pleaded there. (a) Fitz. Barre. 225. S. C.

29. **But upon ſuch a new Plea pleaded, the Court either ought to continue the firſt Iſſue there, or otherways if they remand the Record to ſhew the Cauſe; ſo that the** Darrain Continuance **may appear there.** (b) 49 E. 3. 21. b.

(b) Fitz. Barre. 225. S. C.

30. (c) If the Tenant in *London* vouches a Foreigner to Warranty, and the Record is removed into the Common Pleas to determine the Warranty, the Vouchee may vouch over in a Foreign County, and that Vouchee may vouch over, and if the Vouchee make Default, the Court may make out Proceſs againſt him. 2 *Inſt.* 326.

(c) Dier 69. b. adn it per Curiam. Kelway 109. b. S. P. dubitatur, and well argued. Vide alſo the ſeveral Authorities in the Margin of 2 Inſt.

31. But none of the Vouchees can there plead in Chief, but that muſt be pleaded in the Inferior Court, for that is not within the Commiſſion given the Juſtices by the Statute of *Glouc'.* 2 *Inſt.* 326.

32. In

32. In the Dower in the *Huſtings* in *London*, againſt Husband and Wife, who vouch a Foreigner to Warranty, whereupon the Plea is adjourned into the Common Pleas to a certain Day, at which Day the Husband and Wife ſue out a Writ againſt the Vouchee, whereupon the Vouchee appears, and the Baron makes Default, and *per Curiam* ſhe was received, and it was held within their Commiſſion, for that the Default was made in this Court, whereupon the Land was to be loſt if ſhe were not received, (d) therefore for the Neceſſity, *&c.* 2 (e) *Inſt.* 326. but there ſaid others are of another Opinion.

(d) If after Adjournment the Demandant appear not in B. the Court as incident may award a Nonſuit, and ſo the Tenant may be eſſoined there. 2 Inſt. 326. (e) Vide Fitz. Reſceit 105, 125. there cited.

(H) When the Plea is tried what ſhall be done.

1. **If the Conuſance of a Plea be granted out of the Common Pleas to a Franchiſe, and there is a Foreign Voucher, upon which a Reſummons is ſued in Bank, when the Voucher is there tried; this ſhall not be remanded to the Franchiſe, becauſe they have failed of Right, for here the Conuſance was firſt granted upon Condition** quod celeris fiat partibus juſtitia alioquin redeant. (a) 11 H. 4. 28, 87.

2. **But if a Trial is in Bank upon a Foreign Voucher in** London, **by the Statute of** Glouceſter **the Record ſhall be remanded.** (b) 11 H. 4. 28.

(a) Br. Conuſance 16. S. C. Br. Voucher 161. S. C. Br. Reſummons 9. S. C. Fitz. 12. S. C. (b) Br. Voucher 161. S. C. Fitz. Reſummons 12. S. C.

3. **If the Tenant in an Aſſiſe vouches a Foreigner, upon which the Plea is adjourned in Bank, where the Vouchee demands the Lien and the Deed of his Anceſtor being ſhewn to bind him to Warranty, bearing Date where the Land is which is denied; yet this ſhall not be remanded till this Iſſue is tried,** (c) **becauſe this is out of the Points of the Aſſiſe to which Iſſue the Demandant is not Party.** (d) 17 Aſſ. 9.

(c) The Words of the Statute of Weſtm' cap. 30. are, Cum loquela perbenerit ad captionem Aſſiſe remittatur loquela, &c. (d) Br. Trial 71. S. C.

4. If in an Aſſiſe of two Acres in the County of *N.* the Defendant as to one pleads a Plea triable in a Foreign County, upon which the Iſſue is adjourned in *B.* and thence tried by *Niſi prius* in the Foreign County, and found for the Plaintiff; this Verdict ſhall be remanded to the Juſtices of Aſſiſe; for there is another Acre, the Title of which ought to be tried before any Judgment can be given, and he cannot releaſe his Title to the other Acre, and take Judgment for this. Between (e) *Lucas* and *Picroft. Paſch.* 28 *Eliz.* 3 *Leon.* 137. adjudged.

(e) 2 Leon. 41. S. C. adjudged.

(f) But if in an Aſſiſe a Releaſe is pleaded dated in a foreign County, and thereupon the Aſſiſe is adjourned in *B.* and found for the Plaintiff, if he will releaſe his Damages he ſhall have Judgment of the Freehold preſently. 3 *Leon.* 137. admit *per Curiam*, and there cited. 6 *E.* 4. which is miſprinted, and ſhould be (g) 6 *Aſſ.* 4. (h) 8 *Aſſ.* 15.

(f) 2 Leon. 41. S. P. admit per Curiam.

(g) Br. Aſſiſe 118. S. C. Br. Damages 155. S. C. (h) Fitz. Aſſiſe 190. S. C. Br. 132. S. C. Br. Adjournment 12. S. C.

(I) (a) To what Place it may be adjourned.

1. THE Juſtices of Aſſize have Power to adjourn the Parties to Weſtminſter, or to other Place (b) in itinere ſuo. (c) 47 E. 3. 2.

(a) By the expreſs Words of Mag' Char' cap. 12. they may adjourn, &c. into the Common Pleas, before the Judges there. (b) The Words of the Statute of Mag' Char' cap. 12. are alibi in itinere ſuo, yet they are taken beneficially; for they may adjourn the Parties before themſelves at W. or any other Place out of their Circuit. 2 Inſ. 26. vide and the ſeveral Authorities there in the Margin.—They may adjourn them from Time to Time, and from Place to Place. Dier 132. Pl. 38. Br. Aſſize 385. Adjournment 4. 34. (c) Br. Aſſize. 32. S. C.

Pleader.

Iſſue.

1. As for the Form and Manner of joining Iſſue when a foreign Matter is pleaded in an Aſſize. Vide *Player* and *Crouche*'s Caſe. N. Bendl. 189. Pl. 229. 1 And. 15. Co. Ent. 61. b. the ſame Caſe is in Dier. 283 b. Moor 90. Pl. 223. tho' differently reported, and not ſo full in theſe laſt Books to this Matter.

(a) Age.

Fol. 137.

(a) Age is not granted by the Civil Law, for by them the Guardian may bind or loſe, and therefore he is bound to anſwer preſently. 3 Bulſ. 143. per Coke Ch. Juſtice. 1 Rol. Rep. 325. per Coke——If after the Death of the King's Tenant, one was found Heir by one Office, and another by another Office in the ſame County, it was verata queſtio, whether there ſhould be a Traverſe till the full Age, &c. But that is help'd by 2 E. 6. cap. 8. vide 7. Rep. 45 b. (b) The Rule is where a naked Right in Fee deſcends, of which the Anceſtor was once in Poſſeſſion, there in an Action Anceſtrel brought by the Infant it ſhall, &c. without Plea. 6 Co. 3. b. Dier 137. a——But the Parol ſhall not, &c. without Plea where the Anceſtor died ſeized, &c. vide 6 Co. 4. a. (c) This is an Action anceſtrel droiturel, per 2 Inſ. 291. and the Reaſon given in 6 Co. becauſe a limited Fee only, per formam doni is demanded. Vide 1 Rol. Abr. 141. D. 1, 2, 3, 5, 6. (d) This is miſprinted in the Original, for there are not ſo many fol. in that Year, and I ſuppoſe it ſhould be. 8 E. 3. 59. b.

(A) (b) In what Actions meerly without Plea the Parol ſhall demur.

1. IN a Formedon in Deſcender, the Parol ſhall not demur for the Nonage of the Demandant, unleſs ſomething be pleaded to which he cannot be Party to try it during his Nonage. 17 E. 3. 59. Age 8. 18 E. 3. Age 11. Co. 6. Markal 4. b. 13 E. 3. Age 96. adjudged, (c) becauſe this is a Writ of Poſſeſſion. (d) 2 E. 3. 59. b.

2. (e) In a Formedon in Reverter brought by the Heir of the Donor the Parol ſhall demur for the Nonage of the Demandant, becauſe he demands a Fee, and this is a Writ of Right. 18 E. 3. Age 11. adjudged. Co. 6. Markal 3. 48 E. 3. 33 b. D. 3. 4. Mar. 137. 24. 12 E. 2 Age 145. adjudged.

(e) Dier 137. S. P. ſaid.

3. In a Formedon in Remainder of a Remainder intailed to his Anceſtor, the Parol ſhall demur (f) for the Nonage of the Demandant. 3 E. 3. Itinere Nottingham, Age 72 adjudged.

(f) But not without Plea pleaded, becauſe the Eſtate was never in the Poſſeſſion of any of his Anceſtors, and he muſt alledge the Eſplees in the particular Tenant. 6 Co. 4. a. Markal adjudged. vide Dier 133. Pl. 2. 138. Pl. 28. Moor 35. Dal. 37. Kelw. 205 a.

4. In a Sur cui in vita the Parol ſhall demur for the Nonage of the Demandant, without any Plea pleaded. (g) 2 E. 3. 63. adjudged.

(g) This perhaps is taken from Fitz. Age 67. or elſe is miſprinted in the Original; for there are not 63 fol. of that Year, and perhaps ſhould be. 2 E. 3. 36.

5. In a Writ of Warrantia Chartæ brought by an Infant, the Parol (h) ſhall not demur for his Nonage, tho' the Warranty was made to his Anceſtor. Temp. E. 1. Age 129.

(h) Otherways if the Defendant denies the Deed. 1 Rol. Abr. 141. Pl. 7. vide Fitz. Age 13.

6. (i) In a Writ of (k) Right of Ward the Parol ſhall not demur for the Nonage of the Demandant, tho' this be a Writ of right, Temp. E. 1. Age 128. adjudged.

(i) 2 Inſ. 112. like Point. (k) So in Eſcheat, Ceſſavit, droit ſur diſclaimer brought by an Infant, becauſe he hath the Seigniory in Poſſeſſion, in reſpect of which he claims, and no Right to the Land was ever in the Anceſtor. 6 Co. 3. b. Dier 137. Pl. 25.

7. (l) In a Writ of Right of the Poſſeſſion of the Demandant himſelf, the Parol ſhall not demur for the Nonage of the Demandant, becauſe this is brought of his own Poſſeſſion. (m) 41 E. 3. Age 38. adjudged.

(l) Dier 137. Pl. 24. S. P. ſaid. 6 Co. 3. b. S. P. ſaid.

(m) 6 Co. 3 b. S. C. cited and agreed.

8. (n) In a Writ of Right as Heir to his Anceſtor, (o) the Parol ſhall demur, without any Plea, becauſe this is an Action *Anceſtrel droiterel*, and he lays the Eſplees in his Anceſtor. 6 Co. 3. b. ſaid in *Markal*'s Caſe.

(n) This is not altered by the Stat' Glouceſter. cap. 2. 2 Inſ. 291.

(o) Tho the Battle may be deraigned by Champions. Dier 137. Pl. 24.

9. (p) So if an Infant aliens within Age, and dies within Age, and his Heir brings a *Dum fuit infra ætatem*, the Tenant may pray that the Parol may demur, and yet the Action did not deſcend, but the Right only; for the Father could not have this Action, becauſe he died within Age. 6 Co. 4. a. ſaid in *Markal*'s Caſe; and ſeems to me to be intended without Plea pleaded.

(p) Dier 104. Pl. 10. S. P. admit 1 Rol. Abr. 46. Pl. 6. vide and this is not altered by Glouc. cap. 2. 2 Inſ. 291.

10. So in a *Dum non fuit Compos mentis*. 6 Co. 4. a. in *Markal*'s Caſe ſaid.

11. If (q) in a *Scire facias* to execute a Fine, by which a Remainder was limited to the Grandmother of the Plaintiff, whoſe Heir, &c. the Defendant prays the Parol may demur, yet he ſhall anſwer over, becauſe he does not plead the Deed of his Anceſtor, &c. *Paſch.* 4 *Eliz.* between my Lord (r) *Sandys* and Sir *Edward Bray*, 1 *And.* 24 adjudged.

(q) Dier 138. Pl. 27. like Point cited.

(r) Dal. 37. S. C. adjudged the rather becauſe no Freehold is demanded by the Writ but an Execution of the Fine only. Kelw. 204. b. S. C. adjudged upon the Reaſon in Dal. Moor 35. Pl. 114, S. C. adjudged. Moor 16. Pl. 59. ſeems to be the ſame Caſe adjudged, tho' the particular Eſtate was determined in the Life of the Demandant's Father, and ſaid if the Defendant had pleaded the Deed of the Anceſtor, &c. it ſhould have demurred. N. Bend. 121. Pl. 152. S. C. adjudged. 6 Co. 3. a. S. C. cited.

(B) (*) In what Actions he ſhall have his Age.

(*) The general Rule is, that in all Actions brought of his own Poſſeſſion, the Parol ſhall not demur. 6 Co. 3. a. Cro. Jac. 467. per Cro. Juſ.

1. (a) IN a Writ of Dower the Parol ſhall not demur for Favour of Dower, and becauſe perhaps the Woman may die before his full Age. (b) 5 H. 5. 13 Curia. 17 (c) E. 3. 59. 12 E. 4. 12. Trin. 4 Jac. B. R. between Epps & Epps adjudged Skene, Quon. Attachiamenta, Cap. 90 and 99. the Law of Scotland is accordingly.

arguend'. Ante 254. Pl. 7. (a) 3 Bulſ. 141. S.P. per Dod' vide the ſeveral Books there cited, and the Reaſons there given. 145. S. P. allowed per Coke, Ch. Juſtice. 1 Rol. Rep. 323. S. P. per Curiam, what the old Law was in this Caſe, vide Cro. Jac. 393. 2 Brownl. 118. S. P. agreed by all the Judges. (b) Br. Age 17. S. C. Fitz. 19 S. C. 3 Bulſ. 138. S. C. cited and agreed per Haught. arguend'. (c) Fitz. Age 49. S. C.

2 (d) If a Woman brings a quod ei deforceat upon a Recovery had of Land which ſhe claimed to hold in Dower, the Parol ſhall not demur, becauſe it is of the Nature of a Writ of Dower. (e) 44 E. 3. 43.

(d) 3 Bulſ. 135. S. P. per Coke Ch. Juſtice, arguend'. fo. 136. per Coke. 1 Rol. Rep. 251. S. P. agreed per Curiam. 323. S. P. per Haught. (e) Fitz. Age 38. S. C. 3 Bulſ. 138. S.C. cited and agreed per Haught' arguend. 141. S. C. cited per Dod' arguend'.

3. But if Tenant in Dower be diſſeiſed, and the Diſſeiſor dies ſeiſed, his Heir ſhall have his Age againſt the Feme. (f) 44 E. 3. 43.

(f) 3 Bulſ. 142. S. C. cited as to this Point.

4. (g) In an Attaint againſt the Heir of him who recovered in the firſt Action, the Parol ſhall not demur for the Nonage of the Defendant, for the Miſchief of the Death of the petit Jury before his full Age. 47 Aſſ 4. Curia. (h) 47 E. 3. 9. (i) 9 H. 6. 46 Curia.

(g) 3 Bulſ. 135. S. P. per Haughton arguend'. So. 137. per Haught' arguend' 140. S. P. per Dod' arguend' 145. per Coke. 1 Rol. Rep. 251, 323. S. P. per Haught' and agreed per Curiam, and a further Reaſon given, becauſe for the Publick, and to puniſh a falſe Verdict. Cro. Jac. 392. 6 Co. 4. b. (h) Br. Age 9. S. C. Fitz. 43. S. C. but S. P. does not appear. (i) Fitz. Age 16. S. C. Br. 3. S. C. 3 Bulſ. 135. S. C. cited.

5. In an Attaint againſt the Heir of the Feoffee the Parol ſhall not demur for the Nonage of the Defendant, for the Miſchief of the Death of the petit Jury before his full Age. (k) 47 E. 3. 9. Curia. 9 (l) H. 6. 46. Curia. (m) 47 Aſſ. 4. Curia.

(k) Br. Age 9. S. C. (l) Fitz. Age 16. S. C. Br. 3. S. C. (m) Br. Age 60. S. C.

6. The ſame Law in an Attaint againſt Tenant in Dower within Age who was the Wife of the Recoveror, and is endowed of his Poſſeſſion. (n) 40 Aſſ. 20 adjudged.

Fol. 138.

(n) Br. Age 38. S. C.

7. (o) In a Quare Impedit the Parol ſhall not demur for the Nonage of the Patron Defendant, becauſe the Lapſe may incur during his Nonage. (p) 43 Aſſ. 21.

(o) 3 Bulſ. 142. S. P. per Croke Juſt. arguend' 145. per Coke, Ch. Juſtice arguend'. 1 Rol. Abr. 141. Pl. 4. S. P. tho' upon Plea pleaded. (q) Br. Age 40. S. C. Fitz. 75. S. C. 3 Bulſ. 131. S C. cited arguend'.

8. So if the King preſents in the Right of the Heir in Ward, to a Church of which another is Patron of the Grant of the Father of the Ward with Warranty of the Land to which this is appendant, who left Aſſets to the Ward, and the Patron ſues by Petition to the King to repeal his Preſentment ſhewing the Matter, the Parol ſhall not demur for the Nonage of the Ward for the Miſchief of the Lapſe, and this Suit is in nature of a Quare Impedit. (q) 43 Aſſ. 21. adjudged.

(q) Br. Age. 40. S.C. Fitz. 75. S. C. 1 Rol. Rep. 324. S. C. cited.

9. In a Writ of Eſtrepement againſt an Infant, he ſhall not have his Age, becauſe this Action is in nature of a Treſpaſs, and this is done by himſelf. (r) 3 H. 6. 16.

(r) Fitz. Age 14. S. C. Br. 1. S. C. Dier 104. Pl. 13. S. C. cited. 2 Inſ. 328. S. C. cited.

10. In

10 In an Assize the Tenant shall not have his Age, because this is of his own Wrong, and there shall be no Delays in this Writ. 38 E. 3. 27. adjudged.

(s) 6 Co. 4. b. S. P. said. Con. 1 Rol. Abr. 141. Pl. 12 S.P.Co.Lit. 380. b. 381 a. S. P. but several Books there cited Pro and Con. 8 Co. 44 b. S. P. said. 2 Inst. 401. S. P. Plod. Com. 364 b. S.P. per Walsh arguend'. 3 Mod. 222. S. P. arguend'. (t) Fitz. Age 109. S. C. (u) Raym. 118. S. C. cited. (x) Fitz. Age 109. S. C.

11. (s) In a Cessavit of his own Cesser the Tenant shall have his Age being in by Descent, because he cannot know what Arrearages to tender. (t) 28 E. 3. 99 b. adjudged. (u) Co. 9. Conny 85. 2 E. 2. Age 132. adjudged 30 E. 1. but otherways it is if he be in by Purchase dubitatur. (x) 28 E. 3 99 b. Contra 31 E. 3. Age 55. adjudged.

12. In a Writ of Partition between Coparceners Age does not lie for the Defendant, for nothing is demanded but a Partition. (y) 9 H. 6. (z) b. 8 H. 37. El. B. per Curiam contra 10 H. 4, 5.

(y) 6 Co. 4. b. S. C. cited and agreed. Co. Lit. 171. a. at the bottom. (z) This is misprinted in the Original, and perhaps should be. 9 H. 6. 6. b.

13. The same Law is of a Partition between Joint-tenants and Tenants in Common by the Statute H. 37 El. B. Curia. Hob. Rep. 242. between (a) Points & Gibson.

(a) Hob. fol. 179. S. C. adjudged.

14. (b) In a per quæ servitia the Defendant shall not have his Age, but shall be compelled to Attorn, for he is not prejudiced by his Attornment; for when he comes to full Age he may disclaim to hold of him, or say that he holds by less Service notwithstanding this Attornment. 42 E. 3. Age 33. 9 H. 6. B. (c) Co. 9. Conny 85. 32 E. 3. Age 80. adjudged, the Infant being a Purchaser.

(b) Co Lit. 315. a. S. P. 2 Brownl. 84. S. P. said. (c) 1 Rol. Abr. 141. Pl. 10. S. C. 2 Brownl. 84. S. C. and S. P. per Curiam.

15. (d) The same Law is in a Quid juris clamant against an Infant. 42 E. 3 Age 33. per Belknap, said to be adjudged contra. 2 E. 2 Age 78.

16. In a per quæ servitia, if the Tenant says the Conusor is dead, his Heir within Age, the Parol shall not demur for his Nonage, tho' it may be the Conusor was Tenant in Tail, for it seems the Heir, if he was of full Age could not come to plead this, but the Tenant may plead it, if it be true. Contra. 2. E. 2. adjudged 77 Age.

(d) Co. Lit. 315. a. S. P.

17. In a quid juris clamat by him in Reversion against Tenant in Dower, the Parol shall not demur for the Nonage of the Demandant, for be he of full Age, or within Age, he ought to warrant the Land to the Tenant in Dower because of the Reversion, by Force of an Act in Law. 13 E 2. Age 121. adjudged.

18. (e) But if an Infant in Reversion brings a Quid juris clamat against Tenant for Life the Parol ought to demur, (f) for he hath a Warranty against his Lessor by special Deed, to do which the Plaintiff who is within Age cannot bind himself. 13 E. 2. Age 121 Curia.

(e) 6 Co. 4 a. S. P. cited. (f) So where the Tenant for Life hath a Privilege, not to be impeached of Waste, &c. Co. Lit. 320. a. and b. 3 Bulst. 137. per Haught' arguend'. 9 Co. 85 b. 1 Rol. Rep. 323.

19. In a Writ of Mesn brought by by Baron and Feme in the Right of the Feme, the Parol shall not demur for the Nonage of the Feme. (g) 21 E. 3. Age 85. adjudged.

(g) 1 Rol. Abr. 142. Pl. 3. S. C.

Fol. 139.

20. (h) In a Writ of Mesn the Parol shall not demur for the Nonage of the Demandant, because it is brought for the Wrong and Damage done to the Demandant himself. Temp. E. 1. Age 119. adjudged. (i) 7 E. 3. Age 240 adjudged contra Tempore E. 1. Age 120. admit.

(h) 6 Co. 3 b. S. P. said. 9 Co. 85 a. said

21. In a Writ of Mesn brought by Tenant in Tail against him in Reversion, if he binds him to Acquittal by reason of the Reversion the Parol shall not demur for the Nonage of the Demandant. Tempore E. 1. Age 120.

(i) 6 Co. 3. S. C. cited.

22. In a Contributione facienda by one Coparcener against another, the Parol shall not demur for the Nonage of the Tenant, tho' he says that his Ancestor died seized and held sine contributione facienda (k) 4 E. 2. Age 136. adjudged.

(k) 1 Rol. Abr. 143. F. 6.

23. In a Writ of Cuſtoms and (l) Services the Parol ſhall demur for the Nonage of the Tenant being in by Deſcent. (m) 6 H. 3. Age 148.

(l) Yet he may be diſtrained for Rent during his Minority. 9 Co. 85. a. (m) 9 Co. 85. a. S. C. cited 1 Rol. Abr. 141. Pl. 11. S. C.

24. (n) If a Man recovers againſt A. who dies, in a Scire facias to execute this againſt his Heir within Age, he ſhall not have his Age. (o) 47 E. 3. 8. (p) 9 H. 6. 46. 18 E. 3. 33. (q) 23 E. 3. 22. 47 Aſſ. 4. (r) 28 Aſſ. 17. per Thorp. 15 E. 3. Age 95. adjudged. 8 E. 2. Itinere Cant. Age 124.

(n) 3 Bulſt. 141. S. P. per Dod' arguend' vide and the ſeveral Books there cited

(o) Fitz. Age 43. S. C. Br. 9. S. C. 3 Bulſt. 137. S. C. cited and agreed per Haught' Juſt. arguend'.
(p) Fitz. Age 16. S. C. Br. 3. S. C. (q) Fitz. Age 99. S. C. (r) Fitz. Aſſiſe 267. S. C.

25. The ſame Law in a Scire facias to execute a Fine againſt the Heir of the Conuſor, he ſhall have his Age. (*) 22 E. 3. 9. adjudged. 15 E. 3. Age 95. dubitatur 18 E. 3. 32 b. vide 44 E. 3. Age 37.

(*) Fitz. Age 97. S. C.

26. So it is if it be ſued againſt the Heir of a Stranger to the Fine. 24 E. 3. 29. adjudged. (s) 21 E. 4. 19. b. 33 E. 3. Aid del Roy 109.

(s) Fitz. Age 21. S. C. Br. 46. S. C.

27. (t) If a Man recovers in a præcipe quod reddat in a Scire facias againſt the Heir of the Alienee within Age to execute this Judgment, he ſhall not have his Age. (u) 2 H. 4. 16. b.

(t) 1 Rol. Rep. 323. S. C. cited per Haught' arguend'. Cro. Jac. 393. like Point per Dod'. (u) Br. Age 11. S. C. Br. Execution 24. S. C.

28. But if another than he againſt whom the Recovery was, dies ſeiſed, and a Scire facias is ſued againſt his Heir, he ſhall have his Age. 18 E. 3. 33.

29. If a Man recovers againſt an Abbot in a Contra formam collationis, in a Scire facias againſt the Tertenant, who prays in Aid of the Heir within Age, the Parol ſhall not demur. (x) 2 H. 4. 16. b.

(x) Br. Age 11. S. C. Br. Execution 24. S. C.

30. In a Scire facias againſt the Heir of him againſt whom the Recovery was had, if the Heir be in by Deſcent from another Anceſtor than he againſt whom the Recovery was had, he ſhall have his Age. (y) 23 E. 3. 22. adjudged. 15 E. 3. Age 95. admit.

1 Rol. Abr. 145. K. 2.

31. So in this Caſe, tho' the Anceſtor from whom the Heir claims by Deſcent was in by Deſcent, from him againſt whom the Recovery was. (z) 23 E. 3. 22. adjudged.

(y) Fitz. Age 99. S. C.

(z) Fitz Age 99. S. C.

32. In a Scire facias againſt the Heir of him who accepted a Special Tail by Fine, being dead without Special Iſſue the Heir ſhall have his Age. 2 H. 5. (a) 11. b. 12. admit.

(a) Fitz. Age 22. S. C.

33. If a Man brings a (b) Writ of Error againſt the Heir of him that recovered, being within Age, and in by Deſcent in the Land, the Parol ſhall not demur for his Nonage, tho' perhaps he hath a Releaſe, or other Matter to bar the Plaintiff, which he hath not Knowledge to plead within Age. 47 Aſſ. (c) 49. adjudged.

(b) Age lies not in a Writ of Diſceit. per 3 Bulſt. 135, 136. cited. 141. cited. 1 Rol. Rep. 251. becauſe the Summoners and Pernors may die. 326. per Coke. Cro. Jac. 392.

(c) This is miſprinted in the Original, for there are not ſo many placita of that Year; but perhaps it ſhould be Pl. 4. and 9.

34. (d) In a Writ of Error againſt the Heir of the Recoveror in a real Action, the Parol ſhall demur for his Nonage, tho' he hath nothing in the Land, but another is Tenant, becauſe he cannot have Conuſance of his Right, nor of that which is beſt for him. (e) 9 H. 6. 46. a. b. by all the Juſtices contra. (f) 47 Aſſ. 4. adjudged.

(d) 3 Bulſt. 138. S. P. per Haught' arguend' Con. But where Age ſhall be granted in a Writ of Error, and where not, vide 3 Bulſt. 138, 139, 140, 142. 1 Rol. Rep. 323, 324, 326. at the Top. Cro. Jac. 392. Moor 847. Pl. 1148. a. Diverſity where the Heir is Tertenant, and where not, vide the Books before cited, and Q. if this Difference is not warranted. (e) Fitz. Age 16. S. C. Br. 3. S. C. by which Books he ſhall have his Age only where he is Tertenant, and if Tertenant but of a Moiety, he ſhall have his Age for that only, and the Court ſhall proceed as to the Examination of the Errors quoad the other Moiety. (f) Br. Age 60. S. C.

Fol. 140.

35. If a Man in a Writ of Error against him who was privy to the Judgment reverses the Judgment, and after sues a Scire facias against the Heir of the Alienee of the Land within Age, he shall have his Age. 47 Ass. 4 per Candish.

36. So if a Man reverses a Recovery in a Writ of Disceit, and after sues a Scire facias against the Heir of the Alienee of the Land within Age, he shall have his Age Contra 47 Ass. 4. per Tank.

(g) Where it shall demur in a Scire facias to execute a Remainder limited to the Ancestor. Vid. Moor 16. Pl. 59. 1 And. 24. Dal. 37. Kelw. 204. b. Moor 35. Pl. 114. N. Bend. 121. Pl. 152.

37. In a Scire facias brought by (g) an Infant, the Parol shall not demur for the Nonage of the Demandant. Temp. E. 1. Age 119. per Berr.

(h) 3 Bulst. 134, 135, &c. S. C. adjudged per totam Curiam Con. Doderidge. 1 Rol. Rep. 250, 323. S. C. adjudged per totam Curiam Con. Dod'. Cro. Jac. 392, 393. S. C. adjudged per totam Curiam Con. Dod'. Moor 847. Pl. 1148. S. C. adjudged, but S. P. does not appear, but said Age was granted, because he that prayed it was Tertenant, and that if he had not been Tertenant he should not have had his Age in Error.

38. If Baron and Feme levy a Fine of the Lands of the Baron, and after the Husband dies, and the Conusee dies, his Heir within Age, against whom being Tertenant, the Wife brings a Writ of Error, but the Wife pleads she only claims Dower in the Land, yet the Parol shall demur, because the Wife may make other Title to the Land when reversed, and the Dower is not demanded in this Action as in a quod ei deforceat. H. 13 Jac. B. R. between (h) Harbert and Binion dubitatur upon Demurrer, but after the parties staid till his full Age, and then sued a Resummons. Scilicet Mich. 10 Car.

(i) Dal. 22. Pl. 4. S. C. adjudged. Moor 35. S. C. cited. Kelw. 205. S. C. cited.

39. In a Petition to the King in the Nature of a Formedon in Remainder, the Parol shall demur for the Nonage of the Petitioner. *Hill.* 3 and 4 *Ph. & Mar.* (i) *Basset's* Case, *Dier* 136, 137. adjudged by 4 Justices against 2.

(k) Hale, Pl. Cor. 183. said to have been adjudged of late Time, but yet the Book makes a Quere; but for this vide Title Appeal. (l) Dier 137. Pl. 24.

40. (k) In an Appeal of Murder, the Parol shall not demur for the Nonage of the Plaintiff. 2 *Inst.* 320. said to have been adjudged and approved by continual Experience of late Time, and the Reason (l) of Failure of Battle is of no Force, for a Man of 70 may have an Appeal, and the Defendant shall be ousted of Battle.

41. At Common Law if a Man had been disseised, and the Disseisee or Disseisor had died, their Heir being within Age, in a Writ of Entry *sur Disseisin* brought by the Heir of the Disseisee, or against the Heir of the Disseisor being within Age, the Parol should have demurred till the full Age of the Heir respectively. 2 *Inst.* 257.

(m) But by the Common Law, if the Grandfather had been disseised, and brought an Assise, and died pending the Writ, and after the Father had brought a Writ of Entry sur Disseisin, and pending this Writ the Father had died, if the Son had immediately brought a Writ of Entry, the Parol should not have demurred for his Nonage. 6 Co. 4. b.

42. So notwithstanding the Disseisor had died, (m) pending a Writ of *Novel Disseisin* against him. 2 *Inst.* 257.

(n) 6 Co. 4. a. S. P.

43. At (n) Common Law in a Mortdancester *Aiel Besaiel* or Cosinage, if the Tenant had pleaded a Feoffment or Release from a Collateral Ancestor with Warranty in Bar, *&c.* the Parol should have demurred. 2 *Inst.* 291.

(o) 3 Edw. 1. cap. 47. (p) So tho' he dies before Purchase of the Writ, for this is put only to shew the Mischief of this particular Case, whereas the Body of the Act is general. 2 Inst. 257. (q) This extends only to a Writ in the per, and not in the post; So that if the Heir of the Disseisor makes a Feoffment in Fee, and the Feoffee dies, his Heir within Age, in a Writ of Entry against him, he shall have his Age. 2 Inst. 257.—So it extends not to the

44. By the (o) Statute of *Westm.* 1 *Cap.* 47. it is enacted, That if one (p) purchase an Assise, and the principal Disseisor dies before the Assise passed, the Plaintiff shall have a Writ of Entry (q) against (r) his (s) Heir

the Mouchee or Prise in Aid. 2 Inst. 257. 2 Leon. 148.— If the Heir of the Disseisor takes Husband and has Issue within Age and dies, and the Disseisee brings a Writ of Entry against the Tenant by the Curtesy, and he prays in Aid of the Heir within Age, he shall have his Age, for this is a Writ of Entry in the post, being against Tenant by Curtesy. 2 Inst. 257. (r) This extends to the Heir of the Heir; so that in this special Case, a Writ of Entry in the per and Cui is within the Act. 2 Inst. 257, 258. (s) Special Heirs as in Gavelkind, Borough, English, &c. within the Act. 2 Inst. 258.

or Heirs of what Age soever; (t) so that if the Disseisee die before he hath purchased, his Heir or Heirs shall have, *&c.* so that for the Nonage of the Heirs of either, *&c.* the Plea shall not be delayed, but as much as can, fresh Suit must be made (u) after the Disseisin; so in Case of Prelates, &c. where there can be no Descent, *&c.*

(t) By this Clause, express Provision is made in Case the Disseisee die before Purchase of his Writ. 2 Inst. 258. (u) intended after the Death of the Disseisor, and fresh Suit regularly is within a Year and Day after his Death, within which Time continual Claim may be made. 2 Inst. 258.

45. By the Statute of (x) *Glouc'*, *Cap.* 2. Where an Infant is held from his Inheritance after the Death of his (y) Father, Cousin, Grandfather, *&c.* so that he is drove to his Writ, and the Tenant pleads a Feoffment or other Matter (z) whereby the Justices award an Inquest, the Inquest shall pass as if of full Age.

(x) 6 Edw. 1. cap. 2. (y) This put only for Example, for it extends to Mother, Brother, Sister, Uncle, &c. after the Death of any of which, a Mortdancestor lies. 2 Inst. 291.— But this Act extends not to Actions Ancestrel Droiterel, but giving the Infant a Trial during his Minority, it gave it in such Actions as he might not be forecloſed of his Right, but at his full Age might have recourse to a Writ of a higher Nature, and therefore it extends not to any Formedon dum non compos, infra ætatem, sur cui in vita, &c. 2 Inst. 291. yet vide Br. Age 5. (z) The Words of the Record are, per que le Justices agardant l'Age. 2 Inst. 291.

(C) In what Actions upon Plea pleaded the Parol shall demur.

1. IN Replevin against an Infant, if he avows upon the Plaintiff, and the Plaintiff shews forth the Release of the Father of the Infant to hold by less Services, yet the Parol shall not demur. 48 E. 3. 33. b.

2. In Trespass vi & armis against an Infant, who justifies for a Rent aut hujusmodi as Heir to his Father, if the other shews forth a Deed made by the Ancestor in Discharge, yet the Parol shall not demur, but he ought to answer to the Deed immediately. 48 E. 3. 34.

3. (a) In an Assise by an Infant the Parol shall not demur for the Warranty of his Ancestor pleaded, because all shall be inquired by the Assise. 48 E. 3. 33. b.

(a) 6 Co. 4. b. S. P. said, 1 Rol. Abr. 141. Pl. 10, 11. 142. Pl. 12. 8. Rep. 50. a. S. P. 2 Inst. 411. S. P.

4. (b) In a Writ of Debt against an Heir he shall have his Age, because at his full Age he may discharge himself by saying he hath riens per discent. (c) 18 E. 3. 33. (d) 11 H. 6. 10. b. 411. 3 E. 3. Age 51. adjudged. 19 E. 2. Age 122. admit per Issue. 8 E. 2. itinere Cant. (e) 125. adjudged H. 7. Jac. B. between Vivian and Trelawnye per Coke.

(b) 2 Inst. 89. S. P. Hautree and Anger, S. P. admit. Moor 74. Pl. 203. Dier 239. Pl. 39. 1 And. 10. N. Bendl. 148. Pl. 205. (c) Fitz. Age 13. S. C. (d) Fitz. Age 17. S. C. Br. Aid del Roy 105. S. C. (e) That is, Fitz. Age 125.

5. So in a Writ of Annuity against an Heir, he shall have his Age, because he may discharge himself by saying he hath nothing by Descent. Contra (f) 11 H. 6. 10. b.

(f) Fitz. Age 17. S. C. Br. Aid del Roy 105. S. C.

6. So if a Man sues Execution upon a Statute Merchant against an Heir within Age, and ousts him thereby, (g) an Assise lies for the Heir, (h) for he shall have his Age. 23 E. 3. 21 b. Curia 18 E. 3. 33. 47 Ass. 4.

(g) For the Extent is void which is made upon the Possession of the Infant. Hetl. 54. (h) Co. Lit. 290. a. S. P.

7. (i) So

(i) Co. Lit. 290. a. S. P. 2 Inſt. 89. S. P. (k) So tho' upon a Recognizance upon 23 H. 8. Statute Merchant or Staple. Co. Lit. 290. a.

7. (i) So if a Man ſues Execution upon a (k) Recognizance againſt an Heir within Age he ſhall have his Age, tho' he be charged partly as Tertenant. Co. 3. Sir William Harbert 13. 29 E. 3. 39. (l) 20, Aſſ. 37. adjudged. 11 E. 3. Age 4. adjudged. 12 E. 3. Execution 77. 15 E. 3. Age 95. per Thorp, ſaid to have been adjudged, 1 (m) E. 3. 3. per Herle, but Quære.

(l) Fitz. Age 73. S. C. Br. 36. S. C. (m) This I ſuppoſe is miſprinted, for I can find no ſuch Opinion there.

(n) Co. Lit. 290. a. S. P. (o) So if the Heir endow his Mother, Execution ſhall not be Sued againſt her during his Minority. Co. Lit. 290.

8. (n) So if a Man recovers in an Action of Debt againſt the Father, who dies in a Scire facias againſt the Heir upon this Judgment, (o) he ſhall have his (p) Age. H. 7. Jac. B. between Vivian and Trelawny, per Curiam, but the Clerk ſaid the Precedents were otherways, Contra H. 7. Jac. B. per Coke.

(p) But tho' upon a Judgment in Debt, or upon a Statute or Recognizance, there can be no Proceeding againſt an Infant at Common Law during his Minority, yet there may be in Chancery. 2 Chan. Rep. 164.

(q) Co. Lit. 290. a. S. P. (r) Fitz. Age 102. S. C.

9. (q) In a Scire facias againſt a Tertenant to have Execution of Damages recovered againſt J. S. if the Tertenant be within the Age, and in by Deſcent, he ſhall have his Age, (r) 24 E. 3. 28. adjudged.

Fol. 141.

(s) 1 Rol. Abr. 138. b. 14. S. P. with References.

10. (s) An Infant that hath the Tenancy by Deſcent ſhall not have his Age in a per quæ ſervitia brought againſt him. (t) Co. 9. Conny 85. Reſolved.

(t) 2 Brownl. 84. S. C. and S. P. per Curiam.

11. In a Writ of Cuſtoms and Services, which is a Writ of Right in its Nature, and in which Judgment final ſhall be given, an Infant in by Deſcent ſhall have his Age. (u) 6 H. 3. Age 148. Co. 9. Conny 85.

(u) 1 Rol. Abr. 139. Pl. 23. S. C.

12. (x) In a Ceſſavit againſt an Infant, for his own Ceſſer he ſhall have his Age becauſe he does not know what Arrearages to tender before Judgment, and this is a Writ of Right in its Nature. Co. 9. Conny 85.

(x) 1 Rol. Abr. 138. Pl. 11. S. P. vide and the ſeveral References in the Margin.

(D) Upon what Plea the Parol ſhall demur.

(a) 1 Rol. Abr. 137. A. 1. vide.

1. In a Formedon in (a) Deſcender, if the Tenant pleads the Feoffment of the Anceſtor of the Demandant with Warranty and Aſſets, and the Demandant denies the Deed, the Parol ſhall demur for the Nonage of the Demandant. Dubitatur. 2 E. 3. 59. b.

(b) 18 E. 4. 23. b. S. P. adjudged.

2. (b) In a Formedon in Deſcender brought by an Infant, if the Tenant pleads the Feoffment with Warranty and Aſſets of the Anceſtor of the Plaintiff, the Parol ſhall demur. 38 E. 3. 24. b. 43 Aſſ. 21. 27 Aſſ. 74. 11 E. 3. Age 6. 16 E. 3. Age 45. adjudged contra 33 E. 3. Age 153. till the Deed be denied. 2 E. 3. 59. b.

3. The ſame Law if a collateral Warranty be pleaded in Bar of this Action. 12 E. 4. (c) 12 b.

(c) This is miſprinted in the Original, and perhaps ſhould be 17. b. which vide Fitz. Age 18.

(d) 1 Rol. Abr. 138. Pl. 7. like Point with References.

4. (d) In a Quare Impedit, if a Feoffment of an Acre to which the Advowſon is appendant with Warranty of the Anceſtor of the Defendant is pleaded with Aſſets from the ſame Anceſtor, tho' the Defendant be within Age, yet the Parol ſhall not demur for the Miſchief of the Lapſe incurring in the mean Time. 43 Aſſ. 21. adjudged.

5. In a Formedon in Descender, if the Tenant pleads the Feoffment of the Ancestor of the Demandant to him and J. S. with Warranty and Assets, the Parol shall demur for the Nonage of the Demandant, without shewing that he hath the Estate of J. S. so that he may deraign the Warranty alone, for if the Demandant was of full Age, and should plead this Plea, this would be a Confession of the Deed for one Moiety. 13 E. 3. Age 96. adjudged.

6. In a Formedon in Descender, if the Tenant says that the Ancestor of the Demandant did not die seised, the Parol shall demur for the Nonage of the Demandant, for if he did not die seised he hath not this Writ in lieu of a Mortdancestor. 3 E. 2 Age 133.

7. In a Writ of Warrantia Chartæ upon a Warranty made to the Ancestor of the Demandant, if the Defendant denies the Deed, the Parol shall demur for the Nonage of the Plaintiff. Tempore E. 1. (a) Age 129. per Inge.

(a) 1 Rol. Abr. 137. Pl. 5. vide Fitz. Age 13.

8. In an Action of the Possession of the Infant himself, the Parol shall not demur upon any Plea pleaded. Co. 6. Marshal. 3 b.

9. As in a Writ of Entry of a Disseisin done to himself brought by an Infant, if the Tenant pleads the Feoffment of the Father of the Demandant with Warranty to him, yet the Parol shall not demur, because this is brought of his own Possession. (b) 12 E. 4. (c) 12 Co. Markal. 3 b.

(b) Fitz. Age 18. S. C. Br. Age 42. S. C. 67. S. C. (c) This is misprinted, and should be 17.

10. (d) In an Assize the Parol shall not demur for the Nonage of the Demandant, tho' the Deed of his Ancestor be pleaded in Bar, because this is brought of his own Possession, and the Circumstances shall be inquired in it. (e) 12 E. 4. (f) 12.

(d) 6 Co. 4 b. S. P. said. 1 Rol. Abr. 140. Pl. 3. 8. Rep. 50 a. S. P. 2 Inst. 411. S. P. (e) Fitz. Age 18. S. C. (f) This is misprinted in the Original, and should be 17.

11. So the Parol shall not demur in this Writ for the Nonage of the Demandant, if a Fine be pleaded in Bar, so that the Circumstances shall not be inquired. (g) 12 E. 4. (h) 12.

(g) This should be 17. (h) Fitz. Age 18. S. C.

12. So if a foreign Release be pleaded with Warranty, in which the Circumstances shall not be inquired. 12 E. 4. (i) 12.

Fol. 142.

13. In an Action real, if the Tenant pleads in Bar the Feoffment of the Ancestor of the Demandant with Warranty to J. S. and his Assigns, whose Assignee he is, and says that Assets descended to the Plaintiff, to which the Demandant says nothing descended; in this Case the Parol shall demur, because tho' the Feoffment and Warranty is not in question, but only the Assets which the Infant may well try, yet if he takes this Issue, the Deed of the Ancestor shall be held to be confessed by him. 29 E. 3. 12 b. adjudged. 11 E. 3. Age 6. 16 E. 3. Age 45. adjudged. 33 E. 3. Age 153. contra 23 E. 3. 22 b. adjudged.

(i) This should be 17.

14. So for the same Reason, if in a Formedon in Descender the Tenant pleads a Feoffment by the Ancestor of the Demandant to A. and B. the Father and Mother of the Tenant, and to the Heirs of the Father with Warranty, and that they are dead: and avers, that Assets are descended to the Demandant within Age, tho' the Demandant says, that B. the Mother of the Tenant is yet living; and so the Tenant hath not this Warranty. 11 E. 3. Age 6. adjudged.

15. In an Assize against an Infant, if the Issue be whether the Tenant be a Bastard or Mulier, which is to be tried by the Bishop, by which his Blood is to be bound perpetually, yet the Parol shall not demur, because this is of his own Wrong, and there shall be no Delay in this Writ. 38 E. 3. 27. adjudged.

16. But otherways it is in a Formedon in Descender; for there if the Issue be whether the Tenant be a Bastard, the Parol shall demur. 13 E 3. Age 7.

17. But otherways it is if the Issue be whether the Demandant be a Bastard. 13 E. 3. Age 7.

(E) For the Nonage of what Perſon the Parol ſhall demur.

1. THE Parol ſhall not demur for the Nonage of the King, becauſe the Law adjudges him of full Age. D. 3, 4. Ma. 137. 24. contra 2 H. 3. Age 149 admit.

2. In an Action brought by Baron and Feme for the Inheritance of the Feme, the Parol ſhall not demur for the Nonage of the Baron, (a) becauſe in the Right of the Feme. D. 3, 4. Ma. 137. 24.

(a) 1 Rol. Abr. 144. Pl. 4. vide.

3. In a Writ of Meſne brought by Baron and Feme in the Right of the Feme, the Parol ſhall not demur for the Nonage of the Feme. (b) 21 E. 3. Age 85. adjudged.

(b) 1 Rol. Abr. 138. Pl. 19. S. C.

4. In Detinue againſt an Executor upon a Delivery to the Teſtator, the Parol ſhall not demur for the Nonage of the Executor. (c) 11 H. 6. 40 b.

(c) Br. Coverture 63. S. C.

5. In an Action of Debt brought againſt Baron and Feme upon an Obligation of the Anceſtor of the Feme, the Parol ſhall demur, for the Nonage of the Feme. 8 E. 2. Itinere Cant. Age 125. adjudged.

6. (*) In a Præcipe quod reddat againſt Baron and Feme of Land that the Feme had by Deſcent, the Parol ſhall demur, for the Nonage of the Feme, tho' the Baron be of full Age. (d) 18 E. 3. 33. contra 24 E. 3. Age 134. per Shard.

(*) Rol. Abr. 144. Pl. 5. vide.
(d) Fitz. Age 13. S. C.

7. A Feme received for Default of her Husband ſhall have her Age, tho' the Baron was of full Age. (e) 18 E. 3. 33.

(e) Fitz. Age 13. S. C.

Fol. 143.

(F) For the Nonage of what Perſon for a collateral Reſpect the Parol ſhall demur.

1. IN a Writ of Right where Battle ſhall be joined or great Aſſize, if the Tenant ſhews any Matter to have his Age which makes him Heir to the ſame Perſon, of whoſe Seiſin the Demandant hath brought his Action, becauſe he claims to be Heir to the ſame Perſon, he ſhall not have his Age. 32 E. 3. Age 81. per Thorpe.

2. So in a Formedon in Reverter, if the Demandant makes himſelf Heir to the Donor as Heir at Common Law, and the Tenant claims as younger Son, as Heir to the Donor by the Cuſtom, and prays the Parol to demur for his Nonage, yet ſhall it not demur, becauſe they both claim to be Heir to the ſame Perſon. 32 E. 3. Age 81. adjudged.

(a) 6 Co. 4 b. S. P. cited and ſaid, for it is principally to try the Privity of Blood.

3. (a) In a Nuper obiit by the Aunt againſt the Niece, (b) and a Demand of the Seiſin of the Father of the Aunt who was the Grandfather of the Tenant, the Tenant who is in by Deſcent from her Mother ſhall not have her Age, becauſe they are one Heir, and of equal Condition as to Privity of Blood. 9 E. 2. Age 142. adjudged. 13 E. 2. Age 146. per Berr. (c) Where the Common Anceſtor died laſt ſeiſed, as this Caſe before is to be intended, as it ſeems.

(b) This is miſprinted in the Original, and inſtead of, Demand (as it ought to be) 'tis del ſeme and ſo inſenſible. (b) Co. 4 b. agrees.

4. But if Land deſcends to A. and B. Coparceners, and they enter, and have Iſſue, and die ſeiſed, in a Nuper obiit by one of them againſt the other within Age, the Parol ſhall demur for the Nonage of the Tenant, becauſe their common Anceſtor did not die laſt ſeiſed. 13 E. 2. Age 146. adjudged contra. 4 E. 2. Age 137. adjudged.

5. In

5. In a rationabile parte brought by one Copartener against another within Age, where they are by several Venters, the Parol shall not demur for the Nonage of the Tenant. 13 E. 1. Itinere North 155. adjudged.

6. In a Writ de Contributione facienda by one Copartener against another, the Parol shall not demur for the Nonage of the Tenant, tho' he says that his Anceſtor died ſeiſed, and held without Contribution to be made. (d) 4 E. 2. Age 136. adjudged. (d) 1 Rol. Abr. 139. B. 22.

(G) Who ſhall have it in reſpect of his Eſtate.

1. (a) If an Infant be in by Purchaſe he ſhall not have his Age. 47 E. 3. 8 b. 47 Aſſ. 4. 21 E. 4. 19 b. 41 E. 3. Age 39. 15 E. 3. Age 53. (a) Carr. 88. S. P. argu-end'.

2. If there be a Leaſe for Life, the Remainder to the right Heirs of J. S. who is dead at the Time his Heir within Age, he ſhall not have his Age when he come in by Aid Prayer, for he hath it by Purchaſe. (b) 7 H. 4, 5. (b) Br. Age 12. S. C.

3. If an Infant hath an Eſtate in Poſſeſſion by Purchaſe ſufficient to anſwer the Action, yet if he hath the Reſidue of the Eſtate by Deſcent, he ſhall not have his Age. 43 E. 3. 6. (c) 30 E. 3. 17. 11 E. 2. Age 144 admit. (c) Fitz. Age 58. S. C.

4. As if the Father and Son and Heir purchaſe to them and the Heirs of the Father, and after the Father dies, and a real Action is brought againſt the Son, he ſhall (d) not have his Age etſi he hath the Remainder in Fee by Deſcent. 43 E. 3. 36. (e) 30 E. 3. 17. adjudged. 39 E. 3. Age 26. (d) The Original is miſprinted, for there 'tis, il avera, &c. (e) Fitz. Age 58. S. C.

5. (f) If Leſſee for Life ſurrenders to an Infant who hath the Reverſion by Deſcent he ſhall not have his Age. Contra (g) 45 E. 3. 13. (h) 1 H. 6. 2 b. 22 E. 4 7 b. 11 E. 2. Age 144. adjudged.

(f) Co. Lit. 338 h. S. P. for quoad Strangers the Eſtate for Life hath Continuance. (g) Br. Age 8. S. C. (h) Br. Age 30. S. C.

6. If an Infant be in by Abatement and not by Deſcent, he ſhall not have his Age. (i) 2 H. 5. 11 b. 12. adjudged. 32 E. 3. Age 81 adjudged. (i) Fitz. Age 22. S. C.

Fol. 144.

7. If the Father infeoffs his Son and Heir in Fee with Warranty and dies, the Son ſhall have his Age, becauſe the Warranty is extinct, and therefore in lieu thereof, he ſhall be adjudged in by Deſcent. (k) 30 E. 3. 17 b. adjudged. (l) 24 E. 3. 36 b. (k) Fitz. Age 58. S. C. (l) Fitz. Age 105. S. C.

8. So if he be infeoffed by his Father without Warranty, for he may elect to be in of the one Eſtate or of the other. 5 E. 3. Age 61. adjudged.

9. If the Heir of the Diſſeiſee enters he ſhall have his Age. 9 H. 4, 5. (m) 2 H. 5. 11 b. (m) Fitz. Age 22. S. C.

10. If Tenant in Tail enfeoffs his Iſſue and dies, the Iſſue ſhall have his Age, for he is remitted and ſo in by Deſcent. 11 E. 3. Age 5. (n) 21 E. 4. 19 b. Temp. E 1. Remitter 13 adjudged. So if he takes the Eſtate of the Diſcontinuee. (o) 22 E. 4. 7. (n) Fitz. Age 21. S. C.

11. So if an Infant be enabled by Cuſtom to have and alien his Land at a certain Time, as at 15 Years of Age, or when he can meaſure a Yard of Cloth; after this Time, and before his full Age of 21 he ſhall have his Age, for the Cuſtom does not extend to this collateral Thing. 11 H. 4. (p) 36. 39 E. 3. 19 b. 31 E. 3. Age 54. adjudged. (o) Br. Age 48 S. C. (p) This is miſprinted in the Original, and I ſuppoſe ſhould be fol. 30. which vide Fitz. Age 24. Br. 14.

12. If a Deviſe be to the Heir in Tail, and if he dies, &c. that another ſhall ſell it, the Deviſee ſhall not have his Age, becauſe he hath the Eſtate Tail by Purchaſe. 24 E. 3. 36. adjudged. Quære (r) 3 H. 6. 46.

13. If a Gift be to the Father for Life, the Remainder in Tail to the Son, the Remainder to the right Heirs of the Father, and after the Father dies, and the Fee deſcends upon the Son within Age, (r) Br. Age 2. S. C. Fitz. 15. S. C.

(s) Fitz. Age 105. S. C.

yet he shall not have his Age, because he hath the Estate Tail by Purchase. (s) 24 E. 3. 36. adjudged.

14. So if a Gift be made to the Father for Life, the Remainder to a Stranger in Tail, the Remainder to the Son in Tail, the Remainder to the right Heirs of the Father, and after the Stranger dies without Issue, and after the Father dies, and the Fee descends upon the Son within Age, yet he shall not have his Age, because he hath the Tail by Purchase. 24 E. 3. 36. adjudged.

15. If *A.* being Tenant in Tail, enfeoffes *B.* to the Use of *A.* and his Wife for Life, and after to the Heirs of *A.* and *A.* dies, and the Wife grants her Estate to *C.* and his Heirs during the Life of the Wife, and *C.* enters and dies, and the Lands descend to his Heir, against whom the Issue in Tail brings a Formedon; The Defendant shall not have his Age because he is in only as an Occupant and no Estate of Inheritance descended. *Hill.* 16 *Eliz.* between (t) *Waller* and *Lamb. N. Bendl.* 232. Pl. 265. adjudged.

(t) 1 And. 21. S. C. adjudged, but the Book seems misprinted, and that the Word Defendant, in the second Line, should be Demandant. Cart. 88. S. C. cited.

(H) For what Thing.

(a) Kelw. 105. b. S. P.

1. (a) If the Tenancy escheats to an Infant, who is in by Descent in the Seigniory, he shall have his Age of this. 6 H. 4. Pl. 1. 16 E. 3. Age 46. per Curiam.

(I) The Parol Demur.

(a) Vouchee.

(a) When for the Nonage of the Vouchee in a Writ of Entry sur disseisin notwithstanding the Stat' of West. 1 cap. 46. vide.

1. If two Coparceners in Gavelkind are vouched as one Heir, the Parol shall demur for the Nonage of the youngest if he be seised, yet he is vouched but for his Possession. (b) 43. E. 3. 19.

2. So if one Coparcener be vouched and hath Aid of the other Coparcener, who is within Age, the Parol ought to demur. (c) 43 E. 3. 23 b.

2 Inst. 257. Dier 137. Pl. 24. (b) Br. Parol demur. 7. S. C. Fitz. Age 36. S. C. (c) Fitz. Counterplea d' Aid. 20. S. C. Br. Aid. 27. S. C.

3. If an Infant be vouched and bound to Warranty by the Deed of his Ancestor, the Parol shall demur for the Nonage of the Infant.

(d) Fitz. Age 49. S. C.

(d) 17 E. 3. 59.

4. If a Feme-tenant in Dower vouches the Heir of her Husband, and the Husband of the Heir, the Parol shall not demur for the Nonage of the Baron, his Wife being of full Age, (e) because the Baron is vouched only for the Inheritance of the Feme. (f) 28 E. 3. 99 b. adjudged.

(e) 1 Rol. Abr. 142. Pl. 2. 5, 6, 7.

(f) Fitz. Age 110. S. C.

5. But the Parol ought to have demurr'd if both had been within Age. 28 E. 3. 99 b. but Quære (g) so it should demur if the Feme (*) was within Age, tho' the Baron was of full Age. Contra (h) 28 E. 3. 99 b. per Will.

* Fol. 145.

(g) 1 Rol. Abr. 142. Pl. 6, 7, vide.

6. If the youngest Son enter into the Inheritance descended, the Parol shall not demur for his Nonage, if he be vouched as Heir within Age, if the eldest Son be of full Age who is Heir in right, because he cannot be Heir by Continuance. (i) 21 E. 3. 46.

(h) Fitz. Age 110. S. C.

(i) Br. Parol demur. 12. S. C.

7. (k) If a Bastard be vouched within Age by reason of his Possession, the Parol shall demur for his Nonage, because he may be Heir by Continuance all his Life without Claim to the contrary. (l) 21 E. 3. 46. 11 E. 3. Age 3.

(k) Co. Lit. 244 b. S. P. 8 Co. 101. b. like Point (l) Br. Parol demur. 12. S. C.

8. If an Infant be vouched by Leſſee for Life, by reaſon of the Reverſion which he hath by Deſcent, the Parol ſhall demur tho' he hath not the Freehold by Deſcent. (m) 30 E. 3. 17.

(m) Fitz. Age 58. S. C.

9. At Common Law, if the Husband had aliened the Lands of his Wife with Warranty, and died, and in a *Cui in vita* by the Wife, or a *Sur cui in vita* by the Heir of the Wife, the Alienee had vouched the Heir of the Husband within Age, the Parol ſhould have demurred till the full Age of the Voucher. 2 *Inſt.* 455.

10. But by the Statute of (n) *Weſt.* 2. *Cap.* 40. it is enacted, That if the Husband aliens the Right of his Wife (o) the Suit of her or her Heir after the Death of her Husband, ſhall not be delayed by the Nonage of the (p) Heir (q) that ought to warrant; but the (r) (s) Purchaſer ſhall (t) tarry till the Age of his Warrantor to have his (u) Warranty.

(n) 13 Edw. 1. cap. 40. But ſince the 32 H. 8. cap. 28. (by which an Entry is given to the Wife, or her Heir after an Alienation by her Husband) This Act is of little Uſe. 2 Inſt. 456. (o) Extends only to a cui, or ſur cui in vita, which are the proper Actions, upon an Alienation by the Huſband; for if the Wife is Tenant in Tail, and the Baron aliens, and dies, and ſhe dies, her Iſſue cannot have a ſur cui in vita, but a Formedon in which the Purchaſer may vouch the Heir of the Baron, and for his Nonage the Parol ſhall demur. 2 Inſt. 455. (p) So if there be two Parceners which make but one Heir, and one of them only is within Age. 2 Inſt. 255. (q) So that it extends only to the Heir of the Baron that aliened. 2 Inſt. 455. (r) Intended only of ipſe emptor, not his Heir. 2 Inſt. 456.—So of the immediate Purchaſer and not his Alienee, tho' he may vouch the Heir of the Baron as Aſſignee. 2 Inſt. 455. 4 Co. 50. a.—So intended only where the Purchaſer is Tenant in Deed, not where he comes in as Vouchee or Tenant by Receipt, and vouches the Heir, &c. 2 Leon. 148. 1 Co. 15. a. 4 Co. 50. a. (s) Of any Eſtate of Freehold. 2 Inſt. 456. (t) When he ſhall have a Re-ſummons. 2 Inſt. 456. (u) Whether in Law or Deed. 2 Inſt. 456.

(K) Parol Demur.

(a) Prayee.

1. If in an (b) Action againſt Tenant by the Curteſy he prays in Aid of the Heir within Age, the Parol ſhall demur. 43 E. 3. 36.

(a) Where for the Nonage of the Prie in Aid, and Tenant by Receipt in a Writ of Entry, notwithſtanding the Stat' Weſt. cap. 46. Vide 2 Inſt. 257. Dier 137. Pl. 24. 2 Leon. 148. (b) But if Error is brought againſt Tenant by the Curteſy, the Parol ſhall not demur for the Nonage of him in Reverſion, per 1 Rol. Rep. 251. ſaid per Haught' arguend', quod Coke conceſſit, becauſe he is not Tenant.

2. But in a Scire facias againſt Tenant by the Curteſy to execute a Recovery in a contra formam collationis againſt an Abbot, if he prays in Aid of the Heir within Age the Parol ſhall not demur. (c) 2 H. 4 16. b.

(c) Br. Age 11. S. C. 1 Rol. Abr. 139. Pl. 29.

3. If the Leſſee for Life hath Aid of the Remainder within Age, who is in by Deſcent, the Parol ſhall demur. 7 H. 4. 42. b. (d) 11 H. 4. 74. b. 24 E. 3. 32. b. (e) 27 E. 3. 87. but otherways it is if he be in as right Heir to J. S. which is by Purchaſe. 7 H. 4. 5. adjudged. (f) 11 H. 4. 74. (g) 27 E. 3. 87.

(d) Fitz. Age 25. S. C. (e) Fitz. Age 108. S. C. (f) Br. Age 15. S. C. Fitz. 25. S. C. (g) Fitz. Age 108. S. C.

4. If the Leſſee for Life hath Aid of him in the Reverſion within Age who is in by Deſcent, the Parol ſhall demur. 11 (h) H. 4. 30. (i) 11 H. 6. 10. b. (k) 18 E. 3. 33. 30 E. 3. 17. 14 E. 3. Age 87. adjudged.

(h) Fitz. Age 24. S. C. (i) Fitz. Age 17. S. C. (k) Fitz. Age 13. S. C.

5. If there be Leſſee for Life, the Remainder to the right Heirs of J. S. who is dead, and after the right Heir dies, his Heir within Age, and the Leſſee hath Aid of him, the Parol ought to demur, for he is in by Deſcent. 27 E. 3. 87.

6. So if J. S. at his Death hath two Daughters and Heirs, and after the one dies, and her Part deſcends to her Daughter within Age, the Parol ought to demur for her Nonage, tho' the Aunt is in by Purchaſe. (l) 27 E. 3. 87.

(l) Fitz. Age 108. S. C.

7. In Annuity againſt a Parſon, if he hath Aid of the Ordinary and Patron within Age, yet the Parol ſhall not demur for the Nonage of the Patron, for the Charge lies not upon the Patron but upon the Parſon. (m) 11 H. 6. 10. b. (n) 21 H. 7. 4. 15 H. 7. Age 127. adjudged.

(m) Fitz. Age 17. S. C. Br. 72. S. C.

(n) Br. Age 29. S. C. Fitz. 127. S. C. 1 Rol. Rep. 323. S. C. cited.

8. (o) If he in the Reverſion by Deſcent be received upon Default of the Leſſee, the Parol ſhall demur for his Nonage, tho' the (p) Statute is paratus petenti reſpondere. (q) 18 E. 3. 32. b. 19 E. 3. Age 1. adjudged as I underſtand it. 22 E. 3. Age (r) 52, 53. adjudged. 2 E. 2. Age 79. adjudged. 14 E. 3. Age 86. adjudged. 9 E. 2. (s) Age 142. adjudged. 13 E. 2. Age 147. adjudged. 30 E. 1. Itinere Cornub. Age 150. adjudged.

(o) Dier 298. b. like Point cited Con. (p) Viz. 13 E. 1. cap. 3. which vide 2 Inſt. 341, &c. (q) Fitz. Age 13. S. C.

(r) This is miſprinted in the Original, and ſhould be 55, 56. (s) This is miſprinted in the Original, and ſhould be 143.

8. If two in Reverſion by Deſcent are received upon Default of the Leſſee, and the one is within Age the Parol ſhall demur. 18 E. 3. 12. adjudged.

9. (t) If a Feme in by Deſcent be received by Default of her Husband, the Parol ſhall demur for her Nonage, tho' the (u) Statute be parata petenti reſpondere. (y) 18 E. 3. 33. 5 E. 3. Age 61. adjudged.

(t) 2 Inſt. 344. S. P. (u) Viz. 13 E. 1. cap. 3. which vide 2 Inſt. 341, &c. Explained. (y) Fitz. Age 13. S. C.

Fol. 146.

10. In an Avowry for a Rent-charge reſerved upon a Purparty, if the Plaintiff Leſſee for Life hath Aid of him in the Reverſion within Age, who is in by Deſcent in the Reverſion, yet the Parol ſhall not demur. 16 E. 3. Age 48. adjudged, it ſeems becauſe the Land is not in Demand. Vide the Book in Aid 131. This was in a ſecond Deliverance, where the Father of the Prayer was ſummoned to join in Aid in the firſt Action and made Default; but it ſeems that this does not alter the Caſe.

(L) At what Time it ought to be demanded.

1. (a) If a Man hath Aid of an Infant and of the King, becauſe the Infant is in Ward to him, after a Procedendo the Parol ſhall not demur upon Demand for the Nonage of the Ward, tho' this ought to have been granted if he had demanded it at the Time of the Aid Praier; for the Procedendo commands the Juſtices to proceed, and he ought to have ſhewn this in Chancery to ſtay the Procedendo. (b) 11 H. 6. 10. b.

(a) Vide N. Bend. 118. Pl. 151. 4 Leon. 201. Dier 256. Pl. 4. (b) Br. Age 72. S. C. Fitz. 17. S. C.

(M) (a) Counterplea.

What ſhall be a (b) good Chunterplea.

1. If a Man ſays (in an Action in which Age lies) that his Anceſtor was ſeized in Fee, and died ſeiſed, and this deſcended to him within Age, and prays his Age, (c) it is a good Counterplea that his Anceſtor did not die ſeiſed. 29 E. 3. 6. b. (d) but Quære.

2. If an Infant upon Default of the Tenant prays to be received, becauſe the Tenant is Tenant by the Curteſy after the Death of his Mother, the Reverſion to him by Deſcent as Heir to his Mother, and prays the Parol may demur, it is a good Counterplea of the Age, that the Land was given to the Mother and her firſt Husband in ſpecial Tail, and the Husband died without Iſſue, and ſhe took the Tenant for her ſecond Husband; ſo the ſecond Husband in by Abatement. 32 E. 3. Age 55.

(a) For this vide 3 Bulſt. 144. and the ſeveral Books there cited. (b) That he is a Baſtard, hath an elder Brother, or that his Father was attainted, &c. Dier 137. Pl. 26. 3 Bulſ. 144. vide and the ſeveral Authorities there cited. 1 Rol. Rep. 325. and the Books there cited. Cro. Jac. 393. (c) In a like Caſe the Demandant traverſes the Deſcent, and Day given the Tenant, to adviſe what to do. Hob. 266. (d) Vide 3 Bulſt. 145. at the Top. 1 Rol. Rep. 325.

(N) In what Caſes if the Parol demur againſt one, it ſhall againſt another alſo.

1. If two are vouched, if the Parol demurs for the Nonage of one, it ſhall for the other alſo. 45 E. 3. 23.

2. If Aid is prayed of 2 Coparceners, viz. the Aunt and the Niece, and the Aunt hath the Remainder by Purchaſe, and the Niece is within Age, and hath the Remainder by Deſcent, the Parol ſhall demur for both. (a) 27 E. 3. 87.

(a) Fitz. Age 108. S. C.

3. So if Aid be prayed by one Coparcener of two other Coparceners, of which one is within Age and the other of full Age, the Parol ſhall demur for all. 33 E. 3. Aid del Roy 109.

4. If one Coparcener hath Aid of the other within Age, if the parol ſhall demur for the Nonage of one, it ſhall demur for both. 9 H. 6. 47.

5. If the Tenant vouch himſelf and J. as Heirs, and J. is within Age, the Parol ſhall demur for both. 13 E. 3. Itinere North. (b) 52. adjudged.

(b) That is, Fitz. Age 52.

6. In a Dum fuit infra ætatem by 2 Coparceners of the Seiſin of their (c) Anceſtor, for the Nonage of one Demandant the Whole Parol ought to demur. D. 3. 4. Ma. 137. 25. (d) 30 E. 3. 7. b.

(c) The Original is miſprinted here, for in Lieu of the Word Anceſtor, it is Coparceners. (d) Fitz. Age 82. S. C.

7. So in a non compos mentis by 2 Coparceners of a Seiſin of their Anceſtor, the Parol ſhall demur for both for the Nonage of one, D. 3. 4. Ma. 137. 25.

Fol. 147.

8. In a Writ of Entry ſur Diſſeiſin by 2 Coparceners, of which one is within Age, qui non proſequitur upon the Summons, yet the Parol ſhall demur againſt the other alſo. 12 E. 1. Itinere Wilts. Age 130. adjudged.

9. If a Writ of Error be brought againſt the Heir of the Recoveror within Age, and a Scire facias againſt the Tertenant, if the Parol demurs for the Heir, yet it ſhall not demur as to the Tertenant. (e) 9 H. 6. (f) 4 b. for the Heir ſhall not be at any Prejudice if it is reverſed as to the Tertenant.

(e) Fitz. Error 20. S. C. Br. 9. S. C. Fitz. Age 16. S. C. and vid. Fitz. Error 20. (f) This is miſprinted in the Original, and ſhould be 46.

10. If a Contra formam collationis be brought againſt an Abbot, and a Scire facias againſt the Tertenant who is in by Deſcent, and he hath his Age, yet the Parol ſhall not demur as to the Abbot. 9 H. 6. 47.

11. If 4 enter into a (g) Recognizance, and after one dies, his Heir within Age in a Scire facias againſt the Heir and the reſt, the Parol ſhall demur againſt all. (h) 29 Aſſ. 37. adjudged. 29 E. 3. 39.

(g) So where 2 are bound in a Statute, and one dies, his Heir being within Age. Hetl. 59. Lit. Rep. 72. (h) Fitz. Age 73. S. C. Br. 36. S. C. Br. Parol demur 16. S. C. 3 Co. 13. a. b. S. C. cited.

12. In a Scire facias againſt the Tertenants to have Execution of Damages recovered againſt J. S. if the Parol demurs againſt one of the Tertenants for his Nonage, it ſhall demur againſt all. (i) 24 E. 3. 28. adjudged.

(i) Fitz. Age 102. S. C. Br. 24. S. C. 3 Co. 13. S. C. cited.

13. (k) In a Scire facias if 2 Coparceners are received upon the Default of the Leſſee, and the Parol demurs for the Nonage of one of the Coparceners, it ſhall demur for both. 44 E. 3. Age 37. adjudged.

(k) 3 Co. 13. a. like Point per Coke. Co. Lit. 164. a. vide.

14. If in Debt upon an Obligation againſt *B.* and *C.* Sons and Heirs of the Obligor; and againſt *D.* the Daughter and Heir of *A.* who was another of the Sons and Heirs of the Obligor in Gavelkind, Proceſs is continued till the Uncles are outlawed and the Niece waived, and after the Uncles are pardoned and bring a *Scire facias* againſt the Plaintiff, who thereupon

upon declares againſt them *ſimul cum* the Niece, and the Uncles plead their Niece is but of the Age of 7, *Unde non intendunt quod durante minore ætate ſua*, they ought to Anſwer, *&c.* yet the Parol ſhall not demur; for the Niece is out of Court, and *quoad* her the Original is determined, and at her full Age no Reſummons could be ſued againſt her, but the Uncles only, because ſhe never appeared in Court. *Trin.* 7 *Eliz.* between (l) *Huwtry* and *Anger*. *Dier* 239. *Pl.* 39.

(l) N. Bendl. 148. Pl. 205. S. C. with the Pleading adjudged. Moor 74. Pl. 203. S. C. adjudged. 1 And. 10. Pl. 22. S. C. adjudged.

(O) In what Caſes the Demurrer of the Parol for Part ſhall be for All.

1. IN a Writ of Error upon a Judgment for divers Things againſt an Infant upon a Recovery by his Anceſtor, if the Infant diſclaims for Part, by which the Judgment is to be reverſed for Error therein, yet for the Nonage of the Infant the Parol ſhall demur for the reſt, and this ſhall make the Parol to demur alſo, for that in which the Infant hath diſclaimed, becauſe it is but one Record, and therefore if he hath his Age as to Part, he ſhall have it for the Whole. 47 Aſſ. 4.

2. The ſame Law in an Action againſt an Infant, if he acknowledges the Action of the Demandant for Part, (a) yet if the Parol demurs for the reſt, it ſhall demur for all. 47 Aſſ. 4.

(a) In a Præcipe quod reddat the Tenant may confeſs the Action for Part, and pray his Aid for the Reſt. Br. Age 9. per Tank.

3. If an Infant brings a Writ of (b) Entry, ſur Diſſeiſin to his Father, and the Tenant pleads the Releaſe of the Father as to Part of the Land in Demand, by which the Parol is to demur for this, yet it ſhall not demur for the reſt. 19 E. 2. Age 123. adjudged.

(b) In a Writ of Entry ſur diſſeiſin in the per Age is taken away by Weſt. 2. cap. 47. which vide 2 Inſt. 256. 257.

4. In an (c) Aſſiſe by 3 Coparceners, if the Tenant claims as Tenant by the Curteſy of the Whole, and prays in Aid of one of the Plaintiffs in Reverſion within Age, and hath Aid of him, by which the Parol ought to demur for the third Part that belongs to the Infant, and not for the reſt, yet becauſe the Aſſiſe ſhall not be taken by Parcels it ſhall demur for the Whole. (d) 41 Aſſ. 37.

(c) I ſuppoſe this is intended of Mortdanceſter, for in an Aſſiſe of Novel Diſſeiſin even at Common Law the Parol ſhould not have demurred. 1 Rol. Abr. 141. Pl. 10, 11. (d) This is miſprinted in the Original, for there are not ſo many placita of that Year, and I ſuppoſe it ſhould be 40 Aſſ. 37. which vide. Br. Age 39. Fitz. Voucher 207.

5. In an Aſſiſe againſt an Infant of Land, Parcel of which he had by Deſcent, and Parcel by Purchaſe; ſo that the Parol ought to demur for that deſcended, but not for the other; yet becauſe the Aſſiſe ſhall not be taken by Parcels it ſhall demur for All. (e) 41 Aſſ. 37. per Finchden.

(e) This is miſprinted in the Original, and I ſuppoſe ſhould be 40 Aſſ. 37.

Pleader.

(a) Prayer of Age.

1. (b) The Granting that the Parol ſhall demur, in Judgment of Law is in Favour of the Infant; therefore the Court *ex officio* ought to grant it, tho' the Tenant will anſwer. 6 *Co.* 5 *a.* ſaid and cited the 8 *Ed.* 3. 10.

but the Plea is put without Day until full Age. 2 Inſ. 258. at what Time there ſhall be a Reſummons. As appears by Raſtal's Ent. 360 b. (b) Vide 3 Bulſ. 136. at the top.

(a) Where Age is granted, or the Parol demurs, the Writ does not abate,

2. In a Formedon if the Tenant vouches *J. S.* as Coſin and Heir of, *&c.* and for his Nonage prays that the Parol may demur, he ought to ſhew how he is Coſin. *Hill.* 6 and 7 *Ed.* 6. between *Colvil* and *Hudleſton. Dier* 79. *Pl.* 48. *per Curiam. Contra* 15 *Ed.* 4. 4. there cited.

3. If in Dower the Tenant vouches one within Age, in Favour thereof he ought to ſhew a Deed. 6 *Co.* 5 *a.* ſaid.

(a) Counterplea.

1. (b) A Counterplea of Age is like an Eſtoppel, and therefore ought to be very plain and certain to every Intent. 3 *Bulſ.* 144.

mandant, Judgment final ſhall be given, notwithſtanding the Infancy of the Tenant. 1 Lev. 163. adjudged, Raym. 118. adjudged. 1 Keb. 869. adjudged; 1 Sid. 252. S. C. adjudged; but the Book miſtaken in ſaying the Iſſue was found for the Tenant. Vide. (b) 1 Rol. Rep. 144.

(a) Where Iſſue is taken upon the Counterplea, and found for the De-

Aid of the King.

(a) Fol. 148.

(A) In what Actions.

1. IN Treſpaſs againſt Tenant in Fee of the Grant of the King, Aid does not lie, becauſe no Prejudice can come to the King. 18 H. 6. 12.

2. In Treſpaſs Aid ſhall be granted of the King. (b) 45 E. 3. 3. 46 E. 28 b. 9 H. 6, 56.

(b) Br. Aid del Roy 16. S. C. Fitz. 56. S. C.

3. In Treſpaſs de clauſo fracto, &c. Aid ſhall be granted of the King, becauſe by Common Intendment the Freehold is the Cauſe of the Action, this being for Things annex'd to the Land contra. (c) 4 H. 6. 10. adjudged 18.

(c) Br. Aid. del Roy 55. S. C.

4. In Treſpaſs de bonis aſportatis, or Battery, Aid lies not, becauſe the Freehold cannot be intended the Cauſe of the Action. 4 H. 6. 10 b.

5. Aid lies in Treſpaſs upon the Caſe. (d) 7 H. 4. 2 b.

(d) Br. Aid del. Roy 24. S. C.

6. In an Action upon the Caſe againſt the King's Farmer of a Leet for holding the Leet Aid lies. (e) 18 H. 6. 12. adjudged.

(e) Fitz. Aid del Roy 19. S. C. 1 Rol. Abr. 150. Pl.

7. In an (f) Aſſize Aid (g) ſhall be granted of the King in Reverſion. (h) 4 H. 4. Pl. 19. adjudged.

7. S. C. 151. Pl. 3. (f) But of none but the King. 8 Co. 50 a. 2 Inſ. 411. unleſs Party to the Writ. 1 Rol. Abr. 161. Pl. 13. (g) If the King grants Lands without Title, found by Office, or otherways where the King's Entry is not given by Law, and by colour thereof the Owner is diſſeiſed and brings an Aſſize, and the Patentee prays in Aid, a Procedendo ſhall be granted by the Chancellor without other Suit to the King, per 1 H. 4. cap. 8. (h) Fitz. Aid del Roy 96. S. C.

(i) 1 Rol. Rep. 288. like Point arguend' cited. (k) Br. Scire facias 76. S. C. Fitz. 68. S. C. (l) 1 Rol. Rep. 289. vide at the Bottom.

8. (i) The Indictee of Felony being outlawed, brings a Writ of Error, and hath a Scire facias against the Tertenants and Lords; one Tertenant comes and says that the King granted the Land to him for Life, yet he shall not have Aid of the King, because by this Writ he hath no Day in Court but to hear the Record. (k) 11 H. 4. 53. b.

9. In Replevin Aid shall be granted of the King. 9 H. 6. 56.

10. Tenant in Fee of the Grant of the King shall have Aid in real Actions (because if the Demandant recovers, the King (l) shall change his Tenant.) 18 H. 6. 13.

1 Rol. Rep. 288. S. P. admit arguend'. 1 Rol Abr. 151. Pl. 5.

(m) 1 Rol. Rep. 292. S. P. arguent' cited Con. 1 Rol. Abr. 162. Pl. 22. vide. (n) Riege inconsulto allowed in a Quare Impedit, per 1 Rol. Rep. 290. cited. (o) Br. Aid del Roy 96. S. C. Fitz. Aid 96. S. C.

11. (m) In a (n) Quare Impedit, Aid shall not be granted of the King, because this is brought upon his own Disturbance, and for the Mischief of the Lapse in the mean Time. (o) 5 H. 7. 16.

(p) Fitz. Aid del. Roy 23. S. C. Br. Forcible Entry 6. S. C. (q) Nevill and Barrington, S. P. Moor 421. Pl. 583. dubitatur. Cro. Eliz. 417. adjudged per totam Curiam. 1 Rol. Rep. 207. cited. 3 Keb. 741. vide. (r) 1 Rol. Abr. 161. Pl. 1. vide 156. Pl. 5. vide. (s) 2 Inst. 289. S. C. cited to be adjudged. M. 34 and 35 Eliz. Moor 421. S. C. cited. 1 Rol. Rep. 188. S. C. cited. 3 Bulst. 33. S. C. cited. Dier 320. Pl. 18. perhaps S. C. adjudged; but Q. because of different Time.

12. In an Action of forcible Entry, the Defendant being Tenant for Life, shall have Aid of the Heir in Reversion, and of the King in whose Ward the Heir is, the Defendant making Title by the Lease of the Father of the Heir. (p) 22 H. 6. 17 b. 18. adjudged.

13. (q) In an Ejectione firmæ the Defendant shall have Aid of the King (it seems the King had the Reversion before Issue) because (r) by Intendment the Freehold shall come in Debate in this Action the (s) Earl of Kent's Case adjudged, cited 3 Jac. B. R.

(a) Cro. Eliz. 694. S. C. and S. P. adjudged per Popham & Gawdy, 5 Co. 809. S. C. adjudged for that the Cause of Aid Prier was insufficient, and no Notice taken of this Point.

14. In an Action of Trover and Conversion for Sheep, the Defendant shall not have Aid, because this is but a transitory Action and not local. *Mich.* 41 and 42 *Eliz.* between (a) *Foxly* and *Ansly*. *Moor* 672. *Pl.* 785. adjudged *per totam Curiam*.

15. If in a Writ of Error to reverse a Judgment, the Defendant in Error prays in Aid of the King, it shall not be allowed, because the Land is in demand collaterally only. *Trin.* 10 *Jac.* between *Baker* and *Nichols*. 1 *Bulst.* 218. resolved *per Curiam*.

(b) This Act was not in Print till the latter End of the Reign of H. 8. and so not being commonly known, Aid was several Times granted expressly contrary thereto. 2 Inst. 271. 9 Co. 16 b. (c) 4 Edw. 1. cap. 3. which vide explained 2 Inst. 271. (d) Tho' this Act extends only when the King hath granted the Custody over, or the Heir comes in as Mouchee; yet the 18 Edw. 1. made about 14 Years after, and entered upon the Parliament Roll provides where the King does not grant the Custody over, &c. 2 Inst. 271. vide. (e) A Fortiori the Justices shall not surcease where the Writ is brought against the Heir notwithstanding the Possession of the King for his primer Seisin. Bedingfield's Case. 1 Leon. 285. adjudged. 4 Leon. 87. adjudged. 9 Co. 17 a. adjudged.

16. By the (b) Statute of (c) *Bigamis*, *Cap.* 3. concerning the Dower of Women, where the Guardians of the Inheritance of the Husband have the Wardship by (d) Gift or Grant of the King, or are Tenants of the Thing in Demand, or (e) the Heir be vouched to warrant, and they say they cannot answer without the King, the King shall not surcease, *&c.*

(B) In what Caſes it lies contrary to the Suppoſal of the Writ.

1. IN an Aſſize in S. in the County of H. if the Tenant ſays that the Land is in F. which is in the County of E. and that the King gave it to him rendring 40 l. Rent per Annum, he ſhall not have Aid of the King; becauſe this is contrary to the Suppoſal of the Writ, ſo that if Aid ſhould be granted, the Writ would abate, and the Tenant is at no Prejudice if he hath not the Aid. (b) 21 E. 3. 19. adjudged.

(b) Fitz. Aid. del Roy 2.

S. C. 1 Rol. Abr. 157. Pl. 1. S. C.

2. In a dum fuit infra ætatem, if the Tenant ſays that he holds by Vertue of a Leaſe from the King by this Patent, and ſhews it forth, by which it appears that he hath but a Chattel, and not a Freehold, which is contrary to his own Acceptance, for he hath accepted the Writ good, yet becauſe the King's Right ſhall not be tried without the King, he ſhall have Aid of the King. 31 Edw. 3. Aid del Roy 69. adjudged.

Fol. 149.

(C) Upon Demand of what Thing.

Of another Thing than that which is in Demand.

1. IF the King's Farmer be ſued upon his own Grant made by him after the Grant of the King, he ſhall not have Aid. (a) 48 Ed. 3. 18.

(a) Fitz. Aid. del Roy 59.

S. C. Br. 19. S. C. 1 Rol. Abr. 165. Pl. 1. like Point.

2. If a Common be demanded to iſſue out of the Land of the King's Leſſee for Life, he ſhall have Aid of the King. (b) 6 Hen. 4, 5 b. 4 Hen. 6. 11, 19. (c) 1 Aſſ, 1. adjudged.

(b) Fitz. Counterplea d'Aid 13. S. C.

and like Point, but S. P. does not appear. (c) Fitz. Aid del Roy. 86. S. C.

3. If a Rent or Common be demanded to iſſue out of the Land of the King's Leſſee for Life, he ſhall have Aid of the King. (d) 6 Hen. 4, 5 b. 4 Hen. 6. 11. 19. (e) 3 Aſſ. 1. adjudged, tho' the Aid be granted of another Thing which is not in Demand.

(d) Fitz. Counterplea de Aid 13. S. C. like

Point; but S. P. does not appear. (e) Fitz. Aid del Roy 87. S. C. Br. 70. S. C.

4. If a Common be demanded to iſſue out of the Land of the Feefarm of the King rendring Rent, he ſhall have Aid of the King. 13 H. 4. Aid del Roy 99. Curia dubitatur. (f) 46 Aſſ. 1.

(f) 1 Rol. Abr. 151. Pl. 6. S. C.

5. If a Common be demand to iſſue out of the Lands of the King's Tenant of the Gift of the King diſcharged of Common, he ſhall have Aid, tho' he is to have Aid of another Thing than that which is in Demand. (g) 25 Aſſ. 8. (h) 29 Aſſ. 19.

(g) Br. Aid del Roy 75. S. C.

(h) Fitz. Aid del Roy 75. S. C.

(D) In

(D) In what Caſes it ſhall be granted of the King where the King is Party.

1. IN Treſpaſs by the King for taking of Toll of his Tenants who are Toll-free, the Defendant juſtifies as Fee-farmer (as it ſeems) of the King, and had Aid of the King. (a) 7 Hen. 4. 2 b.

(a) Br. Aid del Roy 24. S. C.

2. If an Office be found for the King, that ſuch a one held of the King in Chivalry, and died his Heir within Age, by which he ſeizes the Ward, and commits it to another during the Nonage, upon which another comes and traverſes the Office, and upon this a Scire facias iſſues againſt the Patentee, who comes and ſhews that the King granted the Ward to him, and prays in Aid of the King; yet he ſhall not have it becauſe the King is Party to the Plea, and the Patentee may join to the King by force of the Scire facias. (b) 15 Hen. 7. 10. per Curiam.

(b) Fitz. Aid. del Roy 97. S. C. Br. 50. S. C.

3. But if the Office be traverſed and found falſe, and after a Scire facias is granted againſt the King's Leſſee, he ſhall have Aid of the King. (It ſeems becauſe that now the King is not Party, for the Plea between him and the Plaintiff is determined) (c) 37 Aſſ. 11. adjudged.

(c) Br. Aid del Roy 84. S. C. 1 Rol. Abr. 152. Pl. 14. S. C.

4. If the Patentee be to have a Recompence in Value againſt the King, he ſhall have Aid of the King, tho' the King be Party, becauſe he ſhall not have the Recompence without Aid. (d) 15 Hen. 7. 10. per Curiam.

(d) Fitz. Aid 97. S. C. Br. 50. S. C.

5. Where the Cauſe of the Action is more ancient than the Cauſe of the Aid Prayer of the King, the Aid does not lie. (e) 4 Hen. 6. 12.

(e) Fitz. Aid del Roy 10. S. C.

6. As in Treſpaſs for a Treſpaſs in the Time of H. 4. if the Defendant ſays that after the Treſpaſs an Office was found that ſuch a one died ſeized after the Treſpaſs ſuppoſed his Heir in Ward to the King; he ſhall not have Aid (*) of the King, becauſe the Cauſe of the Aid is after the Treſpaſs ſuppoſed. 4 Hen. 6. 12.

(*) Fol. 150.

7. (f) In an Action upon the Caſe againſt the King's Fee-farmers of a Leet, if the Plaintiff claims the Leet by Preſcription, and the Farmers by Grant of the King ſince Time of Memory, and ſo after the Title of the Plaintiff, yet the Farmers ſhall have Aid, for that perhaps the King hath barr'd or may bar him of the (g) Leet, or hath a Releaſe. (h) 18 Hen. 6. 12, adjudged.

(f) 1 Rol. Rep. 292. like Point arguend'.

(g) This is miſprinted in the Original, and in lieu of the word Leet, tis Ley.

(h) Fitz. Aid del Roy 19. S. C. 1 Rol. Abr. 148. Pl. 6. S. C.

(E) Upon what Plea.

In what Caſes it ſhall be granted, where it appears the King hath no (a) Title.

1. IF the Party who prays in Aid acknowledges any Matter that would foreclose him of Aid, he ſhall be ouſted of Aid. 39 Edw. 3. 12 b.

(a) In a rege inconſulto a ſufficient Cauſe of Aid ought to appear in the Writ, elſe it ſhall not be allowed. 2 Inſ. 269. F. N. B. 153. F. 154. D. E. 1 Rol. Rep. 206, 207, 208, 289, 292. Moor 842. 2 Rol. Abr. 398. Pl. 3.—But if the Writ contains a ſufficient Cauſe, this is not traverſable or to be denied but in Chancery, per 1 Rol. Rep. 208, 209, 289. But for this vide 1 Rol. Abr. 159. Title Counterplea.

2. (b) If a Man prays in Aid of the King, and shews for Cause of the Aid the King's Grant, if upon his Plea it appears to the Court, that the Grant is (c) void, he shall be ousted of Aid. Pasch. 15 Jac. B. R. between (d) Lightfoot and Levett, Resolved per Curiam.

(b) Post 274. Pl. 1. S. P.
(c) If it appears to the Court, that the Letters Patents, or other Cause of Aid Prier are void, against Law, or insufficient, Aid shall not be granted, for those Things shall not be aided or maintained by Countinance of Law, which are void, against Law, or insufficient. 2 Inst. 269. 1 Rol. Abr. 155. Pl. 10. Margine. (d) Cro. Jac. 421. S. C. and S. P. resolved. Bridg. 89. S. C. and S. P. appears.

3. As in Replevin of Cattle taken, if the Defendant avows the Taking, because the King granted to him by Letters Patents, that he should take for all Cattle that should pass over Willoe-Brig in Yorkshire, so much for Toll as hath been usually taken there & alibi within the Realm of England; and avers, that at another Brig, viz. Burrow-Brig in the same County, 6 d. had been usually taken for every 20 Cattle for Toll, and according to this Rate he avows the Taking, and shews, that upon this Grant the King had reserved a Rent, and prays in Aid of the King; but he shall not have Aid upon this Plea, (e) because it appears the Grant is void for the Uncertainty of the Place and Thing to which the Reference is made, Scilicet & alibi infra regnum Angliæ which is too large, and the Grant is in the Copulative that he should take tantum quantum had been usually taken at Willoe-Brig & alibi, and it is not averr'd that any Thing was usually taken at Willoe-Brig, ergo Pasch. 15 Jac. B. R. between (f) Lightfoot and Levett adjudged.

(e) Holmes Case, like Case where the King granted the Custody of the Lands of a Lunatick sine compoto reddend' under which the Defendant justified and pray'd in Aid, &c. Dier 25. Pl. 164. adjudged. 1 And. 23. adjudged. Moor 4. Pl. 12. S. C. adjudged. N. Bend. 17. Pl. 23. adjudged. 4 Co. 127. b. cited.
(f) Cro. Jac. 421. S. C. adjudged. 2 Rol. Abr. 196. Pl. 1. S. C. Bridg. 88. S. C. adjudged.

4. If a Man makes Conusance as Bailiff of the King for Rent arrear, if the Avowry be not good he shall not have Aid. 4 Hen. 6. Aid del Roy 121.

5. In Trover and Conversion of Goods, if the Defendant pleads that the (g) King was seised in Fee of the Manor of D. and that certain Persons unknown Stole the said Goods of the Plaintiff, and them brought within the Manor, and there them left and waived, per quod the Defendant, as the Queen's Bailiff of the said Manor, did them seize to the Use of the Queen as Goods waived, which is the same Trover and Conversion, and demands Judgment si regina inconsulta; he shall not have Aid of the Queen upon this Plea, for it does not appear by this Plea, that the Goods were forfeited to the King, in as much as it is not alledged that the Felon waived them in pursuit, or for fear of being apprehended thinking himself pursued, fled and waived the Goods. (h) Co. 5. Foxly 109.

(g) This Case is translated exactly according to the Original, which perhaps is not misprinted, nothingbeing more common by Coke, and other Reporters, than to put King for Queen in the Report of Cases tempore Eliz.
(h) Cro. Eliz. 693. S. C. adjudged principally, because the Conversion was not answered, but S. P. appears, and was agreed per Curiam. Moor 572. S. C. adjudged principally, because an Action transitory and not local, and S. P. appears.

6. In a Writ of Dower to be endowed of the Manors of *A.* *B.* and *C.* the Tenant brought a Writ of *Circumspecte agatis*, shewing that the Husband was seised of the Manor of *A.* and held of the Queen in *Capite* by Knights Service, and died seised his Heir of full Age, *prout per inquisitionem Compertum est*, &c. by reason of which the Queen seised all the said Manors, for her Primer Seisin, and because the Queen was to restore the same *tam integre* as they came to her Hands, the Justices were commanded to Surcease *Domina Regina inconsulta. Hill.* 28 *Eliz.* (i) *Bedingfield's* Case. 9 *Co.* 16. admitting this Writ lay, yet it was adjudged, being in Nature of an *Aid Prier* it could not extend to the Manors, not found in the Office, for that by Law the Queen could not seize more than was comprehended in the Office.

(i) 1 Leon. 285. S. C. adjudged. 4 Leon. 87. S. C. adjudged.

7. In an Assise brought by the chief Prothonatory of the Common Pleas for a Disseisin of the Profits of his Office, in making out a Supersedeas,

(k) Per 1 Rol. Rep. 188. it appears the Jury was at Bar before the Writ was put into Court.

(k) the King ſends a Writ to the Juſtices, reciting that he had by Patent granted the making out Superſedeas's to the Defendant, commanding them not to proceed *rege inconſulto*, and whether the Patent is not void, becauſe the making out a Superſedeas is incident to the ſaid Office of Prothonotary, and therefore whether the Writ ſhall be allowed. *Paſch.* 13 *Jac.* between (l) *Brownloe* and *Michel*, *Moor* 842. *Pl.* 1138. *dubitatur*, but ended by Compoſition, and the King granted a Privy Seal, that he no more would make any Grant of any Member of any Office in the ſaid Court.

(l) 1 Rol. Rep. 188, 206, 288. S. C. fully debated & adjorn'. 3 Bulſt. 32. S. C. ended by Compoſition, but there ſaid the Arguments were large and confident on both Sides.

(F) In what Caſes Aid ſhall be granted where both Claim from the (a) King.

(a) A rege inconſulto lies not, unleſs it appears that the Party's Title, is in Diſaffirmance of the King's. per Hard. 179.

1. (b) If it appears by the Plea of him that Prays in Aid that the Grant of the Thing in Demand is void, he ſhall not have Aid of the King. 11 Hen. 4. 87.

per Chief Baron. (b) Ante 273. Pl. 1. S. P.

2. As if the King leaſes for Life, and after charges the Land leaſed, which is void, if the Chargee brings an Action, the Leſſee ſhall not have Aid, becauſe the Charge is void. 11 Hen. 4. 87.

Fol. 151.

3. So if the King grants a Fee-farm to one, and after grants an Office (c) Part thereof to another, the firſt Grantee ſhall not have Aid. (d) 11 Hen. 4. 87.

(c) The Original is, Part de l'auter al auter, and ſo appears to be miſprinted. (d) Fitz. Aid del Roy 46. S. C. Br. 33. S. C.

(e) Perhaps this ſhould be Defendant, and ſo Plaintiff put for Defendant, and Defendant for Plaintiff throughout.

4. In Treſpaſs, if the (e) Plaintiff claims by Leaſe for Years from the King, and prays in Aid, and the Defendant ſhews a Leaſe to him by the King before for Life, and confirmed by Act of Parliament, the Plaintiff ſhall be ouſted of Aid dubitatur. 11 Hen. 6. 28. b.

Vide libr. 11 H. 6. 28. b.

(G) To whom.

1. The Fee-farmer of a City ſhall not have Aid of the King, where the Queſtion is between him and another Officer for Life, of the Grant of the King within the City, which of them ſhall have the Office, becauſe the Inheritance of the Office is to the King, and therefore the Farmer ſhall not have Aid of the King to deſtroy the Inheritance of the King. (a) 11 Hen. 4. 87.

(a) Fitz. Aid del Roy 46. S. C. Br. 33. S. C.

2. But otherways it had been if the King had granted the Inheritance of the Office reſerving no Right, for there the Farmer ſhould have Aid. (b) 11 Hen. 4. 87. But Brooke in Abridging this Aid del Roy 33. ſeems contra.

(b) Fitz. Aid del Roy 46. S. C. Br. 33. S. C.

3. If the Patentee in Tail of the King brings an Action againſt another for holding a Court within a Town, and preſcribes that there hath not been any other Court beſides his Court in the ſame Town Time out of Mind, &c. and the Defendant ſays, that he hath always had ſuch Court, paying Rent to the King, which Court is alſo granted in Tail to the Plaintiff, yet he ſhall not have Aid of the King, becauſe it will be more Beneficial for the King when the Reverſion eſcheats without this new Rent and Court. (c) 13 Hen. 4. 11. b.

(c) 1 Rol. Abr. 148. Pl. 6. 150. Pl. 7.

4. If the King Leases for Life, and grants the Reversion to another, if the Reversioner brings Waste, or avows for Rent, the Lessee shall not have Aid of him. (d) 13 Hen. 4. 11. b.

5. (e) If the King grants a Town to Fee-farm, rendring Rent, and after another demands certain Lands within the Town, by force of a former Grant of the King, the Fee-farmer shall have Aid of the King. 46 Ass. 1. agrees, because if this be evicted, the Recoverer shall be Tenant to the King without his being bound (and it seems the Rent shall be apportioned.)

6. So if another demands Common out of certain Lands within the Town, by force of a former Grant of the King, the Fee-farmer shall have Aid of the King, because perhaps the King had a Release or other Discharge before the second Grant, dubitatur. (f) 46 Ass. 1.

(d) 1 Rol. Abr. 153. Pl. 12. S. C.

(e) 1 Rol. Abr. 148. Pl. 10. like Point.

(f) 1 Rol. Abr. 149. Pl. 4. S. C.

(H) Who shall have Aid in respect of his Estate.

1. A Fee-farmer of the King rendring Rent shall have Aid. 45 Edw. 3. 3. 46 Edw. 3. 28. b. (a) 49 Edw. 3. 6. b. (b) 18 Hen. 6. 12. adjudged. (c) 43 Ass. 2. Curia. 13 Hen. 4. Aid del Roy 99. (d) 7 Hen. 4. 2 b. it seems they were Fee-farmers.

2. (e) The King's very Tenant rendring Rent shall have Aid of the King. (f) 21 E. 3. 19. admit. (g) 25 Ass. 8.

3. The very Tenant of the King by his Patent shall have Aid of the King. 45 E. 3. 3. 2 Hen. 4. 22 b. 24. b. where nothing is reserved. 18 H. 6. 13. (h) 43 Ass. 6. Curia.

4. In a Scire facias against the Alience of the King to repeal his Patent, he shall have Aid of the King. (i) 8 H. 4. 22. (k) 33 Ass. 10. adjudged.

5. He that claims as Feoffee of the King shall not have Aid. (l) 8 Hen. 4. 14 b. it seems this is because nothing passed by the (m) Feoffment. 3 Hen. 6. 6. because the Feoffee is a Disseisor.

(a) Fitz. Aid del Roy 60. S. C. Br. 20. S. C.

(b) Fitz. Aid del Roy 19. S. C.

(c) Fitz. Aid del Roy 92. S. C. Br. 88. S. C.

(d) Br. Aid del Roy 24. S. C.

(e) 1 Rol. Rep. 288. like Point admit arguend' 288. like Point admit arguend'. (f) Fitz. Aid del Roy 2. S. C. (g) Br. Aid del Roy 75. S. C. (h) Fitz. Aid del Roy 94. S. C. Br. 89. S. C. (i) Br. Scire facias 66. S. C. Fitz. 61. S. C. (k) Br. Aid del Roy 83. S. C. Br. Petition 16. S. C. (l) Fitz. Aid del Roy. 41. S. C. (m) Vide Stat. de Bigamis, 4 E. 1. cap. 1. where the Word Feoffment is used to express the King's Grant.

6. An Intruder upon the King shall not have Aid. 3 H. 6. 5. b.

Fol. 152.

7. If the King's Tenant dies, his Heir within Age, if a Stranger, enters in the Right of the King, he shall have Aid if he be impleaded, because his Entry is in the Right of the King. (*) 4 Hen. 6. 12. b.

8. An Abbot of the King's Foundation shall have Aid of him. (n) 6 Hen. 4. 5. b. in an Action where he is charged as Abbot.

9. But 'tis otherways if he is charged as Parson appropriate. (o) 6 Hen. 4. 5. b.

10. In an Assise of a Corody against the Lessee of the King, rendring Rent, with a Clause that the Lessee shall bear his Charges, the Lessee shall not have Aid of the King. (p) 31 Ass. 27. adjudged.

11. Tenant at Will shall have Aid of the King. (q) 4 Hen. 6. 11. b. (r) 21 Hen. 6. 36. b. 17 Edw. 3. 17. b.

12. (s) Tenant by Copy of Court Roll according to the Custom, shall have Aid of the King, Lord of the Manor. (t) 15 Hen. 7. 10. Curia dubitatur. (u) 21 Hen. 6. 37.

(*) Fitz. Aid del Roy 11. S. C. Br. 57. S. C.

(n) Fitz. Counterplea d'Aid. 13. S. C. 1 Rol. Abr. 179. Pl. 1. S. C.

(o) Fitz. Counterplea d' Aid 13. S. C. 1 Rol. Abr. 179. Pl. 2. S. C.

(p) Fitz. Aid del Roy 93. S. C. Br. 82. S. C. 1 Rol. Rep. 208. S. C. cited. (q) Aid del Roy 10. S. C. Br. 56. (r) Fitz. Aid del Roy 22. S. C. 1 Rol. Abr. 158. Pl. 2. S. C. Br. Aid del Roy 46. S. C. Br. Aid 82. S. C. (s) 4 Co. 21. b. S. P. 22. S. P. (t) Fitz. Aid del Roy 98. S. C. Br. 49. S. C. (u) Fitz. Aid del Roy 22. S. C. 1 Rol. Abr. 158. Pl. 2. S. C. Br. Aid del Roy 46. S. C. Br. Aid 82. S. C.

13. Tenant after Poſſibility of Iſſue extinct, ſhall have Aid of the King in Reverſion. 11 Hen. 4. 71. b.

14. If the King ſeiſes Land by Office for the Wardſhip of J. S. and this is leaſed to another during the Nonage, and after upon a Petition by W. H. to the King, who was ouſted of the Land by the King, a Verdict is found for him, and he thereupon ſues a Scire facias againſt the Patentee, he ſhall have Aid of the King. (u) 37 Aſſ. 11. adjudged.

(u) Br. Aid del Roy 97. S. C. 1 Rol. Abr. 149. Pl. 3. S. C.

15. If the King's Committee of a Ward be impleaded for this, he ſhall have Aid of the King, for the King continues Guardian, and therefore the Right of the King ſhall not be put in Trial without the King, (w) 12 Hen. 4. 25. Curia.

(w) Fitz. Gard. 81. S. C. Br. 28. S. C.

16. If the King hath committed a Ward over, and a Stranger takes the Ward by tort, againſt whom a Right of Ward is brought by another Stranger, he ſhall have Aid of the King, becauſe he hath in a manner the Eſtate of the Grantee. (x) 12 Hen. 4. 25. adjudged.

(x) Fitz. Gard. 81. S. C. Br. 28. S. C.

17. So the Grantee of (y) the Ward of the King ſhall have Aid of the King, for the King continues Guardian and in Poſſeſſion. 4 Hen. 6. 11, 12. b. for he ſhall ſue Livery. (z) 9 H. 6. 21. b. 29 Aſſ. 5. dubitatur, (a) where no Rent is reſerved. 19 E. 3. Aid del Roy 64.

(y) This in the Original is miſprinted, for inſtead of gard, 'tis there grant.

(z) Br. Aid del Roy 4. S. C.

(a) 1 Rol. Rep. 292. S. P. arguend'.

18. So for the ſame Reaſon the Grantee of the King's Grantee of a Ward ſhall have Aid of the King. 39 Edw. 3. 8.

19. So if the Grantee of a Ward upon which no Rent was reſerved, be ſued in Treſpaſs after the full Age of the Infant, he ſhall not have Aid of the King, becauſe it was without Rent, and is determined. (b) 9 Hen. 6. 62. adjudged.

(b) Br. Aid del Roy 7. S. C. Fitz. Counterplea d'Aid 9. S. C.

(a) 4 Edw. 1. called ſo, becauſe by the 5 cap. thereof, Bigami are barred of Clergy.

20. By the Statute of (a) *Bigamis, Cap.* 1. it is declared, when a Feoffment is made by the King, with a Deed thereupon, (b) ſo that another Perſon by like Feoffment or Deed would be bound to Warranty; the Juſtices heretofore did not, neither yet do nor can proceed without the King's Commandment.

(b) As if the King give Lands to one in Fee by the Word Dedi, tho' by the Patent the Tenure is to hold of the Chief Lords, and it is for the Honour of the King, that he aid the Patentee with any Records or Evidence that he hath for Maintenance of the Eſtate which he granted and warranted to him. 2 Inſt. 269.

(c) In this Caſe Aid is not to be granted, becauſe the King grants but his own

21. But *per Cap.* 2. Tho' it ſeemed they could not proceed in certain Caſes, as where the King confirmed or ratified any Man's Deed to the Uſe of another, or granted (c) as much as in him was, or where a Deed was ſhewed, (d) and Clauſe therein whereby he ought to warrant; it is declared in like Caſes they ſhall not Surceaſe by reaſon of a (e) Confirmation, Grant, or Surrender, (f) or other like, but (g) after Advertiſement made to the King, they ſhall proceed without Delay.

Eſtate without any Warranty. 2 Inſt. 270. (d) In the Original it is, Ubi Charta profertur quod rex tenement' aliquod reddiderit, nec clauſula aliqua in ea contineatur per quam warrantizare debeat, which vide. 2 Inſt. 269. Q. If the Statute in Engliſh is not miſprinted.—And if a common Perſon is bound to warrant, a Confirmation is in Nature of a Feoffment; and ſo he ſhall have Aid within the Statute of Bigami, Cap. 1. 2 Inſt. 270. (e) This muſt be intended where the Confirmation gives no Eſtate, or if it gives an Eſtate where no Rent or Service is reſerved. 2 Inſt. 270.—but if a Rent or Service be reſerved, and by the Action brought it may be defeated, Aid ſhall be granted. (f) As a Releaſe. 2 Inſt. 270. (g) By this it is intended that Aid ſhall be granted, but only if it ſhould be erroneouſly granted, that there ſhould be a Procedendo ſine dilatione. 2 Inſt. 270.

(l) In respect of the Estate of the King.

1. If the Heir of the Lessor for Years be in Ward of the King for other Land and not for this, the Lessee shall not have Aid of the King. (a) 2 Hen. 4. 10 b.

(a) Aid del Roy 38.

2. But if that be seised in Ward he shall have Aid of the King. (b) 2 Hen. 4. 10 b. (c) 10 Hen. 4. 6. adjudged.

S. C. Br. 21. S. C.

3. If a Man leases for Life rendring Rent, and after the Reversion comes to the King, the Lessee if he be impleaded shall have Aid of the King; for by this Suit the Rent of the King may be destroyed. (d) 31 Ass. 2. 3 Edw. 3. Fitz. Aid del Roy 68.

(b) Aid del Roy 38. S.C. Br. 21. S. C.

4. Aid shall be granted of the King for a Reversion escheated to him. (e) 4 H. 4. Pl. 19.

(c) Fitz. Aid del Roy 120. S. C.

(f) 5. If there be Lessee for Life, the Remainder in Tail, the Remainder in Fee, (g) and both in Remainder are attainted of Treason, the Lessee shall have Aid of the King. (h) 7 Hen. 4. 18 b. and if only the Remainder in Fee had been attainted, he should have had Aid of the Remainder in Tail and the King. (i) 7 Hen. 4. 18 b.

(d) Fitz. Aid del Roy 77. S. C.

(e) Fitz. Aid del Roy 96. S. C.

(g) Fol. 153.

(f) Dier 320. Pl. 18. like Point appears. (h) Br. Aid del Roy 27. S. C. (i) Br. Aid del Roy 27 S. C. Br. Prerogative le Roy 80. S. C.

6. If there be Lessee for Life, the Remainder to a Priory of the Foundation of the King, if there be no Priorels the Lessee shall have Aid of the King, for the Right is to the King till there is a Priorels. 32 Edw. 3. Aid 39. adjudged.

7. (k) If in an Action the Tenant be seised in Fee, and acknowledges in Court he is Tenant for Life the Reversion or Remainder to the King, he shall have Aid of the King, because the King shall have the Reversion by Estoppel against him, by this Acknowledgment of Record. 1 (l) Hen. 7, 29. (m) 8 Hen. 4. 14 b. (n) 11 H. 4. 85 b. (o) 8 Hen. 6. 24.

(k) 1 Rol. Rep. 291. S.P. arguend'.

(l) Br. Aid del Roy 91. S. C. Fitz. 32. S. C.

(m) Br. E- not misprinted

stoppel 203. S. C. (n) Br. Counterplea d'Aid 25. S. C. Fitz. 16. S. C. (o) Q. If this be ed, for I find no such Opinion in the Book.

8. If the King seizes generally the Possessions of an Abbot, in an Action against the Abbot he shall have Aid. 11 Hen. 6 10. 35 b.

9. But if they are seised for Dilapidation he shall not have Aid, because this is his own Act, and his Default, and it appears to the Court. 11 Hen. 6. 35 b. But Query this.

10. If the King takes into his Protection the Goods and Possessions of an Abbot without Cause, the Abbot shall not have Aid of the King if he be impleaded, for the King cannot delay any without Cause. 11 Hen. 6. 10.

11. But otherways it is if he takes it into his Protection for good Cause, as for that he is in his Service in the Wars. 11 Hen. 6. 10.

12. If the King leases for Life, and grants the Reversion to another, it seems the Lessee shall not have Aid after of the King, if he be impleaded by a Stranger, for the King cannot be at any Prejudice. Contra (p) 13 Hen. 4. 11 b.

(p) 1 Rol. Abr. 151. Pl. 4. S. C.

13. (q) If the King seises the Land of a Prior Alien, and leases this to farm rendring Rent, and after grants the Rent over, yet the Farmer shall have Aid of the King (it seems the King had the Reversion to himself). 13 Hen. 4. 11 b.

(q) 1 Rol. Rep. 29. like Point arguend'.

14. If the King grants an Advowson with Warranty, in a Quare impedit against the Grantee and his Presentee, the Grantee hath Aid of the King in nature of a Voucher, The Incumbent shall have Aid

(r) Fitz. Aid del Roy 15. S. C. Br. 6. also of the King, because if it be tried against him, it will be Evidence against the King. (r) 9 Hen. 6. 57 b.

S. C. Br. Quare impedit 7. S. C. Br. Voucher 7. S. C.

(K) Who shall have Aid in respect of Privity.

For Default of Privity.

1. If a Man justifies a Thing as Bailiff and Servant to the King's Grantee of a Ward, he shall not have Aid of the King, because he is not Privy to the King. 3 Hen. 6. 34. (a) 4 Hen. 6. 12. The same Law if a Rent had been reserved upon the Grant. Contra 3 Hen. 6. 34.

(a) Fitz. Aid del Roy 11. S. C. Br. 57. S. C.

2. In an Assize, if the Bailiff says that a Lease was made to his Master for Life, and the Remainder to the King in Fee, he shall not have Aid of the King for Default of Privity. (b) 8 Hen. 7. 11. Aid is granted, but after said that it ought not. (c) 1 Ass. 1.

(b) Fitz. Aid de Roy 35. S. C. Br. 97.

S. C. Fitz. Aid de Roy 86. S. C. Br. 69. S. C. Br. Bayly 11. S. C.

(d) Dier 258 a. like Point. (e) Fitz. Aid de Roy 18. S. C. Br. 5. S. C. 1 Rol. Abr. 154. Pl. 15.

3. (d) In Trespass, if the Defendant justifies the Entry as Servant to the Lessee for Life of the King, he shall not have Aid of the King, because he is not privy to the Lease. 4 Hen. 6. 12.

4. So if a Man in Replevin avows as Bailiff to the Lessee of the King he shall not have Aid, because he is a Stranger to the Lease. (e) 9 Hen. 6. 26 b.

Fol. 154.

(f) Br. Aid de Roy 107. S. C. (g) Fitz. Aid de Roy 13. S. C. (h) Br. Aid de Roy 17. S. C. Br. 4. S. C. (i) Fitz. Aid de Roy 13. S. C. (k) Br. Estray 5. S. C. (l) In the Original this placitum is without Number as here. (m) Fitz. Aid de Roy 11. S. C. Br. 57. S. C. (n) Fitz. Aid de Roy 17. S. C. Br. 4. S. C. (o) Br. Aid de Roy 80. S. C. (p) Fitz. Aid de Roy 17. S. C. Br. 4. S. C.

5. So if a Man justifies the taking of Toll as Bailiff of the Lessee for Years of the King, he shall not have Aid of the King for Default of Privity, but he may have Aid of the Lessee, and then both of the King. (f) 11 Hen. 6. 39 b. Curia.

6. If a Man justifies because he is Sub-collector of Tenths, he shall not have Aid, because he is a Stranger to the Commission. (g) 7 H. 6. 27. (h) 9 Hen. 6. 20 b. 21 b. tho' the Commission gave Power to make a Sub collector.

7. In false Imprisonment, if the Defendant says that he was taken by certain Persons by Force of a Commission to them directed, and they delivered him to the Defendant to keep, &c. he shall not have Aid, for he is not Privy to the Commission. 7 Hen. 6. 37. So he shall not have Aid in this Case altho' the Commission was singulis jure fidelibus. (i) 7 H. 6. 27.

8. In Trespass, if the Defendant, as Bailiff to the Sheriff, justifies the Taking and Sale as a Strap to the Use of the King, he shall not have Aid of the King for want of Privity, dubitatur. (k) 14 Hen. 6. 5. b. (l) But if the King's Tenant dies his Heir within Age, and a Stranger enters in the Right of the King, he shall have Aid because he enters immediately in the Right of the King. (m) 4 Hen. 6. 12 b.

9. If the King leases certain Lands to another, and the Lessee grants over Part of his Estate, in an Action against him, he shall not have Aid of the King, because he is not Privy to the Lease. (n) 9 Hen. 6. 21 Curia. Hil. 39 Eliz. B. R. between Merry & Holdeney, adjudged contra. (o) 29 Ass. 21.

10. But if the King's Lessee grants over all his Estate, and he is impleaded, he shall have Aid of the King, because he is Privy to the first Lease, he having the same Estate. (p) 9 Hen. 6. 21 b.

11. If the King leases for Years, and after endows the Queen of the Reversion, who confirms to the Lessee for his Life, he may have Aid of the King without the Queen. 11 H. 6. 39 b.

12. In Treſpaſs for taking his Cattle, if the Defendant ſays that the King and all thoſe whoſe Eſtate the King hath in the Manor of D. have had Time out of Mind, &c. 20 l. Rent out of a Place where the Taking was, and that the Manor of D. was aſſigned to the Queen in Dower before the Taking, and that he took the Diſtreſs for Rent as Bailiff of the Queen he ſhall not have Aid of the King for want of Privity, tho' he ſhall have it of the Queen. (q) 28 Hen 6. 13. adjudged.

(q) Fitz. Aid de Roy 24. S. C. Br. 9. S. C. Br. Aid. 13. S. C.

13. When King Edw. 4. leaſed Land or an Office for Life and died, and the Reverſion deſcended to his Daughter, who married Hen. 7. tho' the Reverſion was in the Queen, yet the Leſſee being impleaded, might have Aid of the King only without the Queen. (r) 1 Hen. 7. 29 b. by many Juſtices.

(r) Fitz. Aid de Roy 32. S. C.

14. If the Queen leaſes to another and the King confirms it, the Leſſee ſhall have Aid of the King, for the King is enough Privy to this. 15 Edw. 3. Aid del Roy 66. adjudged.

15. If a Man avows, as Bailiff to the Leſſee of the King of a Seigniory, and hath Aid of the Leſſee, they both ſhall have Aid of the King. (s) 9 Hen. 6. 26 b.

(s) Fitz. Aid de Roy 18. S. C. Br. 5. S. C. 1 Rol. Abr. 153. Pl. 4.

(L) Who ſhall have it.

Fol. 155.

The Praiee.

1. If in an ad terminum qui præteriit the Tenant hath Aid of W. the Son and Heir of S. who comes and joins, if they ſay that the King by his Patent rehearſed that he had granted this to G. for Life, the Remainder to the Tenant for Life, yet they ſhall not have Aid of the King, becauſe this is contrary to his Prayer before, by which the Reverſion was ſuppoſed immediately to him who joined himſelf. (a) 25 Edw. 39 a.

(a) Fitz. Aid del Roy 4. S. C.

2. But if they ſay the King granted the Reverſion to the Father of the Praiee, they ſhall have Aid of the King. (b) 25 Edw. 3. 39. adjudged.

(b) Fitz. Aid del Roy 4. S. C.

(M) Who ſhall have Aid in reſpect of his Office.

1. If the King's Officer makes a Contract by Force of his Office to the Uſe of the King, if he be ſued for this he ſhall have Aid of the King, becauſe the King is the Debtor. (a) 11 Hen. 4. 28 b.

(a) Fitz. Aid de Roy 44. S. C. Br. 29. S. C.

2. In Debt the Defendant ſays he was the Buyer of Victuals for the King's Houſhold, and bought of the Plaintiff certain, &c. and that the Plaintiff took a Bill to go to the Treaſurer for Payment, he ſhall have Aid. (b) 3 Hen. 4. (c) 9 b.

(b) Fitz. Aid de Roy 40. S. C.

3. But he ſhall not have Aid upon ſuch a Plea in Account againſt him as Bailiff of his Manor, for this is no Anſwer to the Plaintiff. 3 Hen. 4. (d) 9 b.

(c) This is miſprinted in the Original, and ſhould be 8.

4. In Debt againſt a Buyer of Victuals, if he ſays that he bought to the King's Uſe, he ſhall have Aid. (e) 7 Hen. 4. 7. (f) 11 Hen. 4. 28.

5. (g) So a Purveyor ſhall have Aid of the King. (h) 11 Hen. 4. 28. if he be ſued for Victuals taken for the King's Houſhold at a Price.

(d) This is miſprinted in the Original, and ſhould be 8. (e) Br. Aid de Roy 26. S. C. (f) Fitz. Aid de Roy 44. S. C. Br. 29 S. C. 1 Rol. Abr. 155. n. 2. S. C. (g) In an Action againſt a Purveyor for taking Goods above the Value of 40 s. without the Conſent of the Owner, Aid lies not, per 20 H. 6. cap. 19. Vide 12 Car. 2. cap. 24. by which nothing ſhall be

be taken without the Owner's Conſent, and if the Taking be without Authority, he cannot have Aid, tho' no Proviſion againſt it, as was made in 20 H. 6. which I take for this Reaſon to be ſuperfluous. (h) Fitz. Aid de Roy 44. S. C. Br. 29. S. C.

6. If the Clerk of the King's Works buys certain (i) Carriages and Loads of Gravel to the Uſe of the King at a Price in Debt againſt him, he ſhall have Aid of the King, tho' the Party was not compellable to ſell it him. (k) 11 Hen. 4. 28.

7. A Collector of Fifteenths ſhall have Aid of the King. (l) 7 Hen. 4. 6. (m) 11 Hen. 4. 35. 9 Hen. 6. 56. dubitatur. 14 Hen. 6. 5 b.

8. A Collector of Tenths for the King ſhall have Aid of the King. (n) 2 Hen. 5. 4 b. admit.

9. (o) A Forreſter ſhall have Aid of the King. (p) 7 Hen. 6. 36.

10. If an Eſcheator (q) by colour of his Office ſeiſes a Ward, ſuppoſing his Anceſtor to die in the King's Homage, and a Stranger brings a Right of Ward againſt him, he ſhall have Aid of the King. 18 Hen. 6. 12.

11 If a Man makes Conuſance, as (r) Bailiff of the King for Rent Arrear, and prays in Aid of the King, he ſhall have it. 4 Hen. 6. Aid del Roy 121.

(i) The Original is Cattel, and ſo ſeems to be miſprinted.

(k) Fitz. Aid de Roy 44. S. C. Br. 29. S. C.

(l) Infra 1. S. C. Fitz. Aid de Roy 42. S. C. Br. 25. S. C.

(m) Br. Aid de Roy 30. S. C. Br. Quinziſm 3. S. C.

(n) Fitz. Aid de Roy 36. S. C. infra. Pl. 7. S. C. (o) Dier 157. Pl. 15. S. P. appears. (p) Fitz. Aid de Roy 14. S. C. Br. 42. S. C. 1 Rol. Abr. 157. Pl. 1. S. C. (q) But if it appears to the Court that the King's Officer hath ſeiſed for the King any Lands without Warrant againſt Law, in an Action againſt him, he ſhall not have Aid of the King; nor does the Writ de Rege inconſulto lie, for it is againſt Reaſon that the King, who is the Head of Juſtice, ſhould Aid him in his Wrong. 2 Inſ. 207. 1 Rol. Abr. 153. Pl. 3. 156. Pl. 6, 7. (r) Tho' not ſo by Deed. Kelw. 174.

(N) By an Officer.

Upon what Plea.

1. IN Replevin againſt a Collector of Fifteenths, who avows the Taking as a Diſtreſs for this, if the Iſſue be upon the Place of Taking, he ſhall not have Aid of the King. (a) 7 Hen. 4. 6.

2. But in Debt, if the Defendant juſtifies the Buying of the Things to the Uſe of the King, and prays in Aid, if the other ſays he bought them to his own Uſe, yet he ſhall have Aid of the King. (b) 7 Hen. 4. 7.

3. If the King's Officer makes a Contract to the Uſe of the King, and after he is allowed for this in the Exchequer, yet in Debt by the Party after he ſhall have Aid, for perhaps it is not payed tho' it be allowed, and perhaps the Party hath releaſed to the King. (c) 11 Hen. 4. 28. b.

4. But otherways it is if the Officer be paid by the King for it, for thereby he is Debtor to the Party. (d) 11 Hen. 4. 28. (as it ſeems.)

5. In Debt upon an Obligation, if the Defendant ſays he was the King's Buyer, and bought certain Goods for the ſame Sum, to the Uſe of the King, and for the greater Surety he made the Deed, he ſhall have Aid of the King without ſhewing how he was allowed this in the Exchequer. 13 Hen. 4. Aid del Roy 100 Curiam.

6. In Treſpaſs againſt a Collector of 15, if upon the Plea of the Parties it appears that he took the Diſtreſs of ſuch Things that were not chargeable, tho' it was aſſeſſed by Vertue of a Commiſſion, yet he ſhall not have Aid of the King (e) becauſe the Truth appears. (f) 11 Hen. 4. 35. adjudged 36 b. 47 b.

7. In Treſpaſs againſt a Collector, if it appears upon the Plea that the Tenths were 2 s. which the (g) Plaintiff paid to the Collector, and yet after the Collector took theſe Cattle for which the Action is brought, and them detained till he was paid 18 d. more, the Collector ſhall not have Aid of the King. (h) 2 Hen. 5. 4 b.

(a) Supra 7. S. C. Fitz. Aid de Roy 42. S. C. Br. 25. S. C.

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(b) Fitz. Aid de Roy 44. S. C. B. R. 29 1 Rol. Abr. 155. Pl. 4. S. C.

(c) Fitz. Aid de Roy 44. S. C. B. 29. S. C.

(d) Fitz. Aid de Roy 44. S. C. Br. 29. S. C.

(e) 1 Rol. Abr. 150. Pl. 3. 155. Pl. 10. Margine.

(f) Br. Aid. de Roy 30. S. C. Br. Quinziſme 3. S. C.

(g) The Original is Defendant, and ſo appears to be miſprinted. (h) Fitz. Aid de Roy 36. S. C. Supra 155. Pl. 8. S. C.

(O) Upon what Plea or Iſſue.

1. IN Treſpaſs, if the Defendant ſays that he was made Collector of 15, with Power to make Sub-collectors, and to diſtrain them to make them levy the Sum, and that he made the Plaintiff his Sub-collector, and diſtrained him for not levying, &c. if the Plaintiff ſays he made J. S. his Sub-collector abſq; hoc that he made the (*) Plaintiff his Sub collector, the Defendant ſhall not have Aid of the King, becauſe the Cauſe of his Aid is traverſed. (a) 5 Hen. 5. 11. b. adjudged.

(*) In the Original this is Defendant, but ſeems to me to be miſprinted, vid. 5 H. 5. 11. b. but vid. alſo Br. Aid 36. Br. Counterplea de Aid 8.

2. Where the Party may well maintain the Iſſue without the King, he ſhall not have Aid.

3. In Replevin, the Defendant avows upon the Plaintiff as his Tenant, the Plaintiff ſays he held of the King, and ſo out of his Fee, and the Defendant ſays within his Fee, the Plaintiff ſhall not have Aid (it ſeems becauſe the King cannot Aid him in his Iſſue.) (b) 14 Hen. 4. 26. b.

4. In Treſpaſs, if the Defendant juſtifies as in his Freehold by Leaſe from the King, the Reverſion to the King, he ſhall not have Aid, for he need not have Aid of the King to maintain this Plea in Treſpaſs. (c) My Rep. 14 Jac. for his Freehold is a good Bar of it ſelf. (d) 4 Hen. 6. 10. adjudged. (e) 4 Hen. 6. 18. adjudged.

(a) Fitz. Aid de Roy 37. S. C. Br. 36. S.C.Br.Counterplea d'Aid 8. S. C.

(b) Fitz Aid de Roy 48. S. C. Br. 35.

S. C. 1 Rol. Rep. 207. S. C. cited. (c) 1 Rol. Rep. 407. S. C. and S. P. admit. (d) Fitz. Aid de Roy 9. S. C. Br. 55. S. C. (e) This is Part of the ſame Caſe as is reported. 4 H. 6. fol. 10. Fitz. Aid de Roy 12. S. C.

5. (f) The ſame Law in an Ejectione firmæ. My Rep. 14 Jac. (g) Bennet adjudged, for this is in Nature of a Treſpaſs.

(f) 1 Rol. Abr. 148. Pl. 13. 1 Rol. Abr. 161. Pl. 1. vide.

6. If an Avowry be made by the King's Bailiff for Suit to an Hundred, and Seiſin laid by Preſcription in the King and his Anceſtors, and the Preſcription traverſed and Iſſue thereupon, the Avowant ſhall not have Aid of the King. 17 E. 3. 31. b.

(g) 1 Rol. Rep. 407. S. C. adjudged by 2 Judges againſt 1.

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(P) Where no Title appears to the King.

1. IN Treſpaſs for entring his Chaſe, if the Defendant ſhews that he is the King's Forreſter in ſuch a Forreſt, and pleads a Cuſtom when any Savage Beaſt goes out of the Forreſt, to purſue it into any Chaſe, &c. and to rechaſe it into the Forreſt, &c. and that he did accordingly, &c. he ſhall have Aid of the King upon this Plea, becauſe the Defendant cannot try this Cuſtom whether it be good or not without the King. (a) 7 H. 6. 36.

(a) Fitz. Aid de Roy 14. Pl. 9. S. C.

S. C. Br. 42. S. C. 1 Rol. Abr. 155.

(Q) Upon what Plea.

Not contrary to the Suppoſal of the Writ.

1. IN an Aſſiſe of Land in one County, if the Defendant ſays that the Land is in another County, and that the King gave it to him by his Letters Patents, and prays in Aid of the King, he ſhall not have Aid upon this Plea, becauſe this is contrary to the Suppoſal of the Writ, that the Land is in another County; ſo that if the Demandant grants the Aid the Writ ſhall abate. (a) 21 E. 3. 19. adjudged.

(a) Fitz. Aid del Roy 2. S. C. 1 Rol. Abr. 148. Pl. 1. S. C.

2. In an Aſſiſe, if the Tenant ſays, that the King leaſed to him for Life, the Remainder over to B. and after the Remainder came to the King by the Forfeiture of B. and prays in Aid of the King, he ſhall have it, tho' this be againſt the Suppoſal of the Writ. (b) 1 Aſſ. 1. adjudged.

(b) Br. Aid de Roy 69. S. C. Fitz. 86. S. C.

(R) At what Time prayed

1. (a) WHere Aid ſhall be granted of a common Perſon after Iſſue, it ſhall be granted of the King before Iſſue. 4 H. 6. 18. b. (b) 28 H. 6. 4.

(a) Kelw. 48. S. P. Hard. 179. S. P. per Chief Baron.

(b) Fitz. Aid de Roy 25. S. C. Br. 8. S. C.

2. (c) In Treſpaſs Aid ſhall be granted of the King before any Plea pleaded. (d) 2 H. 6. 14.

(c) Kelw. 48. S. P.

(d) Fitz. Aid de Roy 7. S. C.

3. (e) In Treſpaſs Aid ſhall be granted of the King before Iſſue. 7 H. 6. 36.

(e) Kelw. 48. S. P.

4. In Treſpaſs for taking his Goods, the Defendant who juſtifies the Taking for Damage feſant, as Bailiff of the King, ſhall have Aid of the King before Iſſue. (f) 28 H. 6. 4. adjudged.

(f) Fitz. Aid de Roy 25. S. C. Br. 8. S. C.

5. (g) Aid lies not of the King after Iſſue, becauſe the King cannot be Party to maintain this Iſſue taken by the Party, and if the Aid be granted, a Procedendo in Loquela cannot come from the Chancery, in as much as the Plea is determined by the Iſſue. (h) 5 E. 4. 1. adjudged. (i) 7 E. 4. 8. Curia contra. (k) 22 E. 3. 6. adjudged.

(g) Kelw. 48. S. P.

(h) Fitz. Aid de Roy 30. S. C. Br. 102. S. C.

(i) Fitz. Aid de Roy 31. S. C. Br. 103. S. C.

(k) Fitz. Aid de Roy 70. S. C.

6. In Treſpaſs, if the Defendant alledges a Common in the King by Preſcription for him and his Tenants at Will in the Place where, &c. and that he being a Tenant at Will uſed the Common, and the Plaintiff takes Iſſue upon the Preſcription, the Defendant ſhall not have Aid afterwards for the Cauſe aforeſaid. (l) 7 E. 4. 8. Curia.

(l) Fitz. Aid de Roy 31. S. C. Br. 103. S. C.

7. Aid does not lie of the King after Iſſue, and a (m) Writ de rege inconſulto & procedendo thereupon. (n) 22 E. 3. 15. b. contra (o) 22 E. 3. 6.

(m) Tho' after Iſſue Aid ſhall not be granted at the Prayer of the Party, yet this Writ lies. 1 Rol. Rep. 289, 290. arguend'.

(n) Fitz. Aid de Roy 71. S. C. (o) Fitz. Aid de Roy 70. S. C.

8. If in an *Ejectione firmæ* after Not guilty pleaded and Iſſue thereupon joined, a Special Writ is ſent to the Court, reciting that the Defendant is Tenant in Tail with divers Remainders over, (p) the Reverſion to the King,

(p) Diverſity where the King hath the immediate Reverſion and where not, per 1 Rol. 289. according to a Caſe there cited arguend'.

King, and that by this Trial his Reverſion may be prejudiced, commanding them therefore not to proceed *rege inconſulto*; (q) Tho' this is a perſonal Action, and after Iſſue yet it ſhall be allowed, *per Mich.* 37, and 38 *Eliz.* between (r) *Sale* Leſſee of *Nevil* and *Barrington*. *Cro. Eliz.* 417. reſolved *per totam Curiam.*

(q) The King's immediate Tenant, or his Mediate that joins with his immediate, ſhall have Aid as well after as before Iſſue joined in perſonal Actions. Hard. 179. per Chief Baron.—and per 1 Rol. Rep. 289, 290, arguendo tho' after Iſſue Aid ſhall not be granted at the Prayer of the Party, yet a Writ de rege inconſulto lies. (r) Moor 421. Pl. 583. S. C. adjornat'.

(S) At what Time to be granted

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1. IN an Aſſiſe againſt 2, if each takes the intire Tenancy for Life, the Remainder to the King, and the Demandant acknowledges one to be Tenant, he ſhall have Aid preſently before Trial who is Tenant, for the Demandant hath acknowledged him. 12 H. 6. 1. Curia.

2. And if the other be after found Tenant, he ſhall have Aid alſo. (a) 12 H. 6. 1.

(a) Infra T. 4. S. C.

(T) At what Time.

Aid after Aid.

1. If Aid be granted of the King where it ought, and this is adjourned till another Term, and then a Procedendo comes; (a) yet he ſhall not have new Aid upon a new Cauſe ſhewn, becauſe he hath once delayed the Party. 3 H. 6. (b) 15. and it is after Adjournment.

(a) When a Procedendo is granted, and upon Demurrer a better Right appears for the King, the Court cannot proceed to Judgment before another Procedendo granted, per 1 Rol. Rep. 291. per Baron Attorney General argueno'. (b) This is miſprinted in the Original, and ſhould be 5. which vide. Fitz. Aid de Roy 8. S. C.

2. But if a Man be ouſted of Aid for one Cauſe, he ſhall have Aid the ſame Term upon a new Cauſe ſhewn. (c) 3 H. 6. 5. b.

(c) Fitz. Aid de Roy 8. S. C.

3. If Leſſee for Life hath Aid of him in Reverſion, and the Prayee comes not at the Day, the Leſſee may ſay that the King gave the Land to her and her Husband, and to the Heirs of the Husband, and the Huſband is dead and Aid granted of his Heir; upon this Plea ſhewing the Charter, ſhe ſhall have Aid of the King. (d) 21 E. 3. 59. b. adjudged.

(d) Fitz. Aid de Roy 4. S. C.

4. In an Aſſiſe againſt 2, if each takes the intire Tenancy for Life, the Remainder to the King, and the Demandant acknowledges one to be Tenant, by which he hath Aid, if the other be after found Tenant, he ſhall have Aid alſo. (e) 12 H. 6. 1.

(e) Supra S. 1. S. C.

(V) In what Caſes it lies after Aid of another Perſon.

1. IN a Precipe quod reddat, if the Tenant hath Aid of the Heir (a) of her Husband becauſe of the Reverſion who comes not upon the Summons, the Tenant may after ſay that the King gave the Lands to her and her Husband, and to the Heirs of her Husband, and ſhew forth the Charter of the King, and ſhall have Aid of him. 21 E. 3. Aid del Roy 4. adjudged.

(a) The Original is de roy pur cauſe, &c. and ſo appears plainly to be miſprinted.

2. If

2. If a Tenant at Will, according to the Custom, hath Aid of the Archbishop of Canterbury, his Lord, and after the Lord dies, the Temporalties being in the King's Hands, he shall have Aid of the King. (b) 21 H. 6. 37. agreed, admitting that such a Tenant at Will shall have Aid, of which there is a Doubt.

(b) Fitz. Aid de Roy 22. S. C. 1 Rol. Abr. 152. Pl. 11, 12. S. C. Br. Aid de Roy 46. S. C. Br. Aid 82. S. C.

(X) In what Cases Aid lies after Aid.

1. If Aid be prayed of the King upon a certain Cause shewn, the which is adjudged no Cause of Aid, and so he is ousted of Aid, yet the same Term he shall have Aid of the King upon another sufficient Cause shewn. (a) 8 H. 7. 11. b.

(a) Fitz. Aid de Roy 35. S. C. Br. 97. S. C.

2. If Aid be granted of the King upon an insufficient Cause, upon which a Procedendo is granted out of Chancery in another Term, the Party shall not have Aid again of the King, tho' he shew other sufficient Cause, because he might have shewn this Cause in Chancery, in Stay of the Procedendo. 3 H. 6. 6. adjudged. (b) 8 H. 7. 11.

(b) Fitz. Aid de Roy 35. S. C. Br. 97. S. C.

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(Y) In what Cases the Court *ex Officio* ought to grant it.

1. (a) If the Party will not speak of Aid Prayer, and it appears that it is in the Right of the King, the Court is not bound ex officio to grant Aid. (b) 3 H. 6. 6.

(a) Cro. Eliz. 417. S. P. arguend' per Coke, Attorney-General. Roy 100. and 1 Rol. Rep. 208. S. P. arguend'. But Br. Office del Court. 18 Kelw. 48. b. Br. Aid del many other Books are contrary. (b) Fitz. Aid de Roy 8. S. C. Br. Office del Court 1. S. C.

(Z) Counterplea.

1. NOT Parcel is no good Counterplea. (a) 9 H. 6. 62. because this shall not be tried without making the King Party. 9 H. 6. 62, 43 Ass. 6. 20 E. 3. Aid 1. per Wilby.

(a) Fitz. Counterplea d'Aid 9. S. C.

2. In Trespass if the Defendant justifies as in Parcel of a Manor to him granted by the King, and makes a Title to the King to the Manor, it is no good Plea for the Plaintiff to say, That the Action is brought for a Trespass done in another Part, which is not Parcel of the Manor, for not Parcel or nient Comprise is no good Counterplea of Aid. (b) 9 H. 6. 62.

(b) Fitz. Counterplea d'Aid 9. S. C.

3. If the Defendant in an Action shews Cause to have Aid, the Plaintiff shall not have any Traverse to the Cause of Taking. (c) 28 H. 6. 4.

(c) Br. Aid de Roy 8. S. C.

4. Nothing in the Reversion is a good Counterplea of Aid. 12 H. 6. 1. b.

5. (d) Nient comprise is no good Counterplea, for this shall not be tried without making the King Party. 21 E. 3. 19. b. 39 E. 3. 12. b. per Thorp. 25 E. 3. 42. b. adjudged. (e) 32 E. 3. Aid 1. per Fisse. 25 E. 3. Aid del Roy 72. adjudged.

(d) Dier 257. Pl. 15. like Point, 2 Judges against 2. 3 Keb. 741. vide.

6. In an Assise if the Tenant says that he hath granted the Land by his Charter to the King, and so the King is seised, and prays of him, Nient comprise in the Charter is no Counterplea of Aid. (f) 38 Ass. 16.

(e) This is misprinted in the Original, for it should be 20 E. 3. Aid 1. per Wilby. (f) Br. Aid de Roy 85. S. C.

7. So in an Aſſize, If the Tenant ſays that he hath infeoffed the King of the Land, and ſo he is Tenant, and hath a Writ to the Juſtices, certifying that the King hath purchaſed the Land of the Tenant, and prays Aid; it is no Counterplea that the Lands in Demand are other Lands. (a) 38 Aſſ. 16. adjudged.

(a) Br. Aid de Roy 85. S. C.

8. In an Aſſize of Land in Wincheſter, If the Tenant prays in Aid of the King, becauſe he is a Fee-farmer of the City of Wincheſter, of which this Land is Parcel rendring Rent, it is no good Counterplea for the Demandant to ſay that A. was ſeiſed of this Land at the Time of the Fee-farm, and held this of the King rendring Rent, and that it continued after in the Hands of divers Burgeſſes, till the Demandant purchaſed it in Fee, to which the Tenant hath put his Seal affirming the Purchaſe, &c. for it ſeems this amounted only to this, that it is not compriſed within the Charter of the King. (b) 43 Aſſ. 2. Curia.

(b) Fitz. Aid de Roy 92. S. C. Br. 88. S. C.

9. (c) In an Action, If the Defendant pleads the King's Grant by Patent to him, by which he ought to have Aid and prays it, it is no good Counterplea for the Demandant to ſhew ſpecial Matter by which the King had no Eſtate to grant at the Time of the Grant, and ſo the Patent void, for the King's Patent ſhall not be avoided without making him Party. 39 E. 3. 12 b. adjudged by all the Juſtices.

(c) 1 Rol. 293. like Point argued'.

Fol. 160.

10. When one juſtifies in the Right of the King, a Man ſhall have no Traverſe to the Cauſe of the taking. (d) 28 H. 6. 4. per Priſot.

(d) Br. Aid. de Roy 1. S. C.

11. As in Treſpaſs for taking his Goods, If the Defendant juſtifies for Damage Feaſant in the Soil and Freehold of the King as his Bailiff, it is no good Counterplea for the Plaintiff to ſay, that he took them of his own Wrong, &c. abſq; hoc, that he was the Bailiff or Servant of the King. (e) 28 H. 6. 4. adjudged.

(e) Br. Aid de Roy 8. S. C.

12. So in Treſpaſs for breaking his Cloſe, If the Defendant juſtifies for that the Place where, &c. was the King's Foreſt, and he as Bailiff entered and repaired the Lodge, &c. it is no Counterplea that he was not Bailiff. (f) 23. H. 6. 3. per Priſot.

de Roy 26. S. C. Br. 10. S. C.

(f) Fitz. Aid de Roy 26. S. C. Br. 10. S. C.

(A) In what Caſes it ſhall be granted for all or part.

1. IN a Writ of Dower againſt four of the third Part of a Manor, if they ſay they hold four Parts jointly, and two of them hold the fifth Part of the Grant of the King ſo long as the Land remains in the Hands of the King by reaſon of the Forfeiture of one who held jointly with the fourth, becauſe the fifth Part is not ſevered from the four Parts, they ſhall have Aid of the King for the whole, becauſe if the Demandant recovers, ſhe ſhall have Execution, per Metas, &c. and it is not reaſonable that a Severance ſhould be without the King. 12 H. 4. Aid del Roy 47.

2. In a (a) Writ of Dower, If the Tenant vouches the Heir in Ward of the King and others, the others ſhall not anſwer till he hath ued to the King. 12 H. 4. Aid del Roy 47. per Herle.

(a) No Aid at all perhaps ſhould have been granted in this Caſe, per 4 Ed. 1. Cap. 3. 2 Inſ. 271.

(a) For the ſeveral Ways of praying and having Aid. vide 1 Rol. Rep. 206. 208, 293. Moor 844.

(a) (b) Pleader.

The Entry, and Proceſs thereupon.

1. (c) UPon the Aid Prier, or a Writ *de rege inconſulto*, the Award is, *quod tenens ſive Defendens ſequatur penes dominum regem*, and the Tenant or Defendant ought to remove the Record into Chancery. 2 *Inſ.* 269.

2. In Caſe of Aid Prier, the Plea is not put without Day. 2 *Inſ.* 269.

3. (d) In Caſe of Aid Prier of the King, or of the Writ *de domino rege inconſulto*, no Writ of Search for the King's Title ought to be granted, but thoſe Writs ought to be granted only in a Petition of Right. 2 *Inſ.* 270.

(b) If a Seiſure to the King's Uſe of Goods waived be pleaded, and Aid prayed, the Defendant ought to ſhew he hath accounted to the King for them, per Foxly's Caſe. Moor 572. per Gaudy, Cro. Eliz. 694. per Poph. & Gaudy. (c) 1 Rol. 208, 290. S. P. arguend'. (d) Dier 320. Pl. 18. S. P. adjudged.

Fol. 161.

Aid.

(A) In what Actions it lies.

(b) 1 Rol. Abr. 148. Pl. 13. vide 156. Pl. 5. 2 Rol. Abr. 162. Pl. 27. (c) Br. Aid 127. S. C. (d) Br. Aid 148. S. C. (e) Fitz. Aid del Roy 23. S. C. Br. Forcible Entry 6. S. C. (f) Fitz. Aid 116. S. C. Br. R. 32. S. C.

1. AID lies in an (b) Ejectione firme for the Defendant when the Title of the Land is to come in queſtion. Paſch. 3 Jac. B. R. adjudged.

2. Aid ſhall be granted to the Defendant in a Writ of Treſpaſs, for he is to be charged with Damages in this Writ. (c) 6 E. 4. 2 b. (d) 13 H. 7. 26 b. (e) 22 H. 6. 18. As if in Treſpaſs the Defendant ſays that he is Leſſee for Life of the Plaintiff who is a Villain, the Reverſion to B. he ſhall have Aid. (f) 45 E. 3. 1 b. 33 E. 3. Aid del Roy 105. adjudged.

(g) Br. Aid 32. S. C. (h) Br. Aid 43. S. C. (i) But where the Title of him in Reverſion is not diſcloſed in Pleading nor comes in queſtion, Aid ſhall not be granted therein, per Ow. 43. per Broke Prothonotary. 1 Rol. Abr. 166. Pl. 1. Margin.

3. So if the Defendant juſtifies as Bailiff to the Lord of a Town. (g) 45 E. 3. 1. b.

4. So if he juſtifies as Tenant at Will of B. (h) 7 H. 4. 31 b.

5. In Treſpaſs, If the Iſſue (i) be upon the Right, the Leſſee for Life being Defendant ſhall have Aid of him in Reverſion. 22 H. 6. 18.

(k) Br. Aid 36. S. C. (l) 1 Rol. Abr. 169. Pl. 7. (m) Fitz. Aid 86. S. C. Br. 127. S. C. (n) Fitz. Aid 96. S. C. (o) Fitz. Aid 55. and 182. S. C. 1 Rol. Abr. 179. Pl. 57. S. C. (p) Fitz. Aid 3. S. C.

6. If a Man recovers in a contra formam collationis in a ſcire facias, againſt Tenant by the Courteſy being Tertenent to execute this Judgment, he ſhall have Aid of the Heir in Reverſion. (k) 2 H. 4 16 b.

7. The (l) Plaintiff in an Action of Treſpaſs ſhall not have Aid of him in Reverſion, as in Treſpaſs, if the Defendant pleads in Bar, and the Plaintiff traverſes the Bar, upon which they are at Iſſue, and the Plaintiff ſays that he is Leſſee for Years the Reverſion to A. yet he ſhall not have Aid of A. (m) 6 E. 4. 2. b. adjudged. (n) 5 H. 7. 16. b.

8. In a Ceſſavit againſt a Vicar or Parſon, he ſhall have Aid of the Patron and Ordinary, (o) 21 E. 3. 55. b.

9. So Aid lies tho' it be of his own Ceſſer. (p) 22 E. 3. 3. adjudged.

10. In

10. In a Ceſſavit againſt a Layman of his own Ceſſer, he ſhall not have Aid (q) 28 E. 3. 96. adjudged. 32 E. 3. Aid. 42. adjudged.

11. In an Attaint againſt Tenant in Dower of the Aſſignment of the Heir ſhe ſhall have Aid of him in Reverſion. 30 E. 3. Aid 36.

12. Aid lies in an Attaint, tho' there be Danger by the Death of the Jurors. (r) 40 Aſſ. 20. adjudged. 30 E. 3. Aid 36.

13. In an (s) Aſſize no Aid ſhall be granted. 3 H. 4. 14. b. (t) 1 H. 7. 29. b. Of one that is not Party to the Writ.

14. So in an Attaint upon a Verdict in an Aſſize, becauſe it is of the Nature of the Aſſize. 3 H. 4. 14. b. Contra (u) 40 Aſſ. 20. adjudged, 30 E. 3. Aid 36.

(q) Fitz. Aid 13. S. C.

(r) Fitz. Aid 158. S. C. Br. 111. S. C. 1 Rol. Abr. 168. Pl. 20. S. C.

(s) 1 Rol. Abr. 148. Pl. 7.

(t) Fitz. Aid de Roy 32. S. C. 1 Rol. Abr. 173. Pl. 16. S. C. (u) Fitz. Aid 158. S. C. Br. 111. S. C. 1 Rol. Abr. 168. Pl. 20. S. C.

15. In a ſecta ad molendinum in the debet & ſolet of his own Subſtraction, and upon a Seiſin by the Hands of the Defendant himſelf, yet if the Preſcription be traverſed, and ſo the Thing to be tried in the Right, the Defendant being Leſſee for Life ſhall have Aid of the Leſſor. 17 E. 3. 65. becauſe the Suit is in the Right. 13 E. 3. Aid 26. adjudged, but there is no Traverſe that appears.

16. The ſame Law of Tenant by the Curteſy and Tenant in Dower. 13 E. 3. Aid 26. adjudged.

Fol. 162.

17. In a quod permittat Villanos facere ſectam ad molendinum againſt one Coparcener, ſhe ſhall have Aid of her Companion, tho' this is of her own Subſtraction. 18 E. 3. 56. adjudged.

18. If a Parſon be preſented for Subſtracion of the Alms of an Hoſpital of the King's Foundation, he ſhall have Aid of the Patron, tho' this be of his own Subſtraction. (x) 25 E. 3. 54. adjudged.

19. In a Writ of Intruſion, ſuppoſing the Tenant himſelf to have abated, if the Tenant ſays that he is Tenant for Life, yet he ſhall not have Aid of him in Reverſion, becauſe this is of his own Wrong. 3 E. 2. Aid 162. adjudged.

(x) Fitz. Barr 288. S. C.

20. If the Grantee of a Rent-charge brings a Writ of Reſcous againſt the Tenant for Life, he ſhall not have Aid, becauſe he ſhall not recover the Rent but the Damages for the Reſcous. (y) 2 H. 6. 8. but otherways it is in Replevin. 2 H. 6. 8.

21. If a Tenant leaſes for Life the Remainder in Fee, and the Executor of the Lord brings Debt againſt the Leſſee for the Arrearages of Rent, (admitting it lies) he ſhall have Aid of the Remainder. (z) 2 H. 6. 8 b.

22. (a) No Aid lies in a Quare impedit, becauſe this is brought of his own Wrong, and alſo for the Miſchief of the Lapſe incurring in the mean Time. (b) 5 H. 7. 16 Curia. (c) 9 H. 7. 15 b. Curia. (d) 21 H. 7. 21. adjudged.

23. So Aid lies not in an Aſſize of Darrain Preſentment for the Cauſe aforeſaid. (e) 5 H. 7. 16 b.

24. If a Writ of Error be brought againſt Tenant in Dower of him that recovered, ſhe ſhall have Aid of him in Reverſion. (f) 42 Aſſ. 22. adjudged.

25. If Land be limited by Fine to J. S. for Life, the Remainder to another in Tail or in Fee, and J. S. recovers in a Scire facias againſt the Tenant by Default, and the Tenant brings a Writ of Error againſt J. S. he ſhall not have Aid of him in Remainder, becauſe this Writ is brought to reverſe a Judgment after the Eſtate limited; to which Judgment J. S. was only Party. 20 E. 3. Aid 29 adjudged.

26. In a Writ of (g) Scire facias to execute a Judgment given in a Writ of Nuſance againſt J. for the levying (h) une Gorce. Where it was adjudged that this ſhould be abated, tho' this Scire facias be but to execute the Judgment, yet the Defendant being Leſſee for Life, ſhall have Aid of J. S. in Reverſion. 33 E. 3. Aid del Roy 107. adjudged.

(y) Br. Aid S. C.

(z) Br. Aid 4. S. C.

(a) 1 Rol Abr. 148. Pl. 11.

(b) Fitz. Aid 96. S. C. Br. Aid de Roy 96. S. C.

(c) Br. Aid 120. S. C.

(d) Br. Aid 101. S. C.

(e) Fitz. Aid 96. S. C.

(f) Br. Aid 113. C. C. Fitz. Aſſize 349. S. C.

(g) Vide 2 Inſt. 470.

(h) The Original is ſo. Q. the proper Engliſh thereof, vide Goze in the Terms of the Law.

27. If a Man recovers in an Ejectione firmæ againſt J. S. who dies in a Scire facias againſt his Heir, the Heir ſhall have Aid of him under whoſe Title his Anceſtor claimed. Paſch. 3 Jac. B. R. between Carter & Claypoole adjudged.

(i) 1 Rol. Abr. 169. Pl. 3. vide.

28. In a (i) Writ of Partition between 2 Coparceners no Aid lies, becauſe nothing is demanded thereby but a Partition. H. 37 El. B. Curia.

29. So in a Writ of Partition between 2 Tenants in Common (by the Statute) no Aid lies no more than in Partition between Coparceners. H. 37 El. B. Curia.

Fol. 163.

(B) In what Caſes it lies in reſpect of the Thing demanded.

1. IN a Replevin if the Defendant avows upon a Stranger for a Rent Service, the Plaintiff being his Leſſee for Life ſhall have Aid of him, becauſe he can plead but hors de ſon fee without the other. 22 H. 6. 34.

2. So in an Avowry for a Rent-Charge, the Plaintiff being Leſſee for Life ſhall have Aid of him in Reverſion, for the Feebleneſs of his Eſtate to plead in Diſcharge of the Land. (a) 22 H. 6. 33 b. adjudged 41. (b) 6 E. 4. 3. contra (c) 8 E. 4. 23.

(a) Fitz. Aid 74. S. C. Br. 86. S. C.

3. So in an Avowry for a Rent-Charge, if the Plaintiff ſays he hath nothing in the Land but in the Right of his Wife, he ſhall have Aid of his Wife. 13 H. 4. Aid 176, adjudged.

(b) Fitz. Aid 86. S. C. Br. 128. S. C.

4. If a Writ be brought againſt another to demand a Rent, the Defendant being Leſſee for Life, ſhall have Aid of him in Reverſion. 8 R. 2. Aid del Roy 114. Curia.

(c) Fitz. Aid 91. S. C.

5. In a Writ of Entry ſur Diſſeiſin of a Rent, the Tenant being Leſſee for Life of the Land, ſhall have Aid of him in Reverſion. 12 R. 2. Aid 124. adjudged, who leaſed to him the Land diſcharged.

6. The ſame Law in a Scire facias out of a Fine to execute a Rent. 13 R. 2. Aid 126. adjudged.

7. In a Scire facias out of a Fine of a Rent-Charge, the Tenant being Leſſee for Life of the Land out of which this iſſues, ſhall have Aid of him in Reverſion. 13 R. 2. Aid 126.

8. The ſame Law is of a Rent-Service. 13 R. 2. Aid 126. per Richel.

9. In an Avowry for a Rent granted for Equality of Partition, the Leſſee for Life of the Land whence this iſſues ſhall have Aid of him in Reverſion. 17 E. 3. 33 b.

10. In a Scire facias to execute a Recognizance againſt the Tertenant, who is but Tenant for Life, he ſhall have Aid of the Heir of the Recognizor in Reverſion; for altho' if the Plaintiff recover, this ſhall not bind the Reverſion, yet he may be diſturbed of his Poſſeſſion after the Death of the Leſſee, which will be a Damage to him, and he in Reverſion may have a Releaſe or Acquittal to diſcharge the Execution which the Leſſee hath not. (d) 8 R. 2. Aid del Roy 114. but there by the Judgment he was ouſted of Aid, it ſeems becauſe he in Reverſion was Party to the Writ, but it is not mentioned wherefore the Judgment was.

(d) 1 Rol. Abr. 173. Pl. 19.

11. In a Formedon of a Rent one Coparcener ſhall have Aid of the other. 8 R. 2. Aid del Roy 115. adjudged.

(C) In what Caſes it ſhall be granted contrary to the Suppoſal of the Writ.

1. IN Treſpaſs for Land in one Town, if the Defendant ſays that it is in another Town, and ſhews the Cauſe of Aid, yet he ſhall have it, tho' contrary to the Suppoſal. (a) 45 E. 3. 3.

2. The ſame Law in an Aſſiſe, without taking the Aſſiſe in what Town the Tenements are. (b) 45 E. 3. 3.

3. In a Writ of Entry, Sur diſſeiſin of a Rent, the Tenant being Leſſee for Life of Land, out of which, &c. ſhall have Aid of him in Reverſion. 12 R. 2. Aid 124. adjudged.

4. In an Aſſiſe the Tenant ſhall not have Aid of one who is a Stranger to the Suppoſal of the Writ. (c) 14 H. 6. 22. b. (d) 9 H. 5. 13. b.

(a) Fitz. Aid del Roy 56. S. C. Br. 16. S. C.

(b) Fitz. Aid del Roy S. C. Br. 16. S. C.

(c) Br. Aid 100. S. C.

(d) Fitz. Aid 101. S. C.

5. In a Writ of Entry in Nature of an Aſſiſe, if the Tenant ſays he holds for Life the Reverſion to H. who is a Stranger to the Suppoſal of the Writ, yet he ſhall have Aid of him. (e) 14 H. 6. 22. b. Curia. (f) 21 E. 4. 15. b. 50. b. 12 R. 2. Aid 122. admit. Contra 2 E. 3. (g) 63. adjudged.

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(e) Br. Aid 100. S. C.

(f) Fitz. Aid 94. S. C. Br. 137. S. C. (g) This is miſprinted in the Original, for there are not ſo many Fol. of that Year, perhaps it ſhould be 36.

6. So in a Writ of Entry in Nature of an Aſſiſe againſt a Parſon, he ſhall not have Aid of the Patron and Ordinary, becauſe it is contrary to the Suppoſal of the Writ, tho' he claims but an Eſtate for Life, and ſays, that the Reverſion is over to the Biſhop, who is Patron and Ordinary. (h) 9 H. 5. 13. b. adjudged.

(h) Fitz. Aid. 101. S. C.

7. In a Writ of Entry of a Diſſeiſin to his Father againſt a Parſon or Vicar, if the Tenant ſays he found the Vicarage ſeiſed, he ſhall have Aid of the Patron and Ordinary, for he ſhall not be ouſted of his Aid by a falſe Suppoſal. (i) 21 E. 3. 55. b.

(i) Fitz. Aid 55. and 182. S. C.

8. But otherwiſe it is if he found not the Vicarage ſeiſed, for there he ſhall not have Aid againſt the Suppoſal of the Writ. (k) 21 E. 3. 55. b. (l) 22 E. 3. 9. b.

(k) Fitz. Aid 55 and 182. S. C.

9. But if he ſays that his Predeceſſor died ſeiſed, and that the Anceſtor of whoſe Seiſin the Demandant demands in the Time of Vacation abated, and of ſuch Eſtate continued ſeiſed till he himſelf was Parſon, and he entered, &c. he ſhall have Aid. (m) 22 E. 3. 9. b. adjudged.

(l) Fitz. Aid 4. S. C.

(m) Fitz. Aid 4. S. C.

10. In a Cui in vita, ſuppoſing the Entry of the Tenant by J. to whom the Baron leaſed, &c. if the Tenant ſays that R. leaſed this to him for Life, and prays in Aid of J. N. his Heir to whom the Reverſion does now belong, he ſhall have it, tho' this be againſt the Suppoſal of the Writ. 18 E. 3. Aid (n) 149. adjudged.

(n) This is miſprinted in the Original, and perhaps ſhould be 140.

11. In a Cui in vita, where the Entry of the Tenant is ſuppoſed by the Husband, if the Tenant ſays that A. leaſed to him for Life, and granted the Reverſion to B. to which he attorned, he ſhall have Aid of B. tho' it be againſt the Suppoſal of the Writ, for he does not plead this in Abatement of the Writ. (o) 22 E. 3. 17. adjudged.

(o) Fitz. Aid 4. S. C.

12. In a Writ of Entry Sur diſſeiſin done to his Father, ſuppoſing the Entry of the Tenant by B. who diſſeiſed, &c. the Tenant may ſay, that R. leaſed to him for Life, and pray in Aid of him (p) and he ſhall have it, tho' this be contrary to the Suppoſal of the Writ. Contra 20 E. 3. Aid 31.

(p) This and is not in the Original, but the Senſe ſeems to want it.

13. In a Writ of Entry Sur diſſeiſin of a diſſeiſin done to his Father by the Tenant, if the Tenant ſays that he is Leſſee, &c. the Reverſion to J. S. he ſhall have Aid of him, tho' it be againſt the Suppoſal of the Writ.

(q) Vid. Fitz. Aid 116.

Writ. 9 H. 5. 14. ſaid to be adjudged before Thirning in 11 R. 2. (q) 11 R. 2. Aid adjudged per Belknap.

14. In a Formedon of a Gift made by E. 3. if the Defendant ſhews a Gift made by E. 2. the Father of E. 3. and ſo conveys it to her and other Coparceners, and that Partition is made between them, ſhe ſhall have Aid of her Coparceners, tho' the Plea is contrary to the Suppoſal of the Writ, for the Court ſhall grant it, tho' the Plintiff himſelf cannot without abating his Writ. 29 E. 3. 28. b. adjudged.

15. In a Writ of Dower againſt two, they may ſay that they are Coparceners, &c. & fecerunt Partitionem, and one ſhall have Aid of the other, tho' the Writ ſuppoſes them Join-tenants. 39 E. 3. 4. b. adjudged.

16. In a Dum fuit infra ætatem in the per & cui the Tenant ſhall have Aid out of the Line. 34 E. 3. Aid 165. adjudged.

Fol. 165.

(r) Fitz. Aid 94, 95. Fitz. Voucher 150.

17. In a Writ of Entry within the Degrees, if the Tenant prays in Aid of a Stranger who is not named in the Writ, (r) the Court ſhall grant it ex officio, tho' the Demandant cannot grant it for abating his Writ. 35 E. 3. Aid 166.

(D) In what Caſes it lies contrary to the Suppoſal of an Avowry.

1. If in a Replevin brought by Leſſee for Years, an Avowry be made upon a Stranger, and the Leſſee ſays, that one J. S. was, and yet is ſeiſed in Fee, and holds it of the (a) Defendant by certain Services, he ſhall have Aid of the Leſſor, becauſe without the Leſſor he cannot plead this Matter in Abatement of the Avowry. Co. 9. Avowry 20. b. Reſolved 17 E. 3. 6. b. (b) 18 E. 3. 7.

(a) In the Original it is Plaintiff, but I ſuppoſe it is miſprinted.

(b) Fitz. Aid 139. S. C.

2. (c) But upon a general Allegation that his Leſſor was ſeiſed in Fee, and leaſed to him for Life or Years, he ſhall not have Aid, becauſe for any Thing that appears this is but hors de ſon fee, which he himſelf may plead without Aid. Co. 9. Avowry 20. b. (d) 18 E. 3. 7. adjudged.

(c) Before the 21 H. 8. Cap. 19. Aid was not grantable of a Stranger to the Avowry; but now if according to that Act an Avowry is made upon no Perſon in certain, Aid may be granted of any Man. Co. Lit. 312. a. (d) Fitz. Aid 139. S. C.

3. In a Replevin, if the Defendant avows upon J. S. as upon his very Tenant, and the Plaintiff ſays, that A. was ſeiſed in Fee, and gave to J. in Tail, the Remainder over, which J. leaſed to the Plaintiff for Years, the Plaintiff ſhall have Aid of J. tho' this Plea goes in Abatement of the Avowry, for his falſe Suppoſal ſhall not ouſt him thereof. (e) 2 H. 7. 10. b. 11. adjudged.

(e) Fitz. Aid 95. S. C. Br. 117. S. C.

4. So if the Defendant Avows upon 2 Strangers, where he ought to Avow upon 3, the Plaintiff being Leſſee for Years, ſhall have Aid of them, tho' this be contrary to the Suppoſal of the Avowry. 19 E. 4. 9. b. Quære.

5. In a Replevin, if the Defendant Avows upon F. as his very Tenant, and the Plaintiff ſays, that F. gave the Land by Fine to G. which G. leaſed to him for Years, he ſhall have Aid of G. (Nota, the Avowry is changed by the Fine without Notice.) (f) 5 H. 5. 5. adjudged.

(f) Fitz. Aid 100. S. C.

6. In a Replevin, if the Defendant Avows upon a Stranger, the Plaintiff may ſay that he was jointly infeoffed with his Wife to hold of the Chief Lord, and ſhall have Aid of his Wife, tho' this be againſt the Suppoſal of the Avowry. 2 E. 2. Aid 159.

(E) In what Caſes it ſhall be granted.

Where Title is derived out of the Party himſelf.

1. Where Title is derived from the Leſſee for Life, being Defendant, he ſhall not have Aid of the Leſſor. (a) 48 E. 3. 18. (a) 1 Rol. Abr. 149. Pl. 1. S. C. Fitz. Aid de Roy 59. S. C. Br. 19. S. C.

(F) In what Caſes it lies.

1. Leſſee for Life ſhall have Aid of him in Reverſion, tho' he may vouch him. 18 E. 3. 8. adjudged contra. (a) 30 E. 3. 26. b. adjudged contra 45 E. 3. Aid 118. adjudged. (a) Fitz. Aid 44. S. C.

(G) Upon what Plea it ſhall be granted.

1. In a Scire facias to execute a Fine levied of the Manor of B. if the Defendant ſays, that the Land for which he is warned, is Part of another Manor of which he is ſeiſed for Life; upon this Plea he ſhall not have Aid of the Reverſion, becauſe this Plea amounts to this, that it is not compriſed within the Fine which goes to the Action. 18 E. 3. 24. b. adjudged.

2. In Replevin, if the Defendant acknowledges the Taking as Bailiff to J. S. as in his Several, if the Plaintiff claims (a) Common appendant there, which is in the Right, yet the Bailiff ſhall not have Aid of his Maſter. (b) 39 E. 3. 27. adjudged.

Fol. 166.

(a) The Original is miſprinted, for it is there Come appendant, &c. (b) 1 Rol. Abr. 171. Pl. 6. S. C.

(H) (a) Upon what Iſſue it lies.

(a) Aid lies not in perſonal Actions, unleſs Iſſue be joined upon the Right, per Hard. 179. per Chief Baron. 1 Rol. Abr. 161. Pl. 5.

1. In Ejectment de Gard of J. S. the Heir of J. D. who held of him by Homage, &c. if the Defendant ſays, that A. was ſeiſed in Fee, and leaſed this to J. D. for Life, the Remainder to P. and he entered as Bailiff to P. after the Death of J. D. and upon this Plea Iſſue is joined, whether J. D. was ſeiſed for Life or in Fee, the Defendant ſhall have Aid of P. becauſe his Eſtate will come in queſtion, for if J. D. had a Fee his Eſtate is gone. (b) 21 E. 3. 22. b.

2. In Treſpaſs for cutting of certain Trees, if the Defendant juſtifies for Common of Eſtovers as Leſſee for Years of J. S. by Title of Preſcription, if Iſſue be taken whether he cut them of his own Wrong, or for the Cauſe aforeſaid, the Defendant ſhall not have Aid of the Plaintiff, becauſe the Iſſue is all in the Perſonalty (and the Preſcription is acknowledged) 21 E. 3. 41. adjudged.

3. But if Iſſue had been taken upon the Right of Eſtovers, he ſhould have had Aid. 21 E. 3. 41. (b) Fitz. Aid 54. S. C. 1 Rol. Abr. 171. Pl. 5. S. C.

4. In

4. In a Replevin, if the Defendant as Leſſee for Life avows for a Rent-Service, and the Plaintiff pleads hors de ſon fee, upon which they are at Iſſue, the Defendant ſhall have Aid of him in Reverſion, tho' he in Reverſion may diſtrain after the Death of the Defendant, altho' this be now found againſt the Defendant. 29 E. 3. 40. adjudged.

5. So if an Avowry be upon the Husband Plaintiff in Replevin, as in the Right of his Wife for Services, and the Plaintiff pleads hors de ſon fee, and Iſſue thereupon joined, the Husband ſhall have Aid of his Wife. 29 E. 3. 24. adjudged.

6. In Replevin by the Baron, if the Defendant Avows by reaſon of a Leaſe for Life made to the Baron and Feme rendring Rent, and for Rent arrear Avows, &c. the Baron ſhall have Aid of the Feme. 38 E. 3. 6.

7. In Treſpaſs for beating his Servant, if the Defendant juſtifies, becauſe the Servant was his Villein in the Right of his Wife; to which the Plaintiff ſays he was not his Villein at the Time of the Battery, upon which they are at Iſſue, the Husband ſhall not have Aid of his Wife, becauſe the Iſſue is taken between Strangers upon a Treſpaſs only. (c) Fitz. Aid 28 E. 3. 98. b. adjudged. (c) 27 E. 3. 89. b.

(c) Fitz. Aid 11. S. C.

8. In an Action upon the Statute for taking Averia carucæ where there were others ſufficient, if the Defendant acknowledges the Taking as Bailiff to J. S. for Rent, without that there were other ſufficient Cattle, and Iſſue is taken upon this, the Bailiff ſhall not have Aid of his Maſter, becauſe by this Iſſue the Seigniory is not in queſtion. (d) 15 H. 6. Aid 72. adjudged.

(d) 1 Rol. Abr. 171. Pl. 7. S. C.

(e) 1 Rol. Abr. 171. Pl. 8. S. C.

9. The ſame Law if in Replevin he pleads Non cepit. (e) 15 H. 6. Aid 72. per Jenny.

(I) What Perſons ſhall have Aid in reſpect of their Eſtates.

Fol. 167.

1. If there are two Join-tenants in Fee, and one is impleaded, he ſhall not have Aid of his Companion, becauſe one hath as high an Eſtate as the other, and hath Power to plead any Plea in Diſcharge of the Land, as well as the other. (a) 2 H. 6. 7.

(a) Fitz. Aid 51. S. C. Br. 3, & 7. S. C. Br. Join-tenancy. 2. S. C.

2. So if two Join-tenants in Fee make Partition, and one is impleaded, he ſhall not have Aid of the other at the Common Law, for the Warranty was deſtroyed by the Partition. Contra 2 H. 6. 7. b.

3. If the Tenant brings a Replevin againſt the Lord Paramount, and he Avows upon him as his Tenant, and he pleads in abatement of the Avowry, that he holds of the Meſn, and the Meſn of the Avowant, he ſhall have Aid of the Meſn, becauſe perhaps the Meſn hath a Matter of Eſtoppel againſt him. (b) 9 H. 6. 27.

(b) Fitz. Replevin 3. S.C. 1 Rol. Abr. 187. Pl. 2. S.C.

4. Tenant in Tail ſhall not have Aid (c) of him in Remainder in Fee, for he himſelf hath an Inheritance. (d) 2 E. 3. 46. b. adjudged.

5. (e) Tenant after Poſſibility ſhall not have Aid. (f) 2 H. 4. 17. b. adjudged. and 61. b. 11 H. 4. 15. 8 H. 6. 25. 10 H. 6. 1. (g) 8. adjudged (h) for the Inheritance that was once in him. 39 E. 3. 16. adjudged. 31 E. 3. Aid 35. adjudged.

(c) Otherways if the Remainder be in the King, per Nevel and Barrington. Cro. Eliz. 417. Moor 421.

6. Leſſee for Life, the Remainder in Tail, the Remainder in Fee to himſelf, ſhall have Aid of the Remainder in Tail. (i) 41 E. 3. 16. b.

(d) This is miſprinted, for there are not ſo many Fol. of this Year. (e) 1 Leon. 291. S. P. arguend'. Co. Lit. 127. b. S. P. Otherways if the Reverſion is in the King. 1 Rol. Abr. 152. Pl. 13. (f) Br. Aid 37. S. C. (g) This is miſprinted, and I ſuppoſe ſhould be b. (h) But his Grantee ſhall have Aid. 1 Leon. 291. Co. Lit. 27. b. 28. a. (i) Fitz. Aid 111. S. C. Br. 23. S. C. 1 Rol. Abr. 168. Pl. 3. S. C.

7. If Leſſee for Life of a Seigniory avows in Replevin he ſhall have Aid. (k) 9 H. 6. 29 b. of the Reverſioner.

8. Leſſee for Years ſhall have Aid in an Avowry for a Rent Service. (l) 45 E. 3. 8. (m) 6 E. 4. 2 b.

9. So in Treſpaſs Leſſee for Years ſhall have Aid. (n) 11 H. 4. 90. (o) 6 E. 4. 2. b. being Defendant adjudged.

10. Leſſee for Years ſhall have Aid in Treſpeſs for fiſhing in a Piſcary. 46 E. 3. 11.

11. (p) Tenant at Will ſhall have Aid. (q) 7 H. 4. 31 b. (r) 4 E. 4. 14 b. adjudged, dubitatur. 2 H. 4. 25. Contra (s) 11 H. 4. 90. adjudged. contra 27 E. 3. 88. (t) 12 E. 4, 5. adjudged.

(k) Br. Aid 10. S. C. (l) Br. Joinder in Aid 5. S. C. Fitz. 9. S. C. (m) Br. Aid 127. S. C. (n) Fitz. Aid 105. S. C. Br. 53. S. C. (o) Br. Aid 127. S. C.

(p) 1 Leon. 4. S. P. arguend' Con. 1 Rol. Abr. 169. Pl. 9. S. P. 2 Leon. 47. S. P. per Atkinſon. (q) Br. Aid 43 S. C. (r) Fitz. Aid 85. S. C. Br. 122. S. C. (s) Fitz. Aid 105. S. C. Br. 53. S. C. (t) Fitz. Aid 93. S. C. Br. 135. S. C.

12. (u) If an Avowry be upon Baron and Feme after Iſſue had for Homage in the Right of the Feme, the Baron ſhall have Aid of the Feme. 43 E. 3. 13. in a Replevin brought by the Husband. (x) 35 H. 6. 10. adjudged.

13. In an Avowry upon Baron and Feme for Rent iſſuing out of the Land of the Feme, the Baron Plaintiff ſhall have Aid of his Feme. 46 E. 3. 11. (y) 9 H. 6. 26 b. (z) 35 H. 6. 10. adjudged.

14. If the Baron juſtifies the Impriſonment of his Wife's Villain during Coverture, after the Death of the Feme he ſhall have Aid of the Heir. 11 H. 4. 90.

15. In an Avowry upon the Baron for Services due in the Right of the Feme he ſhall have Aid of the Feme 39 E. 3. 15.

16. In an Avowry Leſſee for Life ſhall have Aid of the Reverſion. 17 E. 3. 33 b.

17. So Tenant in Dower in a Replevin ſhall have Aid of him in Remainder upon whom the Avowry is. 15 E. 3. Aid 33. adjudged.

18. If Leſſee for Years (a) holds over his (b) Term, he ſhall have Aid of the Leſſor. 11 H. 4. 90 b.

19. In a real Action Tenant by the Curteſy ſhall have Aid of the Reverſioner for the Feebleneſs of his Eſtate. (c) 21 E. 3. 14 b. 26 E. 3. 69.

(u) Fitz. Aid 114. S. C. Br. 26. S. C. (x) Fitz. Aid 82. S. C. Br. Joinder in Aid 9. S. C. (y) Br. Aid 10. S. C. (z) Fitz. Aid 82. S. C. Br. Joinder in Aid 9. S. C.

(a) 1 Rol Abr. 169. Pl. 9. vide. (b) In the Original it is terre, and ſo appears plainly to be miſprinted. (c) Fitz. Aid 21. S. C. 1 Rol. Abr. 184. Pl. 5. S. C. Br. Aid 65. S. C.

20. In an Attaint againſt the Wife of him that recovered, being Tenant in Dower, ſhe ſhall have Aid of him in Reverſion for the Weakneſs of her Eſtate. (d) 40 Aſſ. 20. adjudged.

Fol. 168.

21. If 2 Executors have a Term, one ſhall have Aid of the other, becauſe one alone cannot have Aid of the Leſſor. (e) 11 H. 4. 63 b.

22. So if a Man juſtifies as Joint-tenant for Life with another, he ſhall have Aid of him. (f) 11 H. 4. 63 b.

23. In a rationalibus diviſis againſt Leſſee for Life, he ſhall have Aid of him in Reverſion, for this is a Writ of Right. 14 E. 3. Aid 23. adjudged.

24. The ſame Law in a Writ of Admeaſurement of Paſture. 14 E. 3. Aid 23. per Shard.

25. If a Man gives the Veſture of his Land, and he cuts and carries it and a Stranger brings Treſpaſs againſt him, he ſhall not have Aid of the Donor, becauſe he hath not an Eſtate, but by Carrying he hath the Effect of his Gift. 11 H. 4. 90.

(d) Fitz. Aid 158. S. C. (e) Fitz. Aid 104. S. C. Br. 49. S. C. 1 Rol. Abr. 170. Pl. 3. S. C. (f) Br. Aid. 49. S. C.

(K) Of whom.

1. IF there be Tenant for Life the Remainder in Tail, the Remainder in Tail the Reverſion in Fee, and the Reverſion deſcends upon the laſt Remainder, and after the Leſſee is impleaded, he ſhall have Aid of all. (a) 40 E. 3. 13.

(a) Br. Aid 19. S. C. Fitz. Age 28. S. C.

2. If there be Tenant in Tail the Reverſion in Fee to himſelf, he ſhall not have Aid of himſelf. 40 E. 3. 13.

3. But if there be Tenant for Life, the Remainder in Tail the Remainder in Fee to the Leſſee, the Leſſee ſhall have Aid of the Remainder in Tail. (b) 41 E. 3. 16 b. and there he prays it only of him. 42 E. 3. 8 b. but the Reaſon is given becauſe the Fee is not in him till the Tail ſpent.

(b) Fitz. Aid 111. S. C. Br. 23. S. C. 1 Rol. Abr. 167. Pl. 6. S. C.

4. Feme Leſſee takes the Reverſioner in Fee to Husband, and after a Writ is brought againſt them, they ſhall not have Aid of the Husband. 41 E. 3. 17.

5. If there be Leſſee for Life, the Remainder in Tail to J. S. and after the Reverſion in Fee deſcends upon J. S. alſo, the Leſſee ſhall have Aid of him. Contra 21 E. 3. 35 b. adjudged, but Quære.

6. A Parſon ſhall not have Aid of himſelf being Patron. (c) 7 H. 6. 41.

(c) Br. Counterplea d'Aid 10. S. C.

7. Leſſee for Life ſhall have Aid of the right Heir of J. S. who hath the Remainder limited by ſuch Name, and he having this by Purchaſe. 11 H. (d) 74.

(d) I ſuppoſe the Figure 4 is wanting here as in the Original, and that this ſhould be 11 H. 4. 74. which vide Br. Aid 51. Fitz. Age 25.

8. If there be Leſſee for Life, the Reverſion after Poſſibility to J. S. the Remainder to the right Heirs of J. S. the Leſſee ſhall have Aid of J. S. 17 E. 3. 43. b. adjudged.

9. If there be Leſſee for Life, the Remainder in Fee to another, the Leſſee ſhall have Aid of him in Remainder, for he hath a preſent Eſtate veſted. 26 E. 3. 69 b. adjudged contra 29 E. 3. 9. adjudged.

10. If there be Leſſee for Life, the Reverſion for Life, the Reverſion in Fee, the Leſſee ſhall have Aid of him in Reverſion for Life, tho' he hath no Inheritance, becauſe he may pray in Aid over of him that hath the Fee. Contra 11 E. 3. Aid 32. per Shard.

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(e) Not of him who is eſtopped to maintain the Iſſue.

12 If a Replevin be againſt 3, and one denies the taking, and the others confeſs the taking as Bailiffs of him who denied it for Damage feſant, they ſhall not have Aid of him, for he cannot maintain the taking which he hath denied. (f) 42 E. 3. 6 b. (g) 22 H. 6. 53. 19 E. 3. Aid 27. adjudged. Quære 18 E. 3. 35 b.

(e) Here the Figure 11 ſeems wanting, becauſe placitum 12 follows; but perhaps this was intended as a diſtinct Head or Diviſion of it ſelf. (f) Fitz. Joynder in Aid 8. S. C. 1 Rol. Abr. 171. Pl. 4. S. C. (g) Br. Aid 90. S. C. 1 Rol. Abr. 171. Pl. 4. S. C.

(L) What Perſon in reſpect of his Eſtate ſhall have Aid.

1. IN a Juris utrum againſt Leſſee for Life, he ſhall have Aid of him in Reverſion. 13 H. 4. Aid 177. adjudged.

2. In a Formedon againſt Leſſee for Life, he ſhall have Aid of him in Reverſion. 33 E. 3. Aid de Roy 106.

3. In a (a) Writ of Partition brought againſt Tenant by the Curteſy, he ſhall have Aid of him in Reverſion, becauſe the Partition falls in the Right, tho' no Land is demanded thereby. 5 E. 3. Aid 148.

(a) 1 Rol. Abr. 162. Pl. 28, 29. vide.

4. In a Replevin if the Defendant avows for Damage feſant, and the Plaintiff claims Common upon which they are at Iſſue, the Defendant being Leſſee for Life, ſhall have Aid of him in Reverſion. 19 R. 2. Aid del Roy 113. adjudged.

5. In a Replevin the Plaintiff Leſſee for Years ſhall have Aid of him in Reverſion, if the Avowry be upon his Leſſor, becauſe a Return ſhall be awarded againſt him, and he without Aid cannot plead but hors de ſon fee or tantamount. (b) 6 E. 4. 2 b. (c) 5 E. 4. 2 b. tho' it ſeems he may join to the Prayee contra 3 E. 2. Aid 161. adjudged. Contra 8 R. 2. Aid de Roy 118. adjudged.

(b) Br. Aid 127. S. C.
(c) Br. Aid 126. S. C.

(d) 7. (e) The ſame Law in an Action of Treſpaſs by the Leſſee for Years. Contra 8 R. 2. Aid de Roy 117.

(d) There is no Pl. 6. in the Original.

8. If there are 2 Coparceners, and each hath Iſſue a Son, and one Coparcener infeoffs her Son and Heir and one J. in Fee, and dies, and the other Coparcener dies and her Son leaſes her Part to J. for 10 Years, and J. leaſes the Land where the taking, was to the 2 Sons for 8 Years, and the Lord diſtrains and the 2 Sons bring a Replevin, and he avows upon them, they ſhall not have Aid of J. upon this Matter, becauſe they have a Fee, and ſo their Eſtate not feeble. (f) 34 H. 6. 46 b.

(e) 1 Rol. Abr. 161. Pl. 7.

9. (g) Tenant at Will ſhall have Aid of his Leſſor for the Weakneſs of his Eſtate.

(f) Fitz. Aid 81. S. C. Br. 16. S. C.

10. (h) Tenant at Will according to the Cuſtom ſhall have Aid of the Lord, where the Right of the Seigniory comes in queſtion by the Iſſue taken. (i) 21 H. 6. 37. adjudged.

(g) There is a Diverſity between Tenant at Will and Tenant at Sufferance, for Tenant at Sufferance ſhall not have Aid, per Ow. 28. per Atkins arguend'. 2 Leon. 47. S. P. per Atkinſon. 1 Rol. Abr. 167. Pl. 11. 18. vide. (h) 1 Leon. 4. S. P. arguend'. (i) Fitz. Aid de Roy 22. S. C. Br. Aid 82. S. C. Br. Tenant per Copy de Court Roll. 4 S. C. 1 Rol. Abr. 188. Pl. 11.

(M) Who ſhall have Aid.

Fol. 170.

The Baron of the Feme.

1. IN a Replevin by the Baron, if the Defendant avows upon J. S. a Stranger, the Baron may ſay that he hath nothing in the Land but in the Right of his Feme as her Dower, the Reverſion to J. S. and ſhall have Aid of his Wife, tho' ſhe is a Stranger to the Avowry. 19 E. 3. Aid 143.

(N) Vouchee.

1. (a) A Biſhop that comes in by Voucher upon his own Warranty, ſhall have Aid of the Patron and Ordinary.

(a) 1 Rol. Abr. 176. Pl. 24.

(O) Praiee;

(o) Praiee.

1. If the Servant juſtifies in the Right of his Maſter being Leſſee for Life, who joins to him, they both ſhall have Aid of him in Reverſion. (a) 8 H. 4. 16. b.

(a) Br. Aid 45. S. C.

2. But if the Servant prays in Aid of the Maſter who comes in by Procels after Iſſue, he cannot pray in Aid, for there ſhall not be Aid upon Aid; dubitatur. (b) 8 H. 4. 16 b.

(b) Br. Aid 45. S. C.

3. If an Executor of the Tenant of a Term hath Aid of his Companion Executor, they both ſhall have Aid of him in Reverſion. (c) 11 H. 4. 63 b. 64. 13 H. 4. Aid 186.

(c) Fitz. Aid 104. S. C. Br. 49. S. C. 1 Rol. Abr. 168. Pl. 21. S. C.

4. If a Baron hath Aid of his Feme Leſſee for Life, they ſhall have Aid of him in Reverſion. (d) 11 H. 4. 63 b.

(d) Br. Aid 49. S. C.

5. So if Leſſee for Life leaſes for Years, and Leſſee for Years hath Aid of Leſſee for Life, they ſhall have Aid of him in Reverſion. 11 H. 4. 63. b.

6. If a Bailiff of Leſſee for Life hath Aid of the Leſſee, the Leſſee may have Aid over of him in Reverſion. 11 H. 6. 39 b.

7. Leſſee for Life ſhall have Aid of the Leſſor, and the Leſſor ſhall after have Aid of the King who granted this to him. 26 Aſſ. 55.

8. He that is Actor in an Action ſhall have Aid. 9 H. 6. 56 b.

9. As the Defendant in Replevin after Avowry is an Actor, yet he ſhall have Aid. 9 H. 6. 56 b.

Fol. 171.

(P) In what Caſe a Servant ſhall have Aid of his Maſter.

Aid by Officers.

Servant.

1. In Raviſhment of Ward, the Defendant juſtifies as Servant to his Maſter, who is Lord by Priority, and the Priority is traverſed, he ſhall have Aid of his Maſter. (a) 7 H. 4. 9 b.

(a) Fitz. Aid 103. S. C.

2. Otherways it had been if the other had ſaid de injuria ſua propria, &c. 7 H. 4. 9 b.

3. In Raviſhment of Ward, the Defendant juſtifies as Bailiff of J. S. and makes to him Title as Guardian by Priority, and the Defendant traverſes the Eſtate by which he ſhould be in Ward to J. S. the Defendant ſhall have Aid of J. S. 17 E. 3. 25 b.

4. In Replevin againſt 2, if the one denies the taking, and the other acknowledges it as Bailiff to him who hath denied it, he ſhall not have Aid of him, becauſe he cannot maintain the taking which he hath denied. (b) 22 H. 6. 53. (c) 42 E. 3. 6 b. Fitz. Quære 18 E. 3. 53.

(b) Br. Aid 90. S. C. 1 Rol. Abr. 169. Pl. 12. S. C.

5. In an Ejectment of Ward if the Plaintiff ſays that A. held of him, &c. and died in his Homage, &c. and the Defendant ſays, that J. was ſeiſed in Fee thereof, and gave this to A. for Life, the Remainder to H. in Fee, and that after the Death of A. he ſeiſed the Land by the Command of H. to which the Plaintiff ſays, that A. was ſeiſed in Fee, the De-

(c) Fitz. Joinder in Aid 8. S. C. 1 Rol. Abr. 169. Pl. 12. S. C.

Defendant ſhall have Aid of H. his Maſter, becauſe his Eſtate is to be tried. (d) 21 E. 3. 22. b. adjudged.

6. In Replevin, if the Defendant acknowledges the Taking as Bailiff to J. S. as in his Several, if the Plaintiff claims (e) Common appendant there which is in the right, yet the Bailiff ſhall not have Aid of his Maſter. (f) 39 E. 3. 27.

7. In Treſpaſs upon the Statute for taking averia carucæ, if the Defendant ſays he diſtrained them as the Bailiff of J. S. for Rent arere, &c. abſq; hoc that there were other Cattle at the Time than thoſe, upon which they are at Iſſue, the Bailiff ſhall not have Aid of J. S. becauſe the Seigniory is not in queſtion. 15 H. 6. (g) 72. adjudged.

8. In Replevin, if the Defendant ſays non cepit he ſhall not have Aid. (h) 14 H. 6. 72.

9. In Treſpaſs, if the Defendant juſtifies as Bailiff, becauſe the Plaintiff is his Maſter's Villain, and the Plaintiff ſays he is Free, &c. he ſhall have Aid of his Maſter. 28 E. 3. 98.

10. In Treſpaſs for Goods, if the Defendant ſays, that the Goods were the Goods of 2 of the King's Enemies, and that he ſeiſed them as Servant to J. S. and by his Command and to his Uſe, and Iſſue is taken upon the Seiſure in Manner and Form aforeſaid, &c. the Defendant ſhall not have Aid of his Maſter, for the Title of the Maſter comes not in queſtion, for peradventure another ſeiſed them for him. (i) 7 E. 4. 13. b. per Curiam præter Moile.

11. If a Man juſtifies the taking of Cattle in a Cloſe as Servant to J. S. and by his Command as Damage feſant, &c. and the Plaintiff ſays, that he took them of his own Wrong, without ſuch Cauſe the Defendant ſhall not have Aid of J. S. for his Title comes not in queſtion. (k) 7 E. 4. 13. b. per Jenny.

12. But if he ſays that the Place where, &c. is the Freehold of J. D. and he as Servant, &c. and the Plaintiff ſays, it is his Freehold, and not the Freehold of J. D. the Defendant ſhall have Aid of J. D. becauſe his Title comes in Debate. (l) 7 E. 4. 13. b. per Jenny.

13. In a Replevin, if the Defendant make Conuſance as Bailiff for a Rent-charge granted to R. by W. and the Plaintiff ſays that W. was obliged to him in a Statute-merchant before the Grant of the ſaid Rent, upon which Iſſue is taken, the Bailiff ſhall have Aid of R. his Maſter. 21 E. 3. Aid 183.

(d) Fitz. Aid 54. S. C. 1 Rol. Abr. 166. Pl. 1. S. C.

(e) The Original is miſprinted, for there 'tis come appendant.

(f) 1 Rol. Abr. 166. Pl. 2. S. C.

(g) I ſuppoſe the Word Aid is wanting in the Original, and that Fitz. Aid 72. is hereby intended. 1 Rol. Abr. 166. Pl. 8.

(h) This I ſuppoſe is miſprinted. and ſhould be 15 H. 6. Aid 72. 1 Rol. Abr. 166. Pl. 9.

(i) Fitz. Aid 89. S. C. Br. Aid 130. S. C.

(k) Fitz. Aid 89. S. C. Br. 130. S. C.

(l) Fitz. Aid 89. S. C. Br. Aid 130. S. C.

Fol. 172.

(Q) Of whom it ſhall be granted.

Not of him who is Party to the Action.

1. If one Defendant juſtifies as in the right of the other Defendant, he ſhall not have Aid of him; for this needs not when he is Party to the Writ before. (a) 45 E. 3. 1. b. Otherways in the Caſe of the King. 7 H. 4. 2.

2. The ſame Law is in an Avowry. (b) 45 E. 3. 1. b.

3. So if one Defendant juſtifies as Servant to the other Defendant who makes Default, he ſhall have Aid of him. (c) 8 H. 4. 16. adjudged, for he is not Party before Appearance, but there it is ſaid by Hills, that Aid ought not to have been granted,

4. So if a Defendant juſtifies as in the Freehold of another Defendant, and 2 other Strangers Join-tenants, yet he ſhall not have Aid of him who is Party to the Action with others. (d) 7 H. 6. 21. Curia.

5. But in this Caſe he ſhall have Aid of the Strangers. (e) 7 H. 6. 21. Curia.

6. In Treſpaſs againſt 2, if one juſtifies as in the Freehold of the other, as Servant to him, and by his Command, and the other ſays

(a) Fitz. Aid 116. S. C. Br. 32. S. C.

(b) Fitz. Aid 116. S. C. Br. 32. S. C.

(c) Br. Aid 45. S. C.

(d) Fitz. Aid 60. S. C. Br. 71.

(e) Fitz. Aid 60. S. C. Br. 71.

his Freehold, the Servant ſhall not have Aid of the other, becauſe he is Party to the Writ. (f) 34 H. 6. 35. b. adjudged 16. H. 7. Aid 173. per Fineux.

(f) Fitz. Aid 185. S. C. Br. 15. S. C.

7. But if the Servant pleads this Plea before the other appears, he ſhall have Aid of him, for he is not Party before Appearance. 16 H. 7. Aid 173. 15 H. 7. 10.

8. If A. and B. recover in an Aſſiſe againſt C. who brings an Attaint againſt them, and A. makes Default, and B. ſays, that this Land and other Land deſcended to her and A. and they made Partition, and prays in Aid of her, ſhe ſhall not have Aid becauſe ſhe is Party to the Writ, tho' it may be that B. who prays in Aid had all this Land in Allowance of other Land, and ſo ſhe ſhall loſe her Warranty pro rata. (g) 30 Aſſ. 24. adjudged. (h) 50 Aſſ. 4. adjudged. 32 E. 3. Aid 37. adjudged, for the Loſs ſhall be equal without the Aid.

(g) Br. Aid 110. S. C. (h) Br. Aid 116. S. C.

9. If the Patron of a Vicaridge or Parſonage brings an Annuity againſt the Vicar or Parſon, he ſhall have Aid of the Patron, tho' he be Plaintiff in the Action. (i) 10 H. 6. 11. (k) 19 H. 6. 36. (l) 18 E. 3. Aid 28. adjudged. (m) 28 H. 6. 1. adjudged. (n) 10 E. 4. 50. and he may join in Aid. (o) 21 H. 6. 3. adjudged. 34 E. 3. Aid del Roy 111. adjudged. 8 R. 2. Aid del Roy 116. adjudged. Contra (p) 23 E. 3. 21. b.

(i) Fitz. Aid 68. S. C. Br. 138. S. C. 1 Rol. Abr. 180. Pl. 12. S. C.

10. As in a Ceſſavit by the Patron againſt the Parſon, the Parſon ſhall have Aid of the Patron who is Plaintiff, and of the Ordinary. (q) 22 E. 3. 3. adjudged.

(k) Br. Aid 77. S. C.

11. In a Mortdanceſter by 3, ſcilicet 2 Aunts and a Niece, if the Tenant ſays that A. his Wife was ſeiſed of the Land in Fee, and had Iſſue by him B. one of the Plaintiffs, and died, and that he is in as Tenant by the Curteſy, he ſhall have Aid of B. in Reverſion, tho' ſhe be one of the Demandants, becauſe it may be that ſhe hath a Releaſe, or other Thing which may bar the other Demandants. (r) 40 Aſſ. 37.

(l) This is miſprinted, and ſhould be 19 Ed. 3. which vid. Fitz. Aid 28. (m) Fitz. Aid 78. S. C. (n) This is miſprinted in the Original, for there are not ſo many Fol. of that Year, perhaps it ſhould be 4 Ed. 4. 26. vide & Q. (o) Br. Aid 79. S. C. (p) Fitz. Annuity 36. S. C. but vide. (q) Fitz. Aid 3. S. C. 1 Rol. Abr. 178. Pl. 27. S. C. (r) Br. Aid 22. S. C. Fitz. Voucher 207. S. C.

Fol. 173.

12. In a Formedon by 2 Coparceners againſt a Tenant for Life, the Tenant for Life ſhall not have Aid of the Demandants, which have the Reverſion, becauſe they are Demandants. 34 E. 3. Aid del Roy 112. adjudged.

13. If a Man recovers Land and dies ſeiſed, and this deſcends to his Daughter, who takes Husband, and hath Iſſue and dies, and after a Writ of Error to reverſe this, Judgment is brought againſt the Husband, Tenant by the Curteſy and the Heir, the Husband ſhall have Aid upon the ſhewing of this Matter of the Heir in Reverſion, tho' he be Party to the Writ. (s) 47 Aſſ. 4. 9. adjudged.

(s) Br. Aid 115. S. C.

14. In a Writ of Coſenage by two, A. and B. two Siſters, if A. be ſummoned and ſevered, the Tenant being Leſſee for Life ſhall not have Aid of the Demandants, which have the Reverſion, tho' he cannot have it of one of them alone without the other, for he needs no Aid of A. who is ſevered, for he is diſcharged of him for the Moiety, and for the other Moiety he ſhall not have Aid of the Demandant, for he may plead any Plea in Bar againſt him as well as againſt both. 34 E. 3. Aid del Roy 110. adjudged.

15. In a Writ of Entry in Nature of an Aſſiſe againſt Baron and Feme, if the Feme received upon the Default of the Husband, ſays, that the Land was given to her and her firſt Husband, and to the Heirs of the Husband, ſhe ſhall not have Aid of the Heir of her firſt Husband, who hath the Remainder if the Heir be Demandant. 12 R. 2. Aid 122. adjudged.

16. In an Aſſiſe againſt ſeveral, one ſhall have Aid of another who is Party to the Writ. (t) 1 H. 7. 29. b. admit.

(t) Fitz. Aid de Roy 32. S. C. 1 Rol. Abr. 161. Pl. 13. S. C.

17. In a Writ of Entry againſt Baron and Feme and W. if W. makes Default after Default, and the Baron and Feme take upon them the intire Tenancy, and ſay they are but Tenants for Life, the Reverſion to W. they ſhall have Aid of W. tho' he was Party to the Action, and hath made Default. 8 E. 2. Aid 168. adjudged.

18. If

18. If a Mano⁊ be demanded againſt three Coparceners, and two make Default after Default, by which they loſe their Part, the Third ſhall not have Aid of them, becauſe they were Parties as it ſeems and no Partition was between them. Dubitatur 19 E. 2. Aid 172.

19. In a Scire facias to execute a Recognizance, if the Sheriff returns the Conuſo⁊ dead, upon which a Writ is awarded to warn the Heir, and the Sheriff returns the Heir and B. as Tertenants warned, the Tertenant being Tenant in Dower, ſhall not have Aid of the Heir in Reverſion, becauſe he is Party to the Writ. (u) 8 R. 2. Aid del Roy 114. adjudged. But it does not appear whether the Judgment was fo⁊ this Cauſe, o⁊ becauſe the Thing demanded would not bind him in Reverſion, tho' it ſhould be now adjudged againſt Tenant in Dower, fo⁊ both Reaſons were urged.

(u) 1 Rol. Abr. 163. Pl. 10. S. C.

(R) Againſt whom.

1. If a Villain b⁊ings an Action of Treſpaſs, and the Defendant juſtifies in the Right of his Lo⁊d, he ſhall have Aid of the Lord (a) 49 E. 3. 2.

(a) Br. Aid 35. S. C.

2. So if a Stranger b⁊ings an Action upon the Statute of Labourers fo⁊ his Servant, if the Defendant juſtifies in the Right of the Lo⁊d, the Servant being his Villain, he ſhall have Aid notwithſtanding it is between Strangers. (b) 49 E. 3. 2.

(b) Br. Aid 35. S. C.

(S) Of whom it ſhall be granted.

Fol. 174.

1. If there be Leſſee fo⁊ Life, the Remainder fo⁊ Life, the Remainder in Fee, the Leſſee ſhall have Aid of both Remainders at one Time, becauſe all begin at one Time, and depend upon the firſt Eſtate. (a) 11 H. 4. 63. b.

(a) Br. Aid 49. S. C.

2. If there be Leſſee fo⁊ Life, the Remainder in Tail, the Remainder in Fee, the Leſſee ſhall not have Aid of the Remainder in Tail only, but of both. 11 H. 4. (b) 2. b. adjudged. 33 H. 6. (c) 66. (d) 43 Aſſ. 45. per Finchden. 11 R. 2. Aid 120. no⁊ of the Remainder in Fee only, but of both. (e) 7 H. 4. 18. b.

(b) This is miſprinted in the Original, and perhaps ſhould be 63. b. but Q. (c) This is miſprinted in the Original, for it ſhould be 33 H. 6. 6. Fitz. Aid. 80. S. C. Br. 14. S. C. (d) Br. Aid 114. S. C. (e) Br. Aid de Roy 27. S. C.

3. If there be Leſſee fo⁊ Life, the Remainder in Tail, the Remainder to the right Heirs of Tenant in Tail, the Leſſee ſhall have Aid of him in Remainder. 25 E. 3. 39.

4. An Executo⁊ Leſſee fo⁊ Years, ſhall not have Aid of his Companion and Leſſo⁊ at one Time, becauſe he is not intirely Tenant to the Leſſo⁊, but of his Companion, and then both of the Leſſo⁊. (f) 11 H. 4. 63. b.

(f) Br. Aid 49. S. C.

5. If there be Leſſee fo⁊ Life, the Remainder in Tail, the Remainder in Fee to the Leſſee, the Leſſee ſhall have Aid of him in Remainder in Tail only, and not of himſelf. (g) 33 H. 6. 6. adjudged.

(g) Fitz. Aid 80. S. C. Br. 14. S. C.

6. So if there be Leſſee fo⁊ Life, the Remainder in Tail, the Remainder to the Leſſee in Tail, the Remainder in Fee to another, the Leſſee ſhall have Aid of him in Remainder in Tail, and of him in Remainder in Fee, but not of himſelf. (h) 33 H. 6. 6. fo⁊ a Man ſhall not have Aid of himſelf.

(h) Br. Aid 14. S. C.

7. If a Man juſtifies as Servant to the Grantee of the Ward of the King, he ſhall not have Aid of the Grantee and of the King preſently, but he may have Aid of the Grantee, and when he comes in he may have Aid of the King.

(i) Br. Aid de Roy 57. S. C. Fitz. 11. S. C.

8. If there be Leſſee for Life, the Reverſion in Tail, the Remainder in Tail, the Remainder in Fee, the Leſſee ſhall have Aid of him in Reverſion, and of both Remainders. Aid 120. adjudged.

9. If a Man juſtifies as Bailiff of a Leſſee for Life, he ſhall not have Aid of him in Reverſion, for want of Privity between them. 11 H. 6. 39. b.

10. If there be Leſſee for Life, the Reverſion for Life, the Remainder for Life, the Remainder in Fee, the Leſſee ſhall not have Aid of him in Reverſion for Life only, but ſhall have Aid of him and the others in Remainder. 33 E. 3. Aid del Roy 108. adjudged.

11. In Treſpaſs againſt a Miller for taking of Toll where he ought to be Toll-free, if he be the Miller of A. who is Leſſee for Life, the Reverſion to B. he ſhall have Aid of the Leſſee, but not of the Reverſion for want of Privity. 44 E. 3. (k) 2 Brook Aid 30.

(k) This is miſprinted in the Original, and ſhould be 44 E. 3. 20.

12. If a Man be poſſeſſed of a Ward in the Right of his Wife, and a Replevin is brought by him, and the Defendant avows for a Rent-charge iſſuing out of the Land, the Baron ſhall have Aid of the Heir, but not of the Feme. (l) 25 E. 3. 38. b. adjudged 44.

(l) Fitz. Age 106. S. C.

13. If a Feme Tenant in Dower, takes Husband, and they leaſe the Land to B. for the Life of the Feme, and after B. is impleaded, he ſhall not have Aid of the Baron and Feme, as in the Right of the Feme; for tho' ſhe hath a Poſſibility to have it again if ſhe ſurvives her Husband, becauſe ſhe leaſed this in Pais, yet ſhe hath no Reverſion, or Eſtate during the Life of the Husband. 19 R. 2. (m) 113. adjudged.

(m) This ſhould be 19 R. 2. Aid del Roy 113.

Fol. 175.

14. But in this Caſe B. the Leſſee ſhall have Aid of the Heir of the firſt Husband, who hath the Reverſion only without the Baron and Feme, becauſe he hath the immediate Reverſion. 19 R. 2. Aid del Roy 113. adjudged.

15. If Ceſtuy que uſe before the Statute of 27 H. 8. had made a Leaſe for Years by Statute, 1 R. 3. the Leſſee ſhould have had Aid of the Feoffees, tho' they were not Privy to the making of the Leaſe, becauſe they had the Reverſion. (n) 21 H. 7. 21. b. adjudged. 8 H. 7. 9. Curia. 11 H. 7. 6. b.

(n) Br. Feoffmental Uſes. 17. S. C.

16. In Replevin, if the Defendant avows upon B. as his very Tenant, and the Plaintiff ſays, that B. leaſed to W. for 10 Years, &c. which W. made him, and one A. Executors, and died, A. being living; he ſhall have Aid of A. becauſe he alone without A. cannot have Aid of B. 13 H. 4. Aid 186. adjudged.

(T) Abatement of Aid.

By Death.

1. If Aid be granted of three who have the Reverſion to them, and to the Heirs of two of them, and at the Summons ad auxiliandum the Sheriff returns, that one who had the Fee is dead, this ſhall not abate the Aid, becauſe all ſurvives to the reſt. (a) 4 H. 4. 3. b.

(a) Fitz. Aid de Roy 119. S. C.

2. But if the Reverſion had been to two Perſons it had been otherways, for the ſeveral Right (it ſeems intended in Common, of which there ſhould be no Survivor.) 4 H. 4. 3. b.

(U) What Spiritual Perſon ſhall have Aid.

1. TR. 1 E. 2. Br. 57. **Erroꝛ bꝛought of a Judgment in B. and Erroꝛ aſſigned, becauſe it was there pꝛoceeded to take a Jury againſt the Parſon, Pꝛedeceſſoꝛ of the Plaintiff of the Glebe Land without Aid of the Patron and Biſhop, and thereupon adjudged.** Quia Eccleſia quæ ſemper eſt infra ætatem fungetur vice minoris, nec eſt juri conſonum quod infra ætatem exiſtentes per negligentiam cuſtodum ſuorum exhereditationem patiantur, &c. ideo **reverſed**, &c.

2. (a) **A Parſon ſhall have Aid becauſe he hath not the meer Right.** (b) 8 H. 6. 24 b. (c) 11 H. 6. 9. 20 H. 6. 46 33 E 3. Aid del Roy 103.

3. (d) **So a Pꝛebend foꝛ the ſame Reaſon ſhall have Aid.** (e) 11 H. 6. 9. adjudged. 33 E. 3. Aid del Roy 103.

4. **A Maſter of an Hoſpital who hath no College noꝛ Common Seal, wall have Aid.** (f) 44 E. 3. 11 b.

5. **But an Abbot ſhall not have Aid.** 44 E. 3. 11 b. (g) 11 H. 4. 68 b. **becauſe he hath the Right in him, and map** have a Writ of Right. 8 H. 6. 24 b. 11 H. 6. 9. (h) 20 H. 6. 46. 14 E. 3. Aid 22. contra 8 H. 6. 24 b.

6. **Noꝛ a Dean.** (i) 44 E. 3. 11 b.

7. **If an Abbot be ſued as Parſon, he ſhall have Aid of the Patron and Oꝛdinaꝛy.** (k) 6 H. 4, 5 b. 11 H. 4 6 b. (l) 68 b. 8 R. 2. Annuity 53. **adjudged.**

8. (m) **If an Abbot hath uſed to pꝛeſent a Monk to the Patron of the Pꝛioꝛy, who ought to pꝛeſent him to the Biſhop, who ought to inſtitute him Pꝛioꝛ, if this Pꝛioꝛ hath a Convent and Common Seal,** altho' **the Pꝛioꝛ be pꝛeſentable, pet he ſhall** not have Aid, (n) **becauſe he hath the Right in him, and map maintain** a Writ of Right. (o) 11 H. 68 b. **adjudged.**

(a) Co Lit. 341 b. S. P. (b) Fitz. Aid 63. S. C. Br. 76. S. C. Br. Dean and Chapter 8. S. C. (c) Fitz. Aid 69. S. C. Br. 141. S. C. (d) Co. Lit. 341 b. S. P. Dier 239 Pl. 41. S. P. per 3 Judges. (e) Fitz. Aid 69. S. C. Br. 141. S. C. (f) Fitz. Aid. de Roy 54. S. C. Br. 15. S. C.

(g) Fitz. Scire facias 71. S. C. (h) Fitz. Faux. Recovery 7. S. C. (i) Fitz. Aid de Roy 54 S. C. Br. 15. S. C. (k) Fitz. Counterplea d'Aid 13. S. C. (l) Fitz. Scire facias 71. S. C. Br. Aid 50. S. C. (m) Co. Lit. 341 b. S. P. (n) Vide Co Lit. 341 b. (o) Fitz. Scire facias 71. S. C. Br. Aid 50. S. C.

9. **If a Man founds a New Chantry, and oꝛders that they ſhall have a Common Seal, and that the Chaplains ſhall be pꝛeſented,** they ſhall not have Aid. 11 H. 4. (p) 6. 8 b.

Fol. 176.

(p) This is miſprinted in the Original, and ſhould be 68 b.

10. **If a Pꝛebend hath a Covent and a Common Seal,** he ſhall not have Aid, **becauſe he map** have a Writ of Right. 11 H. 6. 9.

11. **A Maſter of an Hoſpital** ſhall have Aid. (q) 2 E. 3. 47 b. 48 **adjudged.**

(q) This I ſuppoſe is miſprinted, for there are not ſo many Fol. of that Year.

12. **A Maſter of an Hoſpital who is by Election,** ſhall not have Aid, foꝛ he **is in equal Eſtate with an Abbot, and ſhall not have** a Juris utrum. 14 E. 3. Aid 22. **adjudged.**

13. **So he** ſhall not have Aid **tho' the Maſter be to be pꝛeſented by the Patron of the Place to the Oꝛdinaꝛy, foꝛ divers Pꝛioꝛs and Abbots are pꝛeſentable.** 14 E. 3. Aid 22. **adjudged.**

14. **A Maſter of an Hoſpital pꝛeſentable who hath a College and Covent Seal** ſhall not have Aid. 33 Ed. 3. Aid del Roy 103. **ſaid to have been adjudged and agreed.**

15. **A Parſon appꝛoꝛiate** ſhall have Aid **of the Patron and Oꝛdinaꝛy in Annuity.** (r) 6 H. 4, 5 b. adjudged. (s) 11 H. 4. 68 b. 8 R. 2. Annuity 53. adjudged.

(r) Fitz. Counterplea d'Aid 13. S. C. (s) Fitz. Scire facias 71. S. C. Br. Aid 50. S. C.

16. A Prior, tho' he himſelf be Patron, ſhall not have Aid, for he being by Election hath the Right in him. 14 E. 3. Aid 22.

17. So he, or an Abbot, ſhall not have Aid, tho' they are preſentable. 14 E. 3. Aid 22.

18. A Biſhop ſhall have Aid of the Prior and Chapter, tho' he be the Soveraign of the Priory and Chapter. (t) 18 E. 3. 7 b. adjudged.

(t) Fitz. Aid 138. S. C. 1 Rol. Abr. 78. Pl. 28. vide.

19. A Biſhop ſhall have Aid of the Dean and Chapter. 5 E. 2. Aid 167. adjudged.

20. A Biſhop ſhall not have Aid of the King who is Patron, becauſe he is Elective. 38 E. 3. 19. Contra 33 E. 3. Aid del Roy 103. per Thorpe.

21. A Dean of a Free Chapel of the King, who hath no College or Covent Seal ſhall have Aid of the King, if his Deanery be in Demand. 33 E. 3. Aid del Roy 103. agreed.

22. (u) A Dean who is of the Collation of the King ſhall have Aid of the King, tho' he and the Chapter have a Common Seal, and may charge it, becauſe he is not Elective, but comes in by Collation. 38 E. 3. 19. adjudged.

(u) Co. Lit. 341 b. S. P.

23. A Dean and Chapter ſhall not have Aid of the Biſhop, contra 32 E. 3. Aid. 40. adjudged.

24. (x) A Biſhop who comes in as Vouchee upon his own Warranty, ſhall have Aid of the Dean and Chapter. 5 E. 2. Aid 167. adjudged.

(x) 1 Rol. Abr. 170. N. 1.

25. If a Dean of a Free Chapel of the King, who hath not a Covent Seal nor College, hath a Church appropriated to him which is demanded by a Writ of Right of Advowſon, he ſhall have Aid of the King. 33 E. 3. Aid del Roy 103. by all the Juſtices, præter Thorpe.

26. If the King be ſeiſed of the Poſſeſſions of a Prior Alien in the Time of War, and after leaſes them to the ſame Prior during the War, rendring Rent, the Prior in an Annuity ſhall have Aid of the King, tho' he be a Prior perpetual, not removeable, and tho' the Charter of the Leaſe be that he ſhall diſcharge all Charges. 20 E. 3. Aid 2. adjudged.

Fol. 177.

(X) In what Actions it ſhall be granted.

1. (a) IN a Scire facias to execute an Annuity againſt a Parſon upon a Judgment againſt the Predeceſſor in which no Aid was granted, the Defendant ſhall have Aid, becauſe there may be a Releaſe after to the Patron (but it does not appear whether the firſt Judgment was per nient dedire (b) 19 H. 6. 44. adjudged. 8 H. 6. (c) 23. adjudged. (d) 24.

(a) Dier 26 b. S. P. appears. 1 Rol. Rep. 292. like Point arguend'.
(b) Fitz. Aid 73. S. C.
(c) Fitz. Aid 64. S. C. (d) Fitz. Aid 63. S. C. Br. Aid 76.

2. In a Scire facias to execute a Judgment in a Writ of Annuity, in which the Predeceſſor of the Defendant had Aid of the Father of the Patron which now is, the Defendant ſhall have Aid, the firſt Judgment being by nient dedire, becauſe perhaps the Plaintiff had after releaſed to the Patron. (e) 41 E. 3. 20.

(e) Fitz. Aid 112. S. C. Br. 24. S. C.

3. Contra (f) 44 E. 3. 18. adjudged, but it does not appear whether the Judgment was by nient dedire, and ſo (g) 46 E. 3. 6 b. adjudged.

(f) Br. Aid 29. S. C.

4. But if in ſuch Caſe the Defendant alledges a Releaſe between the Judgment and Scire facias, Aid ſhall be granted. (h) 46 E. 3. 6 b.

(g) Fitz. Aid de Roy 77. S. C. (h) Fitz. Aid de Roy 57. S. C.

5. In a Scire facias againſt a Parſon to execute an Annuity, upon a Judgment againſt the Predeceſſor, in which Aid was granted, and the Patron and Ordinary fecerunt defaltam, and the Defendant acknowledged the Action, this Succeſſor ſhall have Aid becauſe it may be releaſed after. (i) 14 H. 6. 8. (k) 7 H. 6. 38 b.

(i) Br. Aid 99. S. C.
(k) Fitz. Aid 61. S. C. Br. 72. S. C.

6. But in a Scire facias, to execute a Judgment in an Annuity againſt a Parſon, upon a Jugment againſt the Predeceſſor, he ſhall have Aid. (l) 12 H. 4. 4 b. (m) 19 H. 6. 2 b. becauſe there may be a Releaſe after.

(l) Br. Aid 54. S. C.
(m) Fitz. Aid del Roy 20. S. C. Br. 44. S. C.

7. In a Scire facias to execute a Judgment had againſt the Defendant himſelf, in Annuity the Defendant ſhall not have Aid. (n) 12 H. 4 18.

(n) Fitz. Counterplea d'Aid 17. S. C.

8. So if he had Aid of the Patron and Ordinary. 7 H. 6. 39. 17 E. 3. 56 b. admit.

9. (o) In a Scire facias to execute an Annuity againſt a Parſon upon a Judgment againſt his Predeceſſor, in which Aid was granted of the Patron and Ordinary, the Defendant ſhall have Aid (but it does not appear whether the firſt Judgment was by nil dicit, or how) becauſe there may be a Releaſe after to the Patron, to which the Parſon is a Stranger. (p) 8 H. 6. 23 b. 38 E. 3. 25. adjudged.

(o) Dier 266. S. P. appears. 1 Rol. Rep. 292. like Point argu. end'.
(p) Fitz. Aid 64. S. C.

10. In a Scire facias againſt a Parſon to execute a Judgment, had in a Ceſſavit againſt his Predeceſſor, the Defendant ſhall have Aid, becauſe there may be a Releaſe after the Judgment. 10 H. 8. 5 b. adjudged contra. (q) 8 H. 6. 24 33 b. Dubitatur.

(q) Br. Aid 70. S. C.

Fitz. Aid 63. S. C. Br. Dean and Chapter. 8. S. C.

11. In a Writ of Annuity Aid ſhall be granted of the Patron and Ordinary. (r) 46 E. 3. 6 b. (ſ) 6 H. 4, 5. becauſe the Church is to be charged by the Recovery. 2 H 6. 8. 6. 7 H. 6. (t) 19 b. (u) 38 b. 39. 11 H. 6. (w) 9. (x) 10 b. 20 H. 6. 46. 6 E. (y) 43. 9 H. 5. 14. 8 R. 2. Aid del Roy 116. adjudged. 20 E. 3. Annuity 32. 16 E. 3. Annuity 23 adjudged.

(r) Fitz. Aid de Roy 57. S. C.
(ſ) Fitz. Counterplea d'Aid 13. S. C.
(t) Fitz. Aid 59. S. C. Br. 70. S. C. (u) Fitz. Aid 61. S. C. Br. 72. S. C. (w) Fitz. Aid 69. S. C. Br. 141. S. C. (x) Br. Aid 142. Br. Aid de Roy 105. S. C. (y) This is miſprinted, and ſhould be 6 E. 4. 3. Fitz. Aid 87. S. C.

12. So Aid ſhall be granted, altho' Seiſin be alledged by the Hands of the Defendant himſelf, tho' the Action be brought of his own Subſtraction. (z) 12 H. 4. 18. 13 R. 2. Aid 125. adjudged. 16 E. 3. Aid 132. adjudged.

(z) Fitz. Counterplea d'Aid 17 S. C. Br. Aid 55. S. C.

13. In Debt for the Arrearages of an Annuity by an Executor againſt a Parſon, he ſhall have Aid. (a) 1 H. 6. 6. (b) 2 H. 6. 8. adjudged. (c) 7 H. 6. 19 b.

(a) Fitz. Aid 48. S. C.
(b) Fitz. Aid 48. S. C. Br. 4. S. C.

14. But in Debt for the Arrearages of an Annuity againſt a Parſon brought by an Executor upon the Grant of an Annuity by the Defendant, for the Life of the Teſtator, he ſhall not have Aid, becauſe this does not charge the Church. (d) 2 H. 6. 8 b.

(c) Fitz. Aid 59. S. C. Br. 70. S. C.

15. In a Scire facias to execute a Fine of the Manor of E. againſt J. S. who is Maſter of the Hoſpital of the ſaid E. ſo that this is to defeat his Name, he ſhall have Aid of the Patron and Ordinary. (e) 2 E. 3. 48. adjudged.

(d) Fitz. Aid 48 S. C.
(e) This I ſuppoſe is miſprinted, for there are not ſo many fol. in that Year.

16. In Debt againſt a Parſon for a Pain, for Non-payment of an Annuity, he ſhall have Aid of the Patron and Ordinary, for the Church ſhall be (f) charged by this (g) 7 H. 6. 19 b. adjudged. 40 E. 3. 4. 8 H. 6. 6. 9 H. 6. 56.

(f) Fol. 178.
(g) Fitz. Aid 59. S. C. Br. 70. S. C.

17. In a Scire facias to execute a Judgment in an Annuity, if in the firſt Action, the Parſon had Aid granted of the Patron and Ordinary, and they would not join, and then the Parſon acknowledged the Action, this Succeſſor ſhall have Aid. (h) 14 H. 6. 8.

(h) Br. Aid 99 S. C.

18. The ſame Law in ſuch Caſe, if the Judgment had been given upon the Default of the Parſon. (i) 14 H. 6. 8.

(i) Br. Aid 99. S. C.

19. So if the Parſon in ſuch Caſe, had traverſed the Title of the Action, and this had been found againſt him, the Succeſſor ſhould have Aid in this Scire facias, becauſe there may be a Releaſe after. 38 E. 3. 18 b. adjudged contra. (k) 14 H 6. 8. Curia.

(k) Br. Aid 99. S. C.

20. If

20. If in a Writ of an Annuity, the Parſon hath not any Aid of the Patron and Ordinary, but he traverſes the Title of the Plaintiff, and this is found againſt him, in a Scire facias againſt the Succeſſor, he ſhall have Aid, becauſe there may be a Releaſe after, contra, (l) 14 H. 6. 8. Curia.

(l) Br. Aid 99. S. C.

21. The ſame Law, tho' the Patron and Ordinary join in Aid, in a Writ of Annuity, becauſe there may be a Releaſe after, contra, 14 H. 6. 8. Curia.

22. So if in an Annuity Aid be granted of the King, and after ſeveral Procedendo's granted, the Plaintiff recovers, yet in a Scire facias againſt the Succeſſor he ſhall have Aid again of the King, becauſe there may be a Releaſe after. 17 E. 3. 56 b. adjudged.

23. In a Mortdanceſtor againſt a Parſon, he ſhall have Aid of the Patron and Ordinary. (m) 8 Aſſ. 36.

(m) Br. Aid 108. S. C.

24. In a præcipe quod reddat againſt a Parſon to the Glebe Land, he ſhall have Aid of the Patron and Ordinary, becauſe he hath not the meer Right, and the Patron and Ordinary will receive Prejudice thereby. 3 E. 2. Aid 164. adjudged contra. (n) 8 H. 6. 24 b.

Fitz. Aid. 157. S. C.

(n) Br. Aid 76. S. C. Fitz. Aid 63. S. C.

25. So he ſhall have Aid in a Formedon againſt him for the Land which he hath as Parſon. (o) 17 E. 3. 58 b. adjudged. 18 E. 3. 54 b.

Br. Dean and Chapter 8. S. C.

26. So he ſhall have Aid in a Writ of Entry for Rent. (p) 21 E. 3. 55 b. adjudged.

(o) Fitz. Aid 137. S. C.

27. So he ſhall have Aid in a Ceſſavit. (q) 21 E. 3. 55 b. (r) 22 E. 3. 3.

(p) Fitz. Aid 55, and 182. S. C.

28. In an Action againſt a Biſhop for Land, or other Freehold, he ſhall not have Aid of the Prior and Chapter. (ſ) 18 E. 3. 7 b.

(q) Fitz. Aid 55, and 182. S. C. 1 Rol. Abr. 161. Pl. 8. S. C.

29 Vide 5 E. 2. Aid 167. The Biſhop had Aid of the Dean and Chapter in a precipe quod reddat.

30. In a Scire facias to have Execution of a Fine againſt a Prebend of certain Land, the Prebend ſhall have Aid of the Patron and Ordinary. 20 E. 3 Aid 30.

(r) Fitz. Aid 3. S. C. 1 Rol. Abr. 172. Pl. 10. S. C.

31. So Aid lies tho' his Name of Prebend is to be defeated by this Writ. 20 E. 3. Aid 30.

32. In a Juris utrum the Parſon ſhall have Aid of the Patron and Ordinary, becauſe he may loſe the Land for ever in this Writ. Contra 9 H. 5. 14. per June.

(ſ) Fitz. Aid 138. S. C. 1 Rol. Abr. 176. Pl. 18. vide. Poſt 179. Pl. 40. 42.

33. In a Writ of Right brought againſt a Parſon, he ſhall have Aid of the Patron and Ordinary, tho' he found not the Church ſeiſed, if he claims it in the Right of the Church, and had recovered it before in a Juris utrum. 3 E. 2. Aid 164. adjudged.

34. In an Action of Treſpaſs for cutting his Trees, if the Defendant ſays, that he is Parſon, and that the Place where, &c. is Parcel of the Glebe of his Rectory, upon which they are at Iſſue, the Defendant ſhall not have Aid of the Patron and Ordinary, becauſe he himſelf is Tenant of the Freehold. 12 R. 2. Aid 121.

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35. In a Ceſſavit againſt a Parſon of his own Ceſſer, if the Tenant ſays, that he holds the Land as the Demandant hath acknowledged, he ſhall not have Aid of the Patron and Ordinary. 17 E. 2. Aid 170. adjudged.

36. In a Replevin by a Perſon, if the Defendant avows upon the Plaintiff for Service arrear, he ſhall have Aid of the Patron and Ordinary, contra. 17 E. 2. Aid 170. per Devon.

37. In a Ceſſavit againſt a Vicar, if he found his Church ſeiſed, he ſhall have Aid of the Patron and Ordinary. (t) 21 E. 3. 55 b. per Hill. ſaid to have been adjudged.

(t) Fitz. Aid 55, and 182. S. C. 1 Rol. Abr. 161. Pl. 8.

38. If a Writ of Annuity be brought againſt a Parſon upon a Grant by the Parſon himſelf, without the Confirmation of the Patron and Ordinary, he ſhall not have Aid, becauſe he himſelf is Party to the Grant, and this ſhall not charge the Church. (u) 2 H. 6. 12.

(u) Fitz. Aid 52. S. C. Br. Aid 5. S. C.

39. But he ſhall have Aid if the Grant was confirmed by the Patron and Ordinary, becauſe he himſelf is Party to the Grant, and well knows this is the Cauſe of the Charge, becauſe this will charge the Church. (x) 2 H. 6. 12. adjudged.

40. So a Biſhop ſhall have Aid in Annuity upon his own Grant, which is confirmed by the Prior and Chapter, altho' he himſelf be Sovereign of the Priory and Chapter, for this will charge the Biſhoprick Contra. (y) 18 E. 3. 7. b.

41. In Annuity againſt a Parſon upon the Grant of his Predeceſſor, he ſhall have Aid, altho' a Deed of Confirmation of the Patron and Ordinary be ſhewn, for the Parſon does not know whether it be their Deed. (z) 40 E. 3. 3. b. adjudged.

42. So in an Annuity againſt a Biſhop upon a Grant of the Predeceſſor, with the Confirmation of the Prior and Chapter, he ſhall have Aid of the Prior and Chapter, tho' he himſelf be Sovereign of the Priory and Chapter. (a) 18 E. 3. 7. b. adjudged.

138. 1 Rol. Abr. 176. Pl. 18. 178. Pl. 28.

(x) Fitz. Aid 52. S. C. Br. Aid 5. S. C.

(y) Fitz. Aid 138. S. C. 1 Rol. Abr. 176. Pl. 18. 178. Pl. 28. S. C. Poſt. Pl. 42.

(z) Fitz. Aid 109. S. C. Br. Aid 18. S. C.

(a) Fitz. Aid Supra. 40. S. C.

(Y) Spiritual Corporations.

Of whom they ſhall have Aid.

Of the King.

1. IN an Action againſt an Abbot of the Foundation of the King, which will charge the Abby, he ſhall have Aid of the King. (b) 6 H. 4. 5. b.

2. But in an Annuity againſt an Abbot as Parſon appropriate of a Church, he ſhall not have Aid of the King. (c) 6 H. 4. 5. b. adjudged.

3. In an Annuity againſt a Parſon, if the Biſhop be Patron and Ordinary, and the Temporalties ſeiſed by the King for Cauſe, he ſhall have Aid of the Biſhop and King. (d) 40 E. 3. 3. b.

4. (e) So if the Temporalties are in the King by Vacancy of a Biſhoprick. (f) 4 H. 6. 10. b.

5. So if the Temporalties are in the King by Vacancy of a Biſhop, who is Patron of a Prebend or Parſonage, if the Prebend be ſued during the Vacancy, he ſhall have Aid of the King. (g) 11 H. 6. 9. 19 E. 3. Aid del Roy 5. adjudged.

6. But if a Biſhoprick be full of a Biſhop at the Time of the Suit, he ſhall not have Aid of the King, for there the Biſhop with his Chapter, may charge the Church without the King. (h) 11 H. 6. 9.

7. So if the Patron be in Ward to the King, the Parſon ſhall have Aid of the Patron and King. (i) 11 H. 6. 10 b.

8. In an Aſſiſe againſt the Preſentee of the King, of Parcel of his Glebe, the Parſon ſhall have Aid of the King, tho' the King had the Preſentation, but hac vice. (k) 43 Aſſ. 13. adjudged, Quære.

9. The Dean of a Free-Chapel of the King, of the Collation of the King, ſhall have Aid of the King. 33 E. 3. Aid del Roy. 103.

10. A Parſon appropriate ſhall have Aid of himſelf and of the Ordinary. (l) 25 E. 3. 39. adjudged.

11. A Parſon ſhall not have Aid of himſelf, being Patron. (m) 7 H. 6. 41.

12. But he ſhall have Aid of himſelf and another being Joint-Patrons. (n) 7 H. 6. 41.

(b) Fitz. Counterplea d'Aid 13. S.C. 1 Rol. Abr. 152. Pl. 8. S.C.

(c) Fitz. Counterplea d'Aid 13. S.C. 1 Rol. Abr. 152. S. C.

(d) Fitz. Aid 109. S. C. Br. 18. S. C.

(e) 4 Co. 21. b. 22. a. S. P.

(f) Aid de Roy Br. 54. S. C.

(g) Fitz. Aid 69. S. C. Br. 141. S. C.

(h) Fitz. Aid 69. S. C. Br. 141. S. C.

(i) Br. Aid del Roy 105. S.C. Br. Aid 142. S. C.

(k) Fitz. Aid de Roy 95. S. C. Br. 90. S. C.

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(l) Fitz. Aid 7. S. C.

(m) Br. Counterplea d'Aid 10. S. C.

(n) Br. Counterplea d Aid 10. S. C.

13. He ſhall Aid of the Patron, tho' he be Plaintiff in the Action.

(n) Fitz. Aid 68. S. C. Br. 138. S. C. 1 Rol. Abr. 172. Pl. 9. S. C. (o) Fitz. Aid 141. S. C. (p) Fitz. Aid 3. S. C.

(n) 10 H. 6. 11. (o) 18 E. 3. 28. adjudged. (p) 22 E. 3. 3. 34 E. 3. Aid del Roy 111. adjudged. 8 R. 2. Aid del Roy 116. adjudged. 26 E. 3. Annuity 32. adjudged.

14. Aid ſhall be granted of all thoſe who have Power to charge the Church. (q) 11 H. 6. 9.

(q) Fitz. Aid 69. S. C. Br. 141. S. C.

15. As if a Prebend of which the Biſhop is Patron and Ordinary be to have Aid, he ſhall have Aid of the Biſhop, and the Dean and Chapter, becauſe without all theſe the Church cannot be charged. (r) 12 H. 6. 9. adjudged. (s) 25 E. 3. 54. adjudged, altho' this be of the ſeveral Poſſeſſions of the Biſhop. In 33 E. 3. Aid del Roy 103. it is ſaid he ſhall have Aid of the Dean and Chapter, without mentioning the Biſhop, and this is ſaid per Fiff.

(r) Fitz. Aid 69. S. C. Br. 141. S. C. (s) Fitz. Aid 10. S. C.

16. In an Annuity againſt a Parſon he ſhall have Aid of both Patrons, being Coparceners.

17. So if the King and a Common Perſon are Coparceners of an Advowſon, tho' the King ſhall have all the Preſentations alone, yet the Parſon ſhall have Aid of both. Trin. 3 Jac. B. R. in (t) Harris's Caſe per Popham.

(t) Noy 11. S. C. and S.P. ſaid.

18. In an Annuity againſt an Incumbent, if he ſays that A. and B. were ſeiſed of the Manor of D. to which this Church was appendant, and an Accord was made between them to preſent by Turns, and A. preſented him, yet he ſhall have Aid of both Patrons. (u) 22 Hen. 6. 47.

(u) Fitz. Aid 76. S. C. Br. 88. S. C.

19. So if a Coparcener preſents by Turn, the Incumbent ſhall have Aid of all the Coparceners. (x) 22 H. 6. 47. Curia.

(x) Fitz. Aid 76. S. C. Br. 88. S. C.

20. In an Annuity againſt a Parſon appropriate, he ſhall have Aid of himſelf as Patron. 8 R. 2. Annuity 53. adjudged.

(Z) Of the Ordinary.

1. THE Parſon in an Annuity ſhall have Aid of the Guardian of the Spiritualties of the Biſhoprick, the See being Vacant. (a) 31 H. 6. 10. adjudged.

(a) Fitz. Aid 79. S. C.

2. If the Parſon be to have Aid of the King as Patron, and of the Ordinary, he ſhall not upon Prayer have Aid of the King only, without the Ordinary, without praying in Aid of both together, for otherways the Plaintiff may be delayed again after, which is not reaſonable. Trin. 3 Jac. B. R. (b) Harris's Caſe per Curiam.

(b) Noy 11. S. C. adjudged.

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(A) In what Actions they ſhall have Aid.

Aid by (a) Coparceners.

1. IN a Scire facias upon a Fine, the Tenant ſhall have Aid of her Coparcener, tho' this Aid be in Lieu of a Voucher. 16 E. 3. Aid 130. adjudged. 33 E. 3. Aid del Roy 109. adjudged.

(a) Joint-tenants and Tenants in Common by the expreſs Words of the 31 H. 8. cap. 1. after Partition by Force of that Act, ſhall have Aid one of the other, or of their Heirs, to dereign the Warranty Paramount, or recover pro rata, as is uſed between Parceners by the Courſe of the Common Law after Partition made.

2. In

2. In a Writ of Meſn againſt a Coparcener, to whom the Services were allotted in Purparty, in Allowance of other Land, ſhe ſhall have Aid of her Coparcener. 3 E. 2. Aid 163. adjudged.

3. In a Writ of Admeaſurement of Paſture againſt a Coparcener (as is intended as it ſeems) ſhe ſhall have Aid of the other Coparceners. 32 E. 1. Aid 178. adjudged.

4. In a cui in vita, one Coparcener ſhall have Aid of the other. 30 E. 1. Itinere Cornubiæ (b) 179. adjudged. (b) This is intended. Fitz. Aid 179.

5. In a Quo Warranto againſt one Coparcener for holding Conuſance of Pleas, ſhe ſhall have Aid of the other Coparcener. (c) 2 E. 3. 55. b. adjudged. Co. 9. Ab. Str. Mar. 28. b. 2 E. 3. B. R. Rot. 128. adjudged in a Writ of Error. (c) This I ſuppoſe is miſprinted, for there are not ſo many Fol. of that Year.

6. In a Formedon of a Rent againſt one Coparcener, after Partition, ſhe ſhall have Aid of the other Coparcener, tho' the Rent be only in Demand. 8 R. 2. Aid del Roy 115. adjudged.

(B) What Coparceners ſhall have Aid.

In reſpect of the Eſtate.

1. Where a Partition is made without Title of Coparcenary, tho' by this they are Coparceners by Eſtoppel between themſelves, yet they ſhall not have Aid the one of the other, for they ſhall not delay the Demandant who is a Stranger thereto by this. (a) 11 H. 4. 60. b. (a) Fitz. Counterplea d'Aid 15 S.C. Br. 5. S. C.

2. As if two intrude after the Death of their Father, who was but Tenant for Life, and make Partition, they ſhall not have Aid the one of the other, becauſe they have no Right. (b) 17 E. 3. 47. (b) Fitz. Aid 136. S. C.

3. So if Baron and Feme are ſeiſed to them, and the Heirs of the Feme, ſo that the Baron hath but for Life, the Baron dies, and his Daughters enter and make Partition, and after the Wife dies, without laying Claim to the Eſtate, yet they ſhall not have Aid the one of the other, becauſe no Right is to them deſcended. Contra (c) 17 E. 3. 46. b. adjudged for the not laying Claim. (c) Fitz. Aid 136.

4. If two Diſſeiſors make Partition, and die, the Heir of one ſhall not have Aid of the Heir of the other. (d) 11 Hen. 4. 60. b. (d) Br. Aid 48. S. C. Fitz. Counterplea d' Aid 15. S. C.

5. So if two recover by Action anceſtrel without Title, the one ſhall not have Aid of the other after Partition, tho' between themſelves they are Coparceners by Eſtoppel. (e) 11 Hen. 4. 61. (e) Br. Aid 48. S. C. Fitz. Counterplea d'Aid 15. S.C.

6. But if two Coparceners have a Title anceſtrel, and enter where their Entry is not lawful, and make Partition, yet they ſhall have Aid one of the other. (f) 11 Hen. 4. 60. b. (g) 17 Edw. 3. 46. b. Br. Aid 7. 8. C. (f) Fitz. Counterplea d'Aid 15. S.C.

7. As if they enter upon a Deſcent, and make Partition, Aid lies, having a Right anceſtrel by Deſcent. (h) 17 Edw. 3. 46. b. 39 Edw. 3. 4. b. (g) Fitz. Aid 136. S. C. (h) Fitz. Aid 136. S. C.

8. In an ad terminum qui preteriit, if the Writ ſuppoſes them Tenant by their Anceſtor, tho' the Anceſtor had but for Life, and his Daughters entered and made Partition, yet they ſhall have Aid the one of the other. (i) 17 Edw. 3. 47. b. (i) Fitz. Aid 136. S. C.

9. If Tenant in Tail leaſes for Life, and after aliens the Reverſion to another by Fine, and dies, and his Daughters enter after the Death of the Leſſee as Coparceners, and make Partition, in a Scire facias to execute the Fine, tho' this be to defeat the Cauſe of their Prayer, and their Entry is not lawful, yet becauſe they have a Right anceſtrel, they ſhall have Aid the one of the other. Contra (k) 21 Edw. 3. 15. (k) Fitz. Aid 21. S. C.

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10. If Tenant in Tail leaſes for Life, and aliens the Reverſion by Fine, and dies, and his Daughters enter after the Death of the Leſſee as Coparceners, and the one takes Huſband, and has Iſſue, and dies, and after the other dies, and a Scire facias to execute the Fine is Br. 65. S. C.

is brought againſt the Tenant by the Curteſy, and the other Coparcener, the Coparcener ſhall have Aid of the Heir, becauſe they are in by Deſcent, tho' the Entry of their Anceſtor was not lawful. (l) 21 Edw. 3. 15.

(l) Fitz. Aid 21. S. C. Br. 65. S. C.

11. If two enter as Coparceners having no ancient Right, and die ſeiſed, their Heirs ſhall have Aid one of the other, becauſe they are in by Deſcent. (m) 21 Edw. 3. 15. will prove this.

(m) Fitz. Aid 21. S. C. Br. 65. S. C.

12. If two Coparceners make Partition, and a Seigniory is allotted to one, and after the Tenancy eſcheats to her, ſhe ſhall have Aid after of her Siſter, for this Tenancy comes in Lieu of the Seigniory. 16 E. 3. Age 46. per Thorpe.

13. It is no good Counterplea of Aid that the Anceſtor by whom they claim did not die ſeiſed, for if he had a Right tho' he did not die ſeiſed, yet Aid lies. Contra 29 E. 3. 6. b. but Quære.

(*) 1 Rol. Abr. 185. Pl. 8.

14. (*) In a Cui in vita, if 4 Sons Coparceners in Gavelkind are vouched upon the Warranty of their Anceſtor, and 3 of them make Default after Default, by which Seiſin of the Land is awarded for 3 Parts, and the 4 enters into Warranty, he ſhall not have Aid of the other 3, becauſe the Land in demand never deſcended to them from their Anceſtor, and the Charge is now equal, and the others have loſt their Part, and if he ſhould have Aid of them, he ſhould recover alſo pro rata againſt them for his Part, and ſo he ſhould not loſe ſo much as the reſt. 19 Edw. 2. Aid 172. adjudged.

(n) Fitz. Aid 136. S. C.

15. No Coparcener ſhall have Aid unleſs there hath been a Partition between them. 19 Hen. 6. 78. b. (n) 17 Edw. 3. 47.

(o) Br. Aid 11. S. C. Fitz. Voucher 35. S. C.

16. But after Partition one Coparcener ſhall have Aid of the other. (o) 20 Hen. 6. 2. (p) 17 Edw. 3. 47.

(p) Fitz. Aid 136. S. C.

17. Coparceners in Gavelkind ſhall have Aid one of the other. (q) 11 Hen. 4. 22. b. 17 (r) Edw. 3. 12. b.

(q) Br. Aid 46. S. C. Fitz. Counterplea d'Aid 14. S. C.

18. If there are two Coparceners, and one releaſes to the other who is after impleaded, ſhe ſhall vouch her Siſter who releaſed; for this Acceptance of the Releaſe does not deſtroy the Privity of Coparcenary. (s) 21 E. 3. 27.

(r) Fitz. Aid 134. S. C.

19. (t) If there be Tenant in Tail, the Reverſion expectant to her and her Siſter in Coparcenary, and ſhe is impleaded, ſhe ſhall not have Aid of her Coparcener, becauſe ſhe cannot recover pro rata, nor vouch over for this Land, becauſe ſhe is not ſeiſed of the Tail in Coparcenary. (u) 2 H. 6. 16. adjudged.

(s) 1 Rol. Abr. 183. Pl. 2. S. C. Br. Aid 67. S. C.

20. (x) If Coparceners make Partition, and one aliens, the Alienee ſhall not have Aid of the others. (y) 11 Hen. 4. 23, ſemble 32 Edw. 1. (z) 178. Intended the Heir of the Coparcener who made the Partition, tho' he pleads he hath the Eſtate of one of the Coparceners.

(t) Co. Lit. 174. b. S. P. (u) Fitz. Aid 53. S. C. Br. 6. S. C.

(x) Litl. tenur' Sect. 262. S. P. (y) Fitz. Counterplea d'Aid 14. S. C. Br. 24. S. C. 2 Rol. Rep. 418. S. C. cited. (z) This ſhould be Fitz. Aid 178.

(a) 8 Co. 75. b. S. P.

21. (a) So if after Alienation ſhe Purchaſe, ſhe her ſelf ſhall not have Aid of the other, becauſe ſhe comes in by the Alienee, and not in Privity of the Coparcenary. (b) 11 Hen. 4. 22. b. adjudged contra 18 E. 3. 65.

(b) Br. Aid 46. S. C.

Fitz. Counterplea d'Aid 14. S. C. Br. 24. S. C. Br. Coparceners 5. S. C.

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22. But after an Alienation, if the Coparcener comes to the Land again in Privity of the firſt Eſtate, ſhe ſhall have Aid. 11 Hen. 44. 22. b.

(c) Hob. 21. S. P.

23. (c) As if her Alienee with Warranty vouch her, and ſhe enters into Warranty. (d) ſhe ſhall have Aid of the other, becauſe now ſhe comes in Privity of the firſt Eſtate. 11 Hen. 4. 23. (e) 43 Edw. 3. 23. 18 Edw. 3. (f) 3. 31. admit.

(d) To deraign the Warranty Paramount, but not to recover pro rata, per Co. Lit. 174. a. but per Hob. 26. either to recover pro rata or deraign, &c. (e) Fitz. Counterplea d'Aid 20. S. C. Br. Aid 27. S. C. (f) This Figure 3 is ſuperfluous, for there is no ſuch Opinion in that Fol.

24. So if one Coparcener aliens with Warranty, and takes back for Life, and being impleaded prays in Aid of the Alience, and he vouches her, and ſhe enters into Warranty, ſhe ſhall have Aid of the others. (f) 11 Hen. 4. 23.

(f) Fitz. Counterplea d'Aid 14 S. C.

25. If Partition be made between 3 Coparceners in Chancery, and after one Coparcener in a Writ of Error reverſes the Partition for Inequality, and hath the Manor of D. aſſigned to her for Equality, and dies, and her Heir aliens the ſaid Manor, and after another of the ſaid Coparceners brings a Writ of Error upon the laſt Judgment againſt the Heir and Tertenant; the Heir tho' he hath nothing in the Manor ſhall have Aid of the 3d Coparcener, who is not named, for he is made privy by the Writ. (g) 42 Aſſ. 22. adjudged.

(g) Fitz. Aſſize 349. S.C. Br. Error. 131. S. C.

26. If there be two Coparceners of Land intailed, and they make Partition, and after one leaſes her Part, for the Life of the Leſſee with Warranty, and the Leſſee being impleaded vouches her, and ſhe enters into Warranty ſhe ſhall have Aid of her Siſter, for now ſhe comes in, in Privity of the firſt Eſtate. 14 Edw. 3. Aid 24. adjudged.

27. The ſame Law if ſhe had made a Feoffment in Fee with Warranty, and the Feoffee had vouched, &c. tho' the Eſtate which ſhe gave be higher than what ſhe had. Contra 14 Edw. 3 Aid 24. per Pole.

28. (h) If after Partition one Coparcener leaſes her Part (i) for Life, who is impleaded, and he vouches his Leſſor, who enters in Warranty, ſhe ſhall have Aid of the other Coparcener.

(h) Litl. tenur. Sect. 262. S. P.

(i) So if ſhe makes a Gift in Tail. Litl. Sect. 262. Co. Lit. 174 b.

29. If a Man leaſes Land for Life and dies, by which the Reverſion in Fee thereof, and other Lands deſcend to two Coparceners, and they make Partition, and the Reverſion is aſſigned to one, and for the better Aſſurance of this Partition, the other paſſes the Reverſion to her by Fine, and after ſhe who had the Reverſion is impleaded, ſhe ſhall have Aid of her Coparcener, becauſe the Anceſtor died ſeiſed thereof, and this deſcended to them, of which they had made Partition, and the Fine was levied, but for the better Aſſurance of the Partition. 18 Edw. 2. Aid 171. adjudged.

(C) Of whom it ſhall be granted.

1. If Coparceners make Partition, and one aliens her Part, yet the other Coparcener ſhall have Aid of her, for her Act ſhall not prejudice the other. (a) 11 Hen. 4. 23. 29 Edw. 3. 2. (b) 24 Edw. 3. 37. 8 Rich. 2. Aid de Roy 115. adjudged the Cauſe there is to dereign the Warranty Paramount; but it is there agreed ſhe ſhall not have in Value pro rata of her that hath aliened.

(a) Br. Counterplea d'Aid 24. S. C.
(b) Fitz. Counterplea d'Aid S. C.

2. If there be two Coparceners, and the one hath releaſed to the other in Fee, and after ſhe to whom the Releaſe was made is impleaded, ſhe ſhall have Aid of her Siſter for her own Moiety, tho' ſhe herſelf was Party to the deveſting the Eſtate out of her Siſter, for ſhe ſhall have Aid for the Voucher Paramount. (c) 21 Edw. 3. 27.

(c) 1 Rol. Abr. 182. Pl. 18. S. C. 1 Rol. Abr. 184. Pl. 6. S. C. Br. Aid 67. S. C.

3. If two Coparceners make Partition, and the one takes Husband, and hath Iſſue that dies, and after dies without Iſſue, by which the Husband is Tenant by the Curteſy, the Reverſion to the other Coparcener, who is impleaded for her Moiety, ſhe ſhall not have Aid of the Tenant by the Curteſy, becauſe he is (*) a Stranger to the Blood, and holds not in Coparcenary, and the Reverſion is in her who prays in Aid. 16 Edw. 3 Aid 129. adjudged. 19 Edw. 3. Aid 144. Curia.

* Fol. 184.

4. So in this Caſe Aid lies not of Tenant in Dower. 16 Edw. 3. Aid 129. per Gainford.

5. But in theſe Caſes if the Reverſion had been in the Heir of the other Coparcener who died, or in a Stranger, Aid would have Lay of

Tenant by the Curteſy (d) or Dower, and he in Reverſion to have had in Value. 19 Edw. 3. Aid 144. agreed.

(d) This ſeems in the Original to be miſprinted, for there 'tis Tenant per Curteſy en Dower, whereas perhaps it ſhould be ou Dower.

6. If two Coparceners make Partition, and the one takes Husband, hath Iſſue, and dies, by which the Husband is Tenant by the Curteſy, the Reverſion to the Iſſue, the other Coparcener being impleaded, ſhall have Aid of the Husband Tenant by the Curteſy, and of the Iſſue. 33 Edw. Aid del Roy 109. adjudged.

(D) Aid of Coparceners.

Cauſa efficiens.

(a) Co. Lit. 174 a. S. P. appears.

1. (a) THE Prayer in Aid by one Coparcener of the other, is for two Cauſes; one to have in Value pro rata againſt her Coparcener, in caſe ſhe loſes; the other to have the Warranty Paramount in common in Safeguard of their Eſtates. 46 Edw. 3. 31 b. (b) 11 Hen. 4. 22 b. (c) 2 Hen. 6. 16. 17 Edw. 3. 47. (d) 21 Edw. 3. 14 b. (e) 2 Hen. 6, 7 b.

(b) Br. Aid 46. S. C. Br. Counterplea d'Aid 24. S. C. (c) Fitz. Aid 53. S. C. Br. 6. S. C. (d) Fitz. Aid 21. S. C. Br. 55. S. C. (e) Br. Aid. 7. S. C.

(f) Co. Lit. 174 a. S. P. appears.

2. (f) One ſhall have Aid of the other tho' there can be no Recovery in Value, if the Warranty Paramount may be deraigned thereby. 21 Edw. 3. 27. admit. 8 Rich. 2. Aid de Roy 115.

(E) In what Caſes

Aid by Coparceners.

(a) Br. Aid 7. S. C. (b) Fitz. Aid 136. S. C. (c) Fitz. Aid 136. S. C.

1. If Coparceners make Partition, and after one is impleaded, he ſhall have Aid of the reſt. (a) 2 Hen. 6, 7 b. (b) 17 Edw. 3. 47.

2. But one Coparcener ſhall have Aid of the other before Partition. (c) 17 Edw. 3. 47.

(d) This is miſprinted in the Original, and perhaps ſhould be. 38 E. 3. 20 b. (e) Fitz. Aid 21 S. C. Br. 65. (f) Fitz. Aid 21. S. C. Ante, 167. Pl. 19. S. C. Br. Aid 65.

3. One Coparcener ſhall not have Aid of the other before Partition in Deed or in Law. (d) 29 Edw. 1 b. 2.

4. But if one Coparcener takes Husband, hath Iſſue and dies in a Precipe againſt the Tenant by the Curteſy, and the other Coparcener, the Coparcener ſhall have Aid of the Heir who is Coparcener of the Reverſion with her, tho' there be no Partition between them; for the Tenancy by the Curteſy, hath in a Manner made a Partition. (e) 21 Edw. 3. 14 b. 15. adjudged.

5. And in this Caſe for the ſame Reaſon, the Tenant by the Curteſy ſhall have Aid of the Heir in Reverſion, for the Weakneſs of his Eſtate. (f) 21 Edw. 3. 14 b. adjudged.

(g) 1 Rol. Abr. 183. Pl. 2. Br. Aid 67. S. C.

6. If two Coparceners are ſeiſed, and the one releaſes to the other, and after an Action is brought againſt her to whom the Releaſe was made, ſhe ſhall have Aid of her Siſter for her Moiety, tho' no Partition was made between them, becauſe this Releaſe hath in a Manner made a Partition of their Moieties. (g) 21 Edw. 3. 27.

(h) Fol. 185.

7. If Land deſcends to two Coparceners, and one enters claiming the whole to her own Uſe, and after the other releaſes to her in Fee, if ſhe be after impleaded ſhe ſhall not have Aid of her Siſter, for her own Moiety, becauſe (h) the Releaſe enures by way of Extinguiſhment, and ſo this does not amount to a Partition. 21 Edw. 3. 27.

8. (i) In

8. (i) In a Cui in vita, if four Coparceners in Gavelkind are vouched upon the Warranty of their Anceſtor, and three make Default after Default, upon which Seiſin of three Parts of the Land is awarded, and the fourth enters into Warranty, he ſhall not have Aid of the other Coparceners, becauſe they were not Parceners of the Land demanded.

(i) 1 Rol. Abr. 182. Pl. 14.

9. If one Coparcener aliens her Part, and after the other is impleaded, ſhe ſhall have Aid, becauſe this Alienation is a Partition in Law. 29 Edw. 3. 2. (k) 38 Edw. 3. 20 b. ſaid that it had been adjudged. 8 Rich. 2. Aid del Roy 115. adjudged. contra. (l) 38 Edw. 3. 20 b.

(k) Fitz. Aid 107. S. C.

(l) Fitz. Aid 107. S. C.

10. So if one Coparcener recovers her Moiety in an Aſſize againſt the other, ſhe ſhall have Aid after, (m) for this Recovery is with Partition as is intended) for this is a Partition in Law. 29 Ed. 3. 2.

(m) But Q. if ſuch Judgment can be given in an Aſſize, and vide 6 Co. 13 a. Co. Lit. 167 b.

11. If one Coparcener be diſſeiſed of Parcel by the other, and after the Diſſeiſee is impleaded for the reſt, ſhe ſhall have Aid, for this affirms it for a Partition, and ſhe ſhall not come after to defeat the Poſſeſſion of the Diſſeiſor, againſt this Agreement. 29 Edw. 3. 2. but quære.

12. If one Coparcener be diſſeiſed and not the other, (admit this which cannot be) ſhe that is not diſſeiſed ſhall have Aid of the other which is diſſeiſed, for this is a Partition in Law.

(F) At what Time it ought to be demanded.

1. HE ought to demand it the firſt Day of the Term, that he begins to plead. (a) 3 Hen. 6. 5 b.

(a) Fitz. Aid de Roy 8. S. C.

2. If a Plea be adjourned from (b) one Term to another, in the other Term he ſhall not have it. (c) 3 Hen. 6. 5 b.

(b) Aid lies not after imparlance, becauſe that is ad reſpondendum, and after ſuch an Imparlance taken, no Aid lies. per Hard 179. per Ch. Baron. (c) Fitz. Aid de Roy 8. S. C.

3. In an Avowry for a Rent reſerved upon upon a Partition, if the Plaintiff challenges the Avowry, he ſhall not have Aid as Leſſee for Life of him in Reverſion. 16 Edw. 3. Aid 128. adjudged.

4. If a Man be ouſted (d) of Aid for one Cauſe, he may have other Cauſes in infinitum the ſame Term to have Aid. (e) 3 Hen. 6. 5 b.

(d) The Original is miſprinted, for 'tis their ouſt Damage, &c. (e) Fitz. Aid de Roy 8. S. C.

5. In an *Ejectione firmæ* after not guilty pleaded, and in another Term the Defendant ſhall have Aid of the Leſſees of the King for 99 Years of his Dutchy Land in Truſt for the Queen, and as Bailiff to them. *Paſch.* 13 *Car.* 2. between *Anderſon* and *Arundel.* Hard 179. adjudged.

6. If in a Writ of Dower the Tenant pleads Jointenancy, and Judgment is given that he ſhall anſwer over, and after the Tenant ſhews that he is Tenant by the Curteſy, the Reverſion to his three Daughters, and prays in Aid of them, it ſhall not be allowed, for Aid is not demandable in another Term after Judgment to anſwer over. *Paſch.* 23. *Car.* 2. between the Lady *Cobham* and *Tomlinſon.* 2 *Jon.* 6. 7, 8. reſolved without Demurrer *per totam curiam*, upon a Motion that this Plea ſhould not be received.

(G) A:

(G) At what Time it ſhall be granted.

(e) Where before any Plea pleaded and where not.

(e) It is not granted after Plea to the Action in caſe of a common Perſon. per 2 Mod. 8. per Vaughan. it ſeems to me to be intended in real Actions.

1. IN a Replevin brought by Leſſee for Life, if the Defendant avows upon W. as upon his Tenant, and the Plaintiff pleads, that W. leaſed to him for Life, he ſhall not have Aid of W. before any Plea pleaded, 32 Edw. 3. Aid 41. adjudged. Contra, 8 Hen. 2. Aid del Roy 118. agreed. But if he pleads hors de ſon fee, he ſhall have Aid of him in Reverſion. 32 Edw. 3. Aid 41. adjudged.

2. In Treſpaſs by Leſſee for Years, if the Defendant avows upon J. S. as upon his very Tenant for certain Services arrear, the Plaintiff ſhall not have Aid of J. S. before any Plea pleaded. 8 Rich. 2. Aid del Roy 117. adjudged, becauſe he is but a Termer and hath not the Freehold, it ſeems not to be Law.)

3. In Treſpaſs, if the Defendant avows for that the Uſage of the Town of D. is, that if any one erects a Fold within the Town, the Lord of the Town may take it, ſaving the Abbot of C. who hath a Houſe and Land, by reaſon of which he is to have a Fold and 40 Sheep, and if he hath more the Lord may take them, and alledges the Abbot leaſed the Houſe and Land to the (*) Plaintiff for certain Years, and he put in 7 Sheep above the 40, for which he being Lord of the Town took them, &c. the Plaintiff ſhall have Aid before any Plea pleaded. 8 Rich. 2. Aid del Roy 117. adjudged.

* Fol. 186.

4. In a Replevin, if the Defendant avows upon J. S. as upon his very Tenant, the Plaintiff being Leſſee for Years of J. S. ſhall have Aid of him before any Plea pleaded; for they may join contra. 8 Rich. 2. 118. adjudged.

(H) At what Time it ſhall be granted.

Before Iſſue who ſhall have Aid.

(a) N. Bend. 180. Pl. 224. Margine. vide.
(b) Fitz. Aid. 114. S. C.

1. A Bailiff ſhall not have Aid (a) before Iſſue. (b) 43 Edw. 3. 13 b.
2. And ſo (c) 46 Edw. 3. 11 b. where the Iſſue is, whether it be the Freehold of his Maſter.
3. So of the (d) Servant. 8 Hen. 4. (e) 14.

(c) Br. Aid 32. S. C. (d) 1 Rol. Abr. 187. Pl. 3. (e) Q. If this be not miſprinted, for I find no ſuch Opinion in that fol. perhaps it ſhould be 16. Br. Aid 45. S. C.

(f) Fitz. Aid 114. S. C. Br. 26. S. C.

4. A Baron ſhall have Aid of his Feme before Iſſue where the Avowry is upon him, and his Feme in the Right of the Feme. (f) 43 Edw. 3. 13 b.
5. But otherwiſe it is if he avows upon the Baron only, as in the Right of the Feme. 29 Edw. 3. 24.
6. In a Replevin by the Husband, if the Avowry be made upon a Stranger, the Husband may ſay, that he hath nothing but in the Right of his Wife, who is Tenant in Dower, the Remainder over to a Stranger, and ſhall have Aid of his Wife before other Plea pleaded. 19 Edw. 3. Aid 143. adjudged.

(g) This I take to be miſprinted in the Original, and that it ſhould be Defendant.

7. In a Replevin, if the Defendant avows upon the Plaintiff for certain Services as Bailiff of J. S. to which the Plaintiff ſays, that A. whoſe Eſtate the Defendant hath in the Seigniory releaſed to B. whoſe Eſtate he hath in the Tenancy, the (g) Plaintiff ſhall have Aid of J. S. without more pleading. 24 Edw. 3. 25.

8. So if the Bailiff avows upon the Plaintiff for Services, and the Plaintiff traverſes the Seiſin, yet the Bailiff ſhall not have Aid before Iſſue joined. (h) 30 Edw. 3. 19. adjudged.

9. In Debt for the Arrearages of an Annuity againſt a Parſon, if the Defendant ſays he found the Church diſcharged, he ſhall have Aid before any Plea pleaded. (i) 2 Hen. 6. 8. b. adjudged.

10. In a Replevin, if the Defendant avows for Damage-feſant as in the Right of his Wife in certain Lands, he ſhall not have Aid before Iſſue joined. (k) 7 Edw. 4. 2. b. Curia.

11. In a Replevin, if the Defendant makes Conuſance as Bailiff for a Rent-charge granted to R. by one H. and the Plaintiff ſays that H. was bound to him in a Statute Merchant, and after granted the Rent to R. and (*) prays in Aid of R. he ſhall not have Aid before Iſſue joined. 14 Edw. 3. Aid 56. per Curia. 21 Edw. Aid 183. adjudged.

12. In a Replevin, if the Defendant avows for a Rent-Service, as Leſſee for Life, the Reverſion to J. S. to which the Plaintiff pleads hors de ſon fee, the Defendant ſhall not have Aid of him in Reverſion before he hath joined. 29 Edw. 3. 40. adjudged.

13. (l) In a Replevin, if the Defendant avows upon J. S. for Services arrear as his Tenant, and the Plaintiff ſays, that J. S leaſed the Land to him for Years, and prays Aid of him, he ſhall have it before Iſſue joined, becauſe he is Plaintiff. (m) 2 Hen. 6. 1. per Curiam.

14. But otherways it had been if he had been Defendant, for the Wrong ſuppoſed in him. (n) 2 Hen. 6. 1. Curiam.

(h) Fitz. Aid 43. S. C.

(i) Br. Aid 4. S. C.

(k) Fitz. Aid 88. S. C. Br. 129. S. C.

(*) Here ſeems to be an Omiſſion by the Printer in the Original, for it ſhould be, and the Defendant prays, &c.

(l) Dier 289. Pl. 59. S. P. appears.

(m) Fitz. Aid 50. S. C. Br. 2. S. C.

(n) Fitz. Aid 50. S. C. Br. 2. S. C.

Fol. 187.

(I) At what Time it ſhall be Granted.

Before Iſſue in what Actions.

1. IN Replevin, if the Defendant avows as Aſſignee of a Rent reſerved for Equality of Partition, the Plaintiff being Leſſee for Life. ſhall have Aid before Iſſue. 15 Edw. 34. adjudged. 16 Edw. 3. Aid 128, 130. adjudged.

2. In an Avowry upon a Stranger Aid ſhall be granted before any Plea pleaded to the Right, becauſe he being a Stranger to the Avowry cannot plead in Abatement, 44 Edw. 3. 39. b. (a) 9 Hen. 6. 27. 15 Edw. 3. Aid 33. adjudged. (b) 17 Edw. 3. 9. b. adjudged.

3. In Replevin the (c) Servant ſhall have Aid of his Maſter before Plea pleaded. 8 Hen. 4. (d) 15.

4. (e) If Leſſee for Years brings a Replevin, and the Lord avows upon the Leſſor, the Leſſee ſhall have Aid before Iſſue, becauſe he is Plaintiff. (f) 2 H. 6. 1.

5. In Pleas real the Tenant ſhall have Aid before Plea Pleaded, and (g) Iſſue taken. (h) 4 H. 6. 30. b.

(a) Fitz. Replevin 3. S.C. 1 Rol. Abr. 167. Pl. 3. S. C.

(b) Fitz. Aid 133. S. C.

(c) 1 Rol. Abr. 186. Pl. 3.

(d) I ſuppoſe this is miſprinted, and ſhould be 16. Br. Aid 45. S. C. (e) Dier 289. Pl. 59. S. P. appears. (f) Fitz. Aid 50. S. C. Br. 2. S. C. (g) Hard. 179. S. P. per Ch. Baron, becauſe there the Title of him in Reverſion or Remainder appears by the Plea, for without ſhewing it, he cannot draw his Plea. (h) Fitz. Aid 58. S. C.

6. In Replevin, if the Defendant avows as Bailiff to J. S. for certain Services, if the Plaintiff ſays that the Place where, &c. is not held by the Services alledged but by fealty tantum, the Bailiff ſhall have Aid before Iſſue, becauſe that after Iſſue joined the Lord when he comes cannot alter it. 21 Edw. 3. 12. b. adjudged.

7. In Replevin, if the Defendant ſays that the Place where, &c. is the Freehold of a Stranger, who leaſed to him at Will, and he took this Damage-feſant if the Plaintiff ſays that it is his Freehold, abſq; hoc, that it is the Freehold of the Stranger, yet the De-

fendant **ſhall not** have Aid before Iſſue joined, **becauſe this Replevin is but meerly in the Perſonality as a Treſpaſs.** (i) 10 Hen. 6. 26. b.

8. **In Pleas perſonal, the** Defendant **ſhall not** have Aid before Plea pleaded. (k) 4 Hen. 6. 30. b.

9. (l) **In Treſpaſs the** Defendant **ſhall not** have Aid before Plea pleaded. 8 Hen. 4. 15. **nor before Iſſue in Treſpaſs.** (m) 10 Hen. 6. 26. b.

10. **After Plea pleaded to the Action a Man ſhall not** have Aid. (n) 4 Hen. 6. 30. b. **In Actions real the** Defendant **ſhall** (o) **not** have Aid before Iſſue. 26 Hen. 6. Aid 77.

11. **If Aid be prayed of the Patron and Ordinary, and the Eſtate of the Patron is counterpleaded, the Parſon ſhall not** have Aid of the **Ordinary before the Iſſue determined, for if this be found for the Plaintiff, he ſhall have Judgment preſently,** (p) (Quære this) **and if with the** Defendant, **he ſhall** have Aid **of the Patron and Ordinary** inſimul. (q) 7 Hen. 6. 41.

12. **In Actions perſonal the** Defendant **ſhall not** have Aid (r) **before Iſſue joined.** 26 Hen. 6. Aid 77.

13. **As** Aid **does not lie in a Replevin before Iſſue.** 26 Hen. 6. Aid 77.

(i) Br. Avowry 117. S. C.
(k) Fitz. Aid 58. S. C.
(l) Kelw. 48. S. C.
(m) Br. Avowry 117. S. C.
(n) Fitz. Aid 58. S. C.
(o) I ſuppoſe this Word not, is a Miſtake of the Printer, and that it ſhould not be ſo, vide Fitz. Aid 77. and Supra Pl. 5.
(p) 1 Rol. Abr. 191. Pl. 9. 193. 8. 3.
(q) Br. Counterplea d'Aid 10. S. C. Br. joinder in Aid 12. S. C. Br. Proceſs 137. S. C. Br. 76. S. C.
(r) For till Iſſue joined upon the Right of the Matter it appears not whether the Right will come in queſtion or not. per Hard. 179. per Ch. Baron.

Fol. 188.

(K) Aid after Aid.

In what Caſes Aid ſhall be granted after Aid.

1. **If one Coparcener hath** Aid **of his Brother upon Partition between them, and he makes Default, the other ſhall** have Aid **of his Uncle upon a Partition made between his Father and Uncle,** and ſo infinitum **after paramount, becauſe if his Brother had appeared they both ſhould** have had Aid, **and his Default ſhall not prejudice him.** (a) 17 Edw. 3. 12. b.

2. **If one Coparcener hath** Aid **of B. her Coparcener, and the other Coparceners, and they make Default, he ſhall not** have Aid **of the Heirs of B. and the other Coparceners, becauſe B. and the others made Default before.** (b) 18 Edw. 3. 31.

3. **If a Man hath** Aid **of the King becauſe of his Charter, by which it is given in Exchange for Life,** after a Procedendo **he ſhall** have Aid **of him in Remainder, becauſe he could not anſwer without** Aid of the King, **tho' this** Aid **be in Lieu of a Voucher.** Mich. (c) 17 Edw. 3. 12. b.

4. **If there be Leſſee for Life, the Remainder to a Priory, which Priory is of the Foundation of the King, and the Leſſee hath** Aid **of the King, becauſe there was not any Prioreſs at the Time, ſo the Right to the King, and after a** Procedendo **comes, and after a Prioreſs is made, the Leſſee ſhall not** have Aid **of her.** 32 Edw. 3. Aid 39. adjudged.

5. **In a Replevin, if the Plaintiff being Leſſee for Life,** hath Aid of him **in Remainder, who comes not at the Summons,** and after **the Plaintiff is Nonſuit, and after the Heir of him in Remainder grants his Remainder over, and the Leſſee attorns,** and after **he brings a ſecond Deliverance he ſhall** have Aid **again in this of the Grantee.** (d) 25 Edw. 3. 40. b. adjudged.

6. **If Leſſee** for Life hath Aid of him **in Reverſion, and after he in Reverſion dies, the Leſſee ſhall** have Aid of his **Heir.** (e) 31 H. 6. 10. 21 Hen. 6. 38. b.

7. **And if the Heir after dies, he ſhall** have **Aid** of his **Heir.** 21 Hen. 6. 38. b.

(a) Fitz. Aid 134. S. C.
(b) Fitz. Aid 142. S. C.
(c) Fitz. Aid 135. S. C.
(d) Fitz. Aid 8. S. C.
(e) Fitz. Aid 79. S. C.

8. If a Parſon in an Annuity hath Aid of the Metropolitan Guardian of the Spiritualties, as Ordinary, &c. the See being vacant of a Biſhop, and after a Biſhop being created, he ſhall not have new Aid of him, for now the Metropolitan hath the ſame Right in his Perſon which he had before. (f) 31 Hen. 6. 10.

(f) Fitz. Aid 79. S. C.

9. If a Parſon hath Aid of the Ordinary, and after the Ordinary dies, the Parſon ſhall not have Aid of the Metrapolitan Guardian of the Spiritualties. (g) 31 H. 6. 10. ſaid to be adjudged.

(g) Fitz. Aid 79. S. C.

10. So if a Parſon hath Aid of the Ordinary who dies, he ſhall not have Aid of his Succeſſor, for the Succeſſor comes not in from the Predeceſſor. (h) 31 Hen. 6. 10.

(h) Fitz. Aid 79. S. C.

11. If Tenant at Will, according to the Cuſtom, hath Aid of a Biſhop whoſe Tenant he is; and after when the Inqueſt appears, he ſhews that the Biſhop is dead, and that the King hath the Temporalties, and the Manor of which he himſelf holds; ſo that he holds of the King as of the ſaid Manor during the Voidance, yet he ſhall not have Aid of the King, for the Miſchief that by ſuch Means the Plaintiff ſhould be delayed perpetually. (i) 21 Hen. 6. 37, 39. adjudged.

(i) Fitz. Aid de Roy 22.

S. C. Br. 46. S. C. Br. Aid 82. S. C. Br. Tenant per Copy de Court Roll 4. S. C.

12. In an Action for Land againſt Baron and Feme Leſſees for Life in the Right of the Feme, if they have Aid granted of him in Reverſion, who comes not upon the Summons, by which the Baron and Feme are put to anſwer, and after the Feme is received upon the Default of the Baron, ſhe ſhall have Aid again of him in Reverſion. 12 R. 2. Aid 123. adjudged.

Fol. 189.

13. In an Avowry for a Rent reſerved for Equality of Partition, if the Plaintiff Leſſee for Life hath Aid granted of him in Reverſion, who makes Default upon the Summons, upon which the Plaintiff is adjudged to anſwer alone, and after he in Reverſion dies, the Plaintiff ſhall not have Aid of his Iſſue, becauſe he was adjudged to anſwer alone before 16 Edw. 3. Aid 128. adjudged.

14. But there he had alſo demanded Judgment of the Avowry after the Default of the firſt Praiee.

15. But in this Caſe if the Plaintiff be Nonſuit, and after ſues a ſecond Deliverance, and the Defendant avows as before, the Plaintiff ſhall have Aid of the Heir, tho' he was adjudged to anſwer alone in the firſt Action, becauſe this ſecond Deliverance is in Lieu of a new Original. 16 Edw. 3. Aid 131. adjudged.

(a) (K) What ſhall be a (b) good Counterplea.

(a) 'Tis K. in the Original as here, tho' according to the Courſe of the Letters it ſhould have been L.

To the Eſtate of the Praier.

1. THE Cauſe of the Aid may be traverſed, as if it be pleaded that J. leaſed to him, &c. it is a good Traverſe that J. did not leaſe to him. (c) 44 E. 3. 39. b. 41. b. (d) 3 H. 6. 10. 7 H. 6. 25. b. 19 H. 6. 21. b. 18 E. 3. 28. b. Contra 11 H. 4. 42. b.

(b) It is ſo to ſay he Claims under the ſame Title, and in affirmance of it. Hard. 179. per Chief Baron. (c) Fitz. Iſſue 153. S. C. (d) Fitz. Counterplea d'Aid 7 S. C. Br. 2. S. C.

2. But it is no good Counterplea that he had nothing of the Leaſe of the Praiee the Day of the Writ purchaſed, nor after, for this may be true, and yet he ſhall have Aid, as if he had leaſed to him, and he had granted it over before the Writ purchaſed, and that he purchaſed it again pending the Writ. (e) 3 H. 6. 9. b.

(e) Fitz. Counterplea d'Aid 7. S. C.

3. It

fendant ſhall not have Aid before Iſſue joined, becauſe this Replevin is but meerly in the Perſonality as a Treſpaſs. (i) 10 Hen. 6. 26. b.

8. In Pleas perſonal, the Defendant ſhall not have Aid before Plea pleaded. (k) 4 Hen. 6. 30. b.

9. (l) In Treſpaſs the Defendant ſhall not have Aid before Plea pleaded. 8 Hen. 4. 15. nor before Iſſue in Treſpaſs. (m) 10 Hen. 6. 26. b.

10. After Plea pleaded to the Action a Man ſhall not have Aid. (n) 4 Hen. 6. 30. b. In Actions real the Defendant ſhall (o) not have Aid before Iſſue. 26 Hen. 6. Aid 77.

11. If Aid be prayed of the Patron and Ordinary, and the Eſtate of the Patron is counterpleaded, the Parſon ſhall not have Aid of the Ordinary before the Iſſue determined, for if this be found for the Plaintiff, he ſhall have Judgment preſently, (p) (Quære this) and if with the Defendant, he ſhall have Aid of the Patron and Ordinary inſimul. (q) 7 Hen. 6. 41.

12. In Actions perſonal the Defendant ſhall not have Aid (r) before Iſſue joined. 26 Hen. 6. Aid 77.

13. As Aid does not lie in a Replevin before Iſſue. 26 Hen. 6. Aid 77.

(i) Br. Avowry 117. S. C.
(k) Fitz. Aid 58. S. C.
(l) Kelw. 48. S. C.
(m) Br. Avowry 117. S. C.
(n) Fitz. Aid 58. S. C.
(o) I ſuppoſe this Word not, is a Miſtake of the Printer, and that it ſhould not be ſo, vide Fitz. Aid 77. and Supra Pl. 5.
(p) 1 Rol. Abr. 191. Pl. 9. 193. 8. 3.
(q) Br. Counterplea d'Aid 10. S. C. Br. joinder in Aid 12. S. C. Br. Proceſs 137. S. C. Br. 76. S. C.
(r) For till Iſſue joined upon the Right of the Matter it appears not whether the Right will come in queſtion or not. per Hard. 179. per Ch. Baron.

Fol. 188.

(K) Aid after Aid.

In what Caſes Aid ſhall be granted after Aid.

1. If one Coparcener hath Aid of his Brother upon Partition between them, and he makes Default, the other ſhall have Aid of his Uncle upon a Partition made between his Father and Uncle, and ſo infinitum after paramount, becauſe if his Brother had appeared they both ſhould have had Aid, and his Default ſhall not prejudice him. (a) 17 Edw. 3. 12. b.

2. If one Coparcener hath Aid of B. her Coparcener, and the other Coparceners, and they make Default, he ſhall not have Aid of the Heirs of B. and the other Coparceners, becauſe B. and the others made Default before. (b) 18 Edw. 3. 31.

3. If a Man hath Aid of the King becauſe of his Charter, by which it is given in Exchange for Life, after a Procedendo he ſhall have Aid of him in Remainder, becauſe he could not anſwer without Aid of the King, tho' this Aid be in Lieu of a Voucher. Mich. (c) 17 Edw. 3. 12. b.

4. If there be Leſſee for Life, the Remainder to a Prior, which Prior is of the Foundation of the King, and the Leſſee hath Aid of the King, becauſe there was not any Priorels at the Time, ſo the Right to the King, and after a Procedendo comes, and after a Priorels is made, the Leſſee ſhall not have Aid of her. 32 Edw. 3. Aid 39. adjudged.

5. In a Replevin, if the Plaintiff being Leſſee for Life, hath Aid of him in Remainder, who comes not at the Summons, and after the Plaintiff is Nonſuit, and after the Heir of him in Remainder grants his Remainder over, and the Leſſee attorns, and after he brings a ſecond Deliverance he ſhall have Aid again in this of the Grantee. (d) 25 Edw. 3. 40. b. adjudged.

6. If Leſſee for Life hath Aid of him in Reverſion, and after he in Reverſion dies, the Leſſee ſhall have Aid of his Heir. (e) 31 H. 6. 10. 21 Hen. 6. 38. b.

7. And if the Heir after dies, he ſhall have Aid of his Heir. 21 Hen. 6. 38. b.

(a) Fitz. Aid 134. S. C.
(b) Fitz. Aid 142. S. C.
(c) Fitz. Aid 135. S. C.
(d) Fitz. Aid 8. S. C.
(e) Fitz. Aid 79. S. C.

8. If a Parſon in an Annuity hath Aid of the Metropolitan Guardian of the Spiritualties, as Ordinary, &c. the See being vacant of a Biſhop, and after a Biſhop being created, he ſhall not have new Aid of him, for now the Metropolitan hath the ſame Right in his Perſon which he had before. (f) 31 Hen. 6. 10.

(f) Fitz. Aid 79. S. C.

9. If a Parſon hath Aid of the Ordinary, and after the Ordinary dies, the Parſon ſhall not have Aid of the Metrapolitan Guardian of the Spiritualties. (g) 31 H. 6. 10. ſaid to be adjudged.

(g) Fitz. Aid 79. S. C.

10. So if a Parſon hath Aid of the Ordinary who dies, he ſhall not have Aid of his Succeſſor, for the Succeſſor comes not in from the Predeceſſor. (h) 31 Hen. 6. 10.

(h) Fitz. Aid 79. S. C.

11. If Tenant at Will, according to the Cuſtom, hath Aid of a Biſhop whoſe Tenant he is; and after when the Inqueſt appears, he ſhews that the Biſhop is dead, and that the King hath the Temporalties, and the Manor of which he himſelf holds; ſo that he holds of the King as of the ſaid Manor during the Voidance, yet he ſhall not have Aid of the King, for the Miſchief that by ſuch Means the Plaintiff ſhould be delayed perpetually. (i) 21 Hen. 6. 37, 39. adjudged.

(i) Fitz. Aid de Roy 22.

S. C. Br. 46. S. C. Br. Aid 82. S. C. Br. Tenant per Copy de Court Roll 4. S. C.

12. In an Action for Land againſt Baron and Feme Leſſees for Life in the Right of the Feme, if they have Aid granted of him in Reverſion, who comes not upon the Summons, by which the Baron and Feme are put to anſwer, and after the Feme is received upon the Default of the Baron, ſhe ſhall have Aid again of him in Reverſion. 12 R. 2. Aid 123. adjudged.

Fol. 189.

13. In an Avowry for a Rent reſerved for Equality of Partition, if the Plaintiff Leſſee for Life hath Aid granted of him in Reverſion, who makes Default upon the Summons, upon which the Plaintiff is adjudged to anſwer alone, and after he in Reverſion dies, the Plaintiff ſhall not have Aid of his Iſſue, becauſe he was adjudged to anſwer alone before 16 Edw. 3. Aid 128. adjudged.

14. But there he had alſo demanded Judgment of the Avowry after the Default of the firſt Praiee.

15. But in this Caſe if the Plaintiff be Nonſuit, and after ſues a ſecond Deliverance, and the Defendant avows as before, the Plaintiff ſhall have Aid of the Heir, tho' he was adjudged to anſwer alone in the firſt Action, becauſe this ſecond Deliverance is in Lieu of a new Original. 16 Edw. 3. Aid 131. adjudged.

(a) (K) What ſhall be a (b) good Counterplea.

To the Eſtate of the Praier.

1. The Cauſe of the Aid may be traverſed, as if it be pleaded that J. leaſed to him, &c. it is a good Traverſe that J. did not leaſe to him. (c) 44 E. 3. 39. b. 41. b. (d) 3 H. 6. 10. 7 H. 6. 25. b. 19 H. 6. 21. b. 18 E. 3. 28. b. Contra 11 H. 4. 42. b.

(a) 'Tis K. in the Original as here, tho' according to the Courſe of the Letters it ſhould have been L.

(b) It is ſo to ſay he Claims under the ſame Title, and in affirmance of it. Hard. 179. per Chief Baron. (c) Fitz. Iſſue 153. S. C. (d) Fitz. Counterplea d'Aid 7 S. C. Br. 2. S. C.

2. But it is no good Counterplea that he had nothing of the Leaſe of the Praiee the Day of the Writ purchaſed, nor after, for this may be true, and yet he ſhall have Aid, as if he had leaſed to him, and he had granted it over before the Writ purchaſed, and that he purchaſed it again pending the Writ. (e) 3 H. 6. 9. b.

(e) Fitz. Counterplea d'Aid 7. S. C.

3. It

3. It is no good Counterplea that the Leſſee had nothing of the Leaſe of the Praiee the Day of the Writ purchaſed, for he had nothing in the Land when the Writ was purchaſed, but pending the Writ purchaſed for Life, yet he ſhall have Aid. 21 E. 3. 44.

4. It is a good Counterplea that the Leſſee hath a Fee. 41 E. 3. 8. b. 11 H. 4. 43.

5. So it is a Counterplea that the Leſſee was ſeiſed in Fee the Day of the Writ purchaſed. (f) 3 H. 6. 9. b. (g) 17 E. 3. 5. b. adjudged 21 E. 3. 44. for if he had aliened pending the Writ and repurchaſed, this is no Cauſe of Aid. 50 Aſſ. 3.

(f) Fitz. Counterplea d'Aid 7. S. C.

(g) Fitz. Counterplea d'Aid 2. S. C.

6. If the Tenant prays in Aid becauſe A. his Wife was ſeiſed in Fee, and had Iſſue by him B. and died, and he is Tenant by the Curteſy, and ſo prays in Aid of B. in Reverſion, it is a good Counterplea that J. S. infeoffed the Tenant and his Wife in Fee of the Land, ſans ceo that he holds by Curteſy. (h) 40 Aſſ. 37.

(h) Br. Counterplea d'Aid 29. S. C. Fitz. Voucher 207. S. C.

7. If the Defendant ſhews a Seiſin in his Wife, and another as Coparceners in Fee, and that he had Iſſue by her, and that he is Tenant by the Curteſy after the Death of his Wife, and ſo prays in Aid of the Heir in Reverſion, it is no Counterplea that the Wife had nothing, &c. in the Land during the Coverture, without denying the Seiſin of the other in Coparcenary, or ſhewing a Diſcontinuance or Alteration of the Eſtate. 21 E. 3. 15. b. adjudged.

Fol. 190.

8. But it had been a good Counterplea that the Wife and the others never had any Thing in the Land, &c. 21 E. 3. 15. b. Iſſue.

9. It is no good Counterplea that the Leſſee hath departed with his Eſtate pending the Writ. (i) 23 E. 3. 21. b.

(i) Fitz. Aid 6. S. C.

(L) To the Eſtate of the Praiee.

1. NOthing in the Reverſion is a good Counterplea of Aid, for peradventure a Stranger entered upon the Leſſee, and the Leſſor releaſed to him, and the Leſſee re-entred, or a Stranger recovered the Reverſion againſt the Leſſor. (a) 41 E. 3. 8. b. 11 H. 4. 42. b. Quære 4 H. 6. 5. (b) 30 E. 3. 26. b.

(a) Br. Counterplea d'Aid 34. S. C.

(b) Fitz. Aid 44. S. C.

2. If a Man ſays that J. was ſeiſed, and leaſed to him for Life, the Remainder to B. and prays in Aid of B. it is a good Counterplea that J. never had any Thing in the Land. 18 E. 3. 28. b. Dubitatur.

3. If Aid be prayed of the Patron and Ordinary, it is a good Counterplea to the Aid of the Patron, that he had nothing in the Patronage the Day of the Writ purchaſed, nor ever after. (c) 7 H. 6. 41.

(c) Br. Counterplea d'Aid 10. S. C. Fitz. Proceſs 76. S. C.

4. So if he ſays that he had nothing in the Patronage. 18 E. 3. 55.

(M) To the Eſtate of the Praior.

1. IN a Writ of Dower, if the Tenant ſays that he is Tenant by the Curteſy, the Reverſion to J. and prays in Aid of J. it is a good Counterplea that the Tenant was the firſt who entered after the Death of the Husband of the Demandant, who died ſeiſed of the Land. 2 E. 2. Aid 160. adjudged.

2. In a Mortdanceſter of the Death of C. if the Tenant ſays that C. leaſed to her and her Husband, and to the Heirs of the Husband, and ſo prays in Aid of the (a) Heir of the Husband, it is a good Counterplea that the ſaid C. is the Anceſtor of whoſe Death he brings the Action, and that the Tenant was the firſt who abated after the Death of C. (b) 6 E. 2. Aid 169. adjudged.

(a) The Original is miſprinted, for there 'tis, prays in Aid of the Huſband, &c.

(b) This is miſprinted, and ſhould be 16 E. 2.

(N) To the Eſtate of the Praiee.

1. If Leſſee for Life prays in Aid of J. S. in Reverſion, it is no good Counterplea that the Reverſion is to J. S. and a Stranger ſhewing how, and ſo he ought to have Aid of both, for this is nothing to the Demandant, for the Delay is all one to him. (a) 39 E. 3, 4 b.

2. If one Coparcener prays in Aid of the other, becauſe their Anceſtor was ſeized in Fee, and died ſeized, and ſhe entred, &c. it is no Counterplea that their Anceſtor did not die ſeized, for if he was ſeized at any Time ſhe hath Cauſe to have Aid (b) 21 Edw. 3. 15 b.

3. But it is a good Counterplea in this Caſe, that the Anceſtor never had any Thing. (c) 21 E. 3. 15 b.

4. In a Writ of Dower, if the Defendant ſays, that the Land deſcended to her and A. her Siſter as Coparceners from J. their Brother, and of which they have made Partition, and prays in Aid of A. it is no good Counterplea by the Demandant, that her Husband died ſeized Sans ceo, that J. ever had any Thing in the Land after the Death of the Husband. (d) 39 E. 3, 4 b. adjudged.

5. So in this Caſe it is no good Counterplea that J. never had any Thing in Demeſne or Reverſion after the Death of the Husband. 39 E. 3, 4 b. adjudged.

6. If the Tenant in an Action for certain Land, ſays that the King by his Charter gave the Manor of S. of which this Land is Parcel, to R. and the Tenant his Wife, and to the Heirs of R. and ſo ſhe is but Tenant for Life the Reverſion to the Heir of R. and prays in Aid of the Heir, it is no Counterplea to ſay this Land is not Parcel of the Manor, for by this Counterplea ſhe would avoid the King's Charter. 20 E. 3. Aid 1. adjudged.

7. But if certain Land be demanded, and the Tenant ſays, that he is Tenant for Life the Reverſion to B. by Fine of the Manor of D. of which the Land in Demand is Parcel, it is a good Counterplea that this Land is not Parcel of the Manor. 21 E. 3. Aid 25. adjudged, for this is a direct Traverſe.

8. In a Formedon, if the Tenant ſays that he is Leſſee for Life, the Reverſion to B. and prays in Aid of B. it is no Counterplea for the Demandant to ſay, that at another Time he ſued a Scire facias of this againſt him, and he ſaid the Grand-father of the Demandant was ſeized by Force of the Fine, and ſo the Fine executed, &c. by which Plea he acknowledged that he had a Fee, and this Writ is freſhly ſued after the Abatement of the other. 33 E. 3. Aid del Roy 106. adjudged.

9. If a Parſon prays in Aid of the Patron and Ordinary, it is not ſufficient to Counterplead the Patronage of the Patron, (e) for he is to have Aid of the Ordinary notwithſtanding this, and it will be all the ſame Delay to have Aid of both as of one. 18 E. 3. 55. but quære.

(a) Fitz. Counterplea d'Aid 19 S. C. Br. 16. S. C.

(b) Fitz. Aid 21 S. C. Br. Counterplea d'Aid 9. S. C. Br. Aid 65. S. C.

(c) Fitz. Aid 21 S. C. Br. Counterplea d'Aid 9. S. C. Br. Aid 65. S. C.

(d) Br. Aid 17. S. C.

Fol. 191.

(e) 1 Rol. Abr. 187. Pl. 11. 193. S. P.

(O) Joinder in Aid.

In what Caſes Joinder may be without Prayer.

1. THere ought to be Privity between him that joins, and the other to whom he is joined, otherways the Joinder ſhall not be ſuffered. 45 E. 3. 7.

2. As if an Avowry be made upon a Stranger, the Stranger cannot join with the Plaintiff if the Plaintiff hath nothing in the Land, for there is not any Privity. 45 E. 3. 7 b.

3. So if an Avowry be upon a Diſſeiſor, the Diſſeiſee cannot join to him for want of Privity, 45 E. 3. 8.

4. But in an Avowry upon him that hath the Freehold, he may join to Leſſee for Years being Pfaintiff, for there is ſufficient Privity. (a) 45 E. 3. 8. adjudged.

(a) Br. Joinder in Aid 10. S. C. Fitz. 9. S. C.

5. But he that hath the Freehold cannot join to Leſſee at Will, (for the Feebleneſs of his Eſtate as it ſeems). 45 E. 3. 7 b.

(b) 9 Co. 22 b. S. P.

6. (b) If there be Lord Meſn and Tenant, and the Avowry is upon Meſn he may ſoon join to the Tenant. 45 E. 3. 7 b. 14 H. 4 b. for he is made Privy by the Avowry. 17 E. 3. 6 b. 15 b. 39 E. 3. 34 b. agrees.

(c) 9 Co. 22. b. S. P.

7. (c) If there be Lord Meſn and Tenant, and the Lord avows upon a Stranger, the Meſn cannot join to the Tenant (and abate the Avowry). 17 E. 3. 6. 15. for he may put his Cattle in the Pound and bring a Replevin.

8. If the Avowry be upon a Stranger, the Donor cannot join to the Donee in Tail being Plaintiff. 17 E. 3. 6 b. contra.

9. If there be Lord, two Meſns, and Tenant, and the Lord avows upon the firſt Meſn, who is his Tenant, the 2d Meſne may join to his Tenant, Contra, 17 E. 3. 6 b.

Fol. 192.

(P) In (*) what Caſes Joinder in Aid ſhall be without Proceſs.

(*) If the Avowry be made according to 21 H. 8. cap. 19. by the expreſs Words of the Statute, there ſhall be Joinder by Proceſs or without, as if made according to the Common Law.

1. IF a Bailiff hath Aid of the Queen, Proceſs ſhall be awarded againſt the Queen as againſt a common Perſon. (a) 28 H. 6. 13. adjudged.

2. If the Husband hath Aid granted of his Wife, he ſhall be commanded by the Court to have his Wife at the Day in Court without Proceſs made againſt the Wife. (b) 43 E. 3. 13 b. 7 H. 6. 45. (c) 9 H. 6. 26 b. 29 E. 3. 24. becauſe ſhe is amenable at the Will of the Husband, and Proceſs would be a Delay. (d) 35 H. 6. 10. adjudged, and alſo it may be granted at the Election of the Court. (e) 7 H. 6. 45. 35 H. 6. 10.

(a) Fitz. Aid de Roy 24. S. C. (b) Fitz. Aid 114. S. C. Br. 20. S. C. (c) Br. Aid 10. S. C. (d) Fitz. Aid 82. S. C. Br. Joinder in Aid 9. S. C. (e) Br. Baron 46. S. C. Br. Aid 74. S. C. Fitz. Proceſs 77. S. C. Br. Proceſs 65. vide.

3. In Replevin by Leſſee for Years if he hath Aid granted of the Leſſor, upon whom the Avowry is made the Leſſor may join without Proceſs. (f) 2 H. 6. 1.

(f) Fitz. Joinder in Aid 2.

4. If the Tenant brings a Replevin, and the Lord avows upon the Meſne, and Aid is granted of the Meſne, he may join without Proceſs, becauſe otherways the Tenant ſhall have a Writ of Meſne againſt him if he loſes. 2 H. 6. 1.

5. If a Bailiff make Conuſance in the right of his Maſter, and hath Aid of him the Maſter cannot join without Proceſs. 2 H. 6. 1.

6. So

6. So in falſe Impriſonment if the Defendant juſtifies that the Plaintiff is the Villein of J. S. and that by his Command, &c. if the Iſſue be whether he be Free, and the Defendant hath Aid of his Maſter, yet he cannot join without Proceſs. 1 H. 6. 2.

7. In an Avowry upon B. as Tenant, if the Plaintiff ſays that A. was ſeized and leaſed to him for Years, altho' he ſhall not have Aid upon this Plea, yet A. may join to abate the Avowry. 3 H. 6. 54.

8. In a Plea of Land, if the Tenant hath Aid of one within Age, the Praiee may join without Proceſs. 7 H. 6. 45 b.

9. In a Plea of Land againſt Leſſee for Life, if Aid be granted of him in Reverſion, he may join without Proceſs. (g) 21 E. 3. 14. (h) 28 E. 3. 94 b. adjudged. 32 E. 3. Aid 38.

(g) Fitz. Joinder in Aid 11. S. C.

(h) Fitz. Joinder in Aid 13. S. C.

10. But in this Caſe if he in Reverſion prays to join, and the Leſſee ſays, that he is not the ſame Perſon of whom he hath prayed in Aid, the Leſſee ſhall be ouſted of Aid and ſhall anſwer alone. (i) 21 E. 3. 14.

(i) Fitz. Joinder in Aid 11. S. C.

11. In a Writ of Error againſt Tenant by the courteſy and the Heir of the Recoveror, if Aid be granted of the Heir in Reverſion for the Tenant by the Courteſy the Heir ſhall not be received to join in Aid to the Tenant by the Courteſy, without Proceſs, tho' he be preſent in Court. (k) 47 Aſſ. 9. adjudged. Quære this.

(k) Fitz. Aid 115. S. C.

12. In a Scire facias to execute a Re-cognizance upon a Return of the Conuſee dead, if a Writ iſſues to warn his Heir, and the Sheriff returns the Heir and B. as Tertenants warned, and Aid is granted to B. Leſſee for Life of the Heir in Reverſion, (admitting this) yet no Proceſs ſhall be awarded againſt the Heir to join in Aid becauſe he is Party to the Writ before. 8 R. 2. Aid del Roy 114.

(Q) How the Joinder ſhall be without Proceſs.

(*) By Attorney.

(*) Dier 111. Pl. 43. vide.

1. If Leſſee for Years hath Aid of the Leſſor, upon whom the Avowry is made, the Leſſor may join in Aid by Attorney, (a) 111 H. 4. 28 b.

(a) Br. Joinder in Aid 6. S. C. 10. S. C. Fitz. Attorney 35. S. C. Br. Aid 47. S. C.

2. But the Meſne ſhall not join to the Tenant by Attorney, becauſe by the Joinder, he acknowledges an Acquittal, and therefore ought to join in Perſon. 11 H. 4. 28 b.

Fol. 193.

3. So where an Avowry is upon a Stranger, and Aid granted of him, he cannot join by Attorney without Proceſs. 1 H. 6. 4 b.

(R) Joinder in Aid by Proceſs.

1. In a Scire facias, if the Tenant Leſſee for Life hath Aid of the Reverſioner, a Scire facias in auxilium according to the Nature of the firſt Writ ſhall be granted, and not a Summons ad auxiliandum. (a) 12 H. 4. 3.

(a) Br. Proceſs 38. S. C. Fitz. 124. S. C.

(S At

(S) At what Time Proceſs ſhall be granted.

1. If a Servant be at Iſſue and hath Aid of his Maſter, it is not neceſſary that the Scire facias ad jungendum ſhould be returned before any venire facias ſhall be awarded, (a) but they may be returnable at one time, becauſe the Iſſue being joined the Praier cannot alter the Iſſue, but is only to give Evidence. (b) 7 H. 6. 21. Contra. (c) 8 H. 4 16 b.

(a) Br. Proceſs 156. S. P.
(b) Br. Aid 45. S. C.
(c) Br. Aid 45. S. C.

2. If Aid be granted of the King and Ordinary, by which he is awarded to ſue to the King, yet before a Procedendo comes Proceſs ſhall be awarded againſt the Ordinary preſently. 12 H. 4. 4 b. tho' it may be (d) Proceſs ſhall not come before the Return; Dubitatur. (e) 19 H. 6. 5 b. 19 E. 3. Aid del Roy 5.

(d) This I take to be miſprinted, and that it ſhould be a Procedendo.

(c) Fitz. Proceſs 87. S. C. Br. 61. S. C.

3. If Aid be granted of the Ordinary, and the Eſtate of the Patron is Counterpleaded, Proceſs ſhall not be awarded againſt the Ordinary till the Iſſue tried. (f) 7 H. 6. 41.

(f) 1 Rol. Abr. 187. Pl. 11. 191. Pl. 9.

4. If Aid be granted of a common Perſon Patron and Ordinary, Proceſs ſhall iſſue againſt both at the ſame Time. 19 H. 6. 6.

5. If a Patron hath Aid of the King, Patron and of the Ordinary, and Proceſs is made preſently againſt the Ordinary before any Procedendo comes, if the Ordinary comes in upon the Return, he ſhall not join in Aid to the Parſon before the Procedendo comes. 19 H. 6. (g) b. Curia.

(g) This is miſprinted in the Original, and ſhould be 6.

(T) How.

1. In an Avowry upon the Leſſor, if the Leſſee hath Aid of him, the Leſſor may join by Proceſs, by Attorney. 11 H. 4. 28 b.

2. So where the Avowry is upon the very Tenant, and Aid granted of him he may join by Proceſs, by Attorney. 1 H. 6. 4 b.

(A) (*) Alien-Born.

(†) Alien Friend.

Fol. 194.

(*) The Sons of an Alien, tho' born here, being Merchants for the first Generation, ſhall pay alien Cuſtoms and Duties.

What Things he may have without Forfeiture to the King.

1. AN Alien (a) may (b) purchaſe Land (c) 11 Hen. 4. 26. b. (d) 14 Hen. 4. 20. Co. Lit. 2. b.

Lit. Rep. 140. ſaid to be the Practice of the Exchequer. Hard. 335. agrees. (†) The King pardons his loving and obedient Subjects; this extends to Aliens if here at the Time, tho' not made Denizens, per Hob. 271. (a) But the Law which nihil facit fruſtra, will give him no Eſtate or Inheritance, which it does not enable him to keep, ſo that he ſhall take nothing by Deſcent, Curteſy, Dower or Guardianſhip. 1 Vent. 417. Molloy 364. 7 Co. 25. (b) He takes the Eſtate. Co. Lit. 2. b.—and if in Tail, he may ſuffer a Recovery, and dock Remainders. 2 Rol. Rep. 321. Goulſ. 102. 4 Leon. 82. (c) Br. Denizen and Alien 17. S. C. (d) Br. Denizen and Alien 2. S. C.

(e) 2. But the King may (f) ſeiſe it. (g) 11 Hen. 4. 26. b. (h) 14 Hen. 4 20.

(e) Vide 17. Edw. 2. cap. 12.

3. (i) If an Alien Friend be a (k) Merchant, he may Purchaſe a Leaſe for Years of a Houſe for his Habitation, and the King ſhall not have this ſo long as he inhabits there. Co. Lit. 2. b. for this was (l) neceſſary for his Trade and Traffick.

(f) Upon Office found, the King ſhall have it. Co. Lit. 2. b. at the Top; but till Office nothing veſts in the King. 1 Leon. 47. 4 Leon. 82. Goulsb. 29. 102. 4 Leon. 84. 2 Rol. Rep. 321. (g) Br. Denizen and Alien. 17. S. C. (h) Br. Denizen and Alien 2. S. C. (i) Poph. 36. like Point, per Curiam arguend'. 1 Bulſt. 134. like Point, per Williams Juſtice arguend'. 7 Co. 17. a. S. P. (k) But Leaſes of any Dwelling Houſe or Shop, made to an Alien Artificer or Handicraft-man, are void, per 32 H. 8. cap. 16. Paragr. 13. and ſo of Conſequence is a Bond for the Payment of Rent thereupon; as vide in Jevon and Harridge's Caſe. 1 Sid. 308, 309. 2 Keb. 102. 116. 118. 1 Sand. 6. 8. Freeman and King. 1 Sid. 357. 2 Keb. 315. Bridgham and Frontee. 3 Mod. 94. and what Reſolutions and Pleadings hath been upon the ſaid Act. (l) By 27 E. 3. cap. 2. it is enacted, That all Merchant Strangers, and not Enemies, may ſafely Dwell in the Realm, &c. upon which Statute at a Reading in Lincoln's-Inn, 35 Eliz. it was agreed a Merchant Alien might take a Leaſe of a Houſe with Gardens at Will, but not for Years, per N. Dier 2. b. Margine.—So for a like Reaſon within the Words of 15 Car. 2. cap. 2. M. of an Alien, Hemp or Flax Dreſſer, notwithſtanding the Statute. 32 H. 8. cap. 16.

4. But if he (m) departs or leaves the Realm, the King ſhall have this Leaſe. Co. Lit. 2. b.

(m) Not if he goes beyond Sea, and leaves Servants in the Houſe during his Abſence, per Harriſon Lectura Lincoln's-Inn, 1632. cited

5. So if he dies poſſeſſed thereof, yet his Executors or Adminiſtrators ſhall not have it. Co. Lit. 2. b. Sir James Croft's Caſe. 29 Eliz.

6. (n) But ſuch Alien Friend, tho' he be a Merchant, yet if he Purchaſes (o) a Leaſe for Years of Land, Meadow, &c. the King ſhall have it; for this is not neceſſary for his Trade or Traffick. Co. Lit. 2. b. Sir James Croft's Caſe. 29 Eliz. Reſolved.

N. Dier 2. b. Margine. (n) Dier 2. b. S. P. per Curiam. 7 Co. 17. a. S. P. 18. b. S. P. and the Reaſon thereof. 1 And. 25. S. P. per Curiam con. N. Bend. 36. Pl. 61. S. P. per Curiam con. (o) An Alien Friend Merchant, may upon a Statute extend Lands, and upon Office the King ſhall not have them, and upon Ouſter he ſhall have an Aſſiſe. Paſch. 11 E. 3. Rot. 87. adjudged, and per Glanvil Juſt' Lectur' ſua N. Dier 2. b. Margine cited. And indeed, 13 E. 1. de Mercatoribus, ſeems plainly to extend to Alien Merchants Creditors.

7. But if an Alien Friend who is not any Merchant, Purchaſe a Leaſe for Years of a Houſe for his Habitation; yet the King ſhall have it. Co. Lit. 2. b. Sir James Croft's Caſe reſolved.

8. If an Alien Friend Purchaſes a (p) Copyhold in Fee, in the Name of J. S. in Truſt for himſelf and his Heirs. Quære, Whether

(p) If an Alien Purchaſes a Copyhold.

Q. If the King ſhall have it. In Holland's Caſe. All. 14, 15, &c. dubitatur. Stil. 20, 40. dubitatur, becauſe the King cannot be Tenant at Will, and therefore it ſhall Eſcheat to the Lord, per Harriſon Lectur. 1633, cited N. Dier 2. b. the King ſhall have it as a Truſt, per Holland's Caſe, as cited. 1 Mod. 17. but the Caſe is miſtaken by the Reporter.

the King ſhall have (q) this Truſt of the Copyhold. Paſch. 24 Car. B R. this was a Queſtion between the (r) King and Holland, and much argued at Bar, but no Opinion given therein, but the Truſt being traverſed, and this found for the King, yet Judgment was given againſt the King; becauſe by the Inquiſition by which this Truſt and Matter was found, J. S. who was the Perſon truſted, and who had the Eſtate in Fee in Law in him, was put out of Poſſeſſion thereof by the Inquiſition, whereas the Alien had but the Truſt and no Poſſeſſion, and therefore admitting the Truſt was given to the King, yet the King could not have the Poſſeſſion by Force thereof, but ought to ſue to have the Truſt executed in a Court of Equity. Intratur Trin. 21. Car. Rot. 20.

(q) If the King ſhould have had a Uſe at Common Law, or ſhall have a Truſt now of Freehold Lands limited to an Alien. Q. In Holland's Caſe dubitatur. Stil. 20, 21, &c. All. 14, 15, &c. and S. P. dubitatur.

(r) All. 14. S. C. adjudged, and S. P. dubitatur. Stil. 20, 21, 41, 76. S. C. adjudged,

9. An Alien Friend may be an Adminiſtrator, and ſhall have Adminiſtration of Leaſes as well as perſonal Things, becauſe he hath them in another's Right, and not to his own Uſe. *Paſch.* 1 *Car.* 1. (s) Sir *Upwell Caroon's* Caſe. *Cro. Car.* 8. adjudged.

(s) 1 Vent. 417. S. C. cited and agreed, per Hale Chief Juſtice.

Fol. 195.

(B) Alien (a) Enemy.

(a) Who ſhall be ſaid to be an Alien Enemy, vide. Went. Off. Ex. 23. Cro. Eliz. 142. Ow. 45. Cro. Eliz. 683. 4 Inſt. 152. 7 Rep. 25. in Calvin's Caſe. Br. Denizen 20.

1. If a Man be bound to an Alien Enemy, this is void quoad the Obligee. (b) 19 E. 4. 6. a. b.

(b) Br. Debt 219. S. C. Br. Denizen & Alien. 16, 20. S. C.

2. So if a Man be bound to an Alien Friend, who after becomes an Enemy, it is void quoad him. (c) 19 E. 4. 6. a. b.

3. But in both Caſes the King ſhall have it. (d) 19 E. 4. 6. a. b. but Quære.

(c) Br. Denizen & Alien 16, 20. S. C.

(d) Br. Debt 219. S. C. Br. Denizen & Alien 16, 20. S. C.

(C) (a) Alien.

(b) Denizen.

What Act in Law will make a Man a Denizen.

(a) Aliens made Denizens ſhall pay Cuſtoms and Subſidies as before, per 1 H. 7. cap. 2. 11 H. 7. cap. 14. 22 H. 8. cap. 8. but vide 25 Car. 2. cap. 6. — A Denizen ſhall not Inherit, but may Purchaſe Lands, and his Children born after ſuch Denization may inherit them. Co. Lit. 8. a. Stile's Rep. 139. (b) A Denization may be for Life or in Tail, or upon Condition. Co. Lit. 129. a. 7 Co. 6. a. in Calvin's Caſe. 2 Rol. Rep. 95. per Chief Juſtice, or for Years. Cro. Jac. 539. per Chief Juſtice. (c) 2 Jon. 12. (d) Fitz. Denizen 3. S. C. Br. Denizen & Alien 11. S. C. Fitz. Challenge 91. S. C. Br. 48. S. C.

1. If an Alien Friend comes into England when he is an Infant, and at all Times after, and for a long Time continues here, and is ſworn to the King, (c) yet he continues an Alien. (d) 14 H. 4. 20.

2. The King may make a particular Denization, as if he Grants to an Alien *quod in quibuſdam curiis ſuis Angliæ audiatur ut Anglus, & quod non repellatur per illam exceptionem quod eſt alienigena*, &c. *Co. Lit.* 129. a.

3. In the Conqueſt of a Chriſtian Kingdom, as well thoſe that ſerved in War at the Conqueſt, as thoſe that remained at Home for the Safety and Peace of their Country, and other the King's Subjects, as well *Antenati* as *Poſtnati*, are capable of Lands in the Kingdom or Country conquered, and may

may maintain any real Action, and have the like Privileges there as they may have in *England*. (e) 7 *Co.* 6. a. 18. a. in *Calvin's* Caſe.

(e) Vaugh. 291. S. P. cited and allowed arguend' per Vaughan.

(D) Alien.

(a) Naturalization.

1. (b) **An Alien born in Portugal, who came into England with Beatrice Counteſs of Arundel, was Naturalized by (c) Parliament, and was enabled to Purchaſe, &c. (d) 3 H. 6. 55.**

(a) None above 18, to be Naturalized without receiving the Sacrament a Month before the Bill exhibited, and taking the Oath of Allegiance and Supremacy before it be twice read per 7 Jac. cap. 2. —Perſons Naturalized in France, have not ſo many Privileges as thoſe Naturalized here. 1 Sid. 197, per Bridgman, Chief Juſtice. (b) Other Naturalizations by Parliament. vide 2 Rol. Rep. 94, 95. Palm. 16. And vide 29 Car. 2. by which the Children of the Natural Subjects of this Realm born beyond Sea during the then late War, are Naturalized, and 9 and 10 Will. cap. 20. by which the Iſſue of the Natural born Subjects of this Realm, born while beyond Sea in the King's Service, are Naturalized, but under what Proviſions, vide the ſeveral Acts. (c) It muſt be by Parliament, and ſuch Alien naturalized, is to all Intents and Purpoſes as a natural born Subject. Co. Lit. 129. a. 7 Co. 7. a. Cro. Jac. 539. Co. Lit. 8. a. Vide Godfry and Dixon. Palm. 13, 14, &c. 2 Rol. Rep. 92, 93, &c. Cro. Jac. 539. Godb. 275. Collingwood and Paps. 1 Sid. 193, 194, &c. 1 Vent. 413. Foſter and Ramſy. 2 Sid. Br. Denizen 9. 23, 51. Vaugh. 274, 275, &c. 2 Keb. 601. Cart. 185, 188, &c. 2 Vent. 7. (d) Br. Denizen & Alien 1. S. C.

2. (e) One cannot be Naturalized either with Limitation for Life, or in Tail or upon Condition, for that is againſt the Abſoluteneſs, Purity, and Indebility of Natural Allegiance. *Co. Lit.* 129. a.

(e) 2 Rol. Rep. 95. S. P. per Chief Juſtice, Cro. Jac. 539. S. P. per Chief Juſtice.

3. If a Man is naturalized in *Ireland* by the Parliament there, this is no Naturalization (f) as to *England*, for the Parliament of *Ireland* hath no direct or conſequential Power of binding *England*, and Naturalization is but a Fiction which can bind only thoſe that conſent to it. *Hill. 21 and 22 Car.* 2. between (g) *Craw* and *Ramſy*. *Vaugh.* 274, 275, *&c.* the Court was divided.

(f) But a Naturalization in England makes a Man a natural born Subject of Ireland. Vaugh. 291. per Vaugh. arguend', and vide 2 Keb. 601. (g) Carter 185, 186, &c. S. C. but no Judgment. 2 Keb. 601. S. C. adjudged by 3 Judges againſt 1. 2 Jon. 11, 12. S. C. adjudged. 2 Vent. 1, 2, &c. S. C. adjudged by 3 Judges againſt 1.

(E) Alien.

(a) Denization.

(b) By whom (c) and what Perſons ſhall be.

1. **If an Alien be made a Denizen, and the Letters of Denization have a** Proviſo, **(uſual in ſuch Charters) that the Denizen ſhall do his Liege Homage, and** (d) **that he ſhall be obedient, and obſerve the** (e) **Laws of this Realm, this** Proviſo **is not any Condition, for tho' he never doth his Liege Homage, nor be obedient to all the Laws of this Realm, yet this will not make the Denization void, for if he doth not obſerve the Laws he ſhall forfeit the Penalties appointed by them.** Paſch. 8 Jac. Scaccario. (f) Verſeline Manning's Caſe per Curiam.

(a) Hen. 2. of France indenizated all the City of Antwerp at one Time. 2 Rol. Rep. 93. Palm. 14. (b) By the King, but this is a Prerogative inſeparable, for he cannot grant to another to make Denizens. 7 Co. 25. b. in Calvin's Caſe. 2 Rol. Rep. 93. Palm. 14. Vaugh. 269. 2 Jon. 12. (c) The Original is, Et hers quel perſons giſt, and therefore perhaps miſprinted. (d) This Proviſo is inſerted in all Letters Patents of Denization, per 32 H. 8. cap. 16. Paragr. 7. (e) viz. 1 Rich. 3. cap. 9. 14 H. 8. cap. 2. 21 H. 8. cap. 16. that concern Strangers and Denizens, and the other Laws of the Realm, unleſs the King grant to any ſuch Alien any ſpecial Liberty or Privilege. vide 32 H. 8. cap. 16. (f) Lane 58. S. C. adjudged.

Who

Who shall be said an Alien, who a Subject born.

1. Regularly there are two Incidents neceſſary to make a Subject Born: 1ſt, That his Parents at the Time of his Birth, be under the actual Obedience of the King: 2dly, That the Place of his Birth be within the Dominions of the King. 7 *Co.* 18. a. in *Calvin*'s Caſe.

2. (a) Thoſe which were Born in *Normandy*, *Gaſcoign*, &c. while under actual Obedience to the Kings of *England*, were Subjects Born. 7 *Co.* 20. b. in *Calvin*'s Caſe.

(a) Vaugh. 279. S. P. and by the Statute 42 Edw. 3. cap. 10. this is declared to have been the Common Law.

3. So thoſe are now which are Born in the *Engliſh* Plantations. *Vaugh.* 279.

4. But if one is now Born in *Normandy*, *Gaſcoign*, &c. to which the King of *England* hath an abſolute Right, that he is an Alien Born, becauſe the King of *England* is not in actual Poſſeſſion thereof. 7 *Co.* 18. a. in *Calvin*'s Caſe.

5. If Baron and Feme Aliens, come into *England*, and live here under the Protection of the King, and have Iſſue Born here, this Iſſue is a Natural born Subject. 7 *Co.* 6. a. in *Calvin*'s Caſe.

6. But if Aliens come as Enemies into the Realm, and poſſeſs themſelves of a Town or Fort, and one of them has Iſſue Born here, this Iſſue is an Alien; for it is not *Cælum* nor *Solum* that makes a Subject, but the being Born within the Allegiance and under the Protection of the King. 7 *Co.* 6. a. 18. a. in *Calvin*'s Caſe.

7. The *Antenati*, or thoſe Born in *Scotland* before the Deſcent of the *Engliſh* Crown to King *James* I. are Aliens, for the Uniting of the Kingdoms by a ſubſequent Deſcent, cannot make them Subjects of that Crown to which they were born Aliens. 7 *Co.* 27. a. b. agreed in *Calvin*'s Caſe.

8. But the *Poſtnati*, or ſuch which were born after, are not Aliens, for being born within the Allegiance, and under the Protection of the King of *England*, they are his natural Subjects, and not Aliens. *Trin.* 6. *Jac. Calvin*'s Caſe. 7 *Co.* 1, 2, 3. &c. fully and at large debated, and Judgment given accordingly with the (b) Reaſons at large.

(b) Vaugh. 286. It is ſaid the Reaſon was not becauſe they were Natural Subjects to him that was King of England, for then the Antenati would not be Aliens; nor becauſe they were Natural Subjects of Dominions belonging to the Crown of England, for then the Poſtnati would be Aliens; but the Reaſon was, becauſe they were born under the ſame Ligeance with the Subjects of England.

9. If one of the King's Ambaſſadors in a Foreign Country hath Iſſue there by his Wife, being an *Engliſh* Woman, by the Common Law they are Natural born Subjects. 7 *Co.* 18. a. in *Calvin*'s Caſe.

10. (c) If a Merchant, for the Sake of Trading, goes into *Poland* and there marries an Alien, and dies, leaving his Wife enſeint, who is after delivered, this Iſſue is a Subject Born, and ſhall inherit the Lands of the Father in *England*, for tho' the Mother was an Alien, *partus non ſequitur ventrem*, but the Iſſue ſhall be of the Condition of the Father. *Hill.* 16 *Car.* 1. between (d) *Bacon* and *Bacon*. *Cro. Car.* 601, 602. adjudged.

(c) Lit. Rep. 23, 24, &c. S. P. long debated but no Reſolution; but Cro. Car. 602. this Caſe, (as it ſeems) is cited, and ſaid, that Judgment was entered accordingly, and vide Br. Denizen 21. March 91. S. C. adjudged. 1 Sid. 198. S. C. cited. (d)

11. By the *Stat.* 25 *Edw.* 3. *Stat.* 2. it is declared to be the ancient Law of the Crown, that the King's Children, whereſoever Born, ſhall inherit.

12. By the Statute 25 *Edw.* 3. *Stat.* 2. it is declared, That Children Born without the Allegiance of the King, whoſe Fathers and Mothers at the Time

Time of their Birth (e) ſhall be of the (f) Allegiance of the King, ſhall have the ſame Advantage and inherit, *&c.* ſo that their Mothers paſſed the Seas with the Licence of their Husbands.

(e) But if Baron and Feme go beyond Sea, that Iſſue is Merchants.

without Licence, or ſtay after the Time limited by the Licence, and have Iſſue there, an Alien. Cro. Eliz. 3. rul'd upon Evidence; but I ſuppoſe this is not intended of 1 Sid. 198.——but Q. tho' they travel without Licence, if not reſtrained by Writ of ne exeat regnum, or Privy Seal. Lit. Rep. 27. and vide Br. Denizen 6. (f) But it is otherways where they go out of the Realm as Fugitives. Lit. Rep. 27.

Pleader.

In what (a) Actions Alien Born is a good Plea.

(a) N. Bend. 58. Pl. 96. vide.

1. (b) An Alien Friend may have perſonal Actions. *Co. Lit.* 129 b.

2. But an Alien Friend ſhall not have mixt or (c) real Actions. *Co. Lit.* 129 b.

3. An Alien Enemy ſhall have neither real mixt or (d) perſonal Actions. *Co. Lit.* 129 b.

4. (e) An Abbot, Prior or Prioreſs Alien ſhall have Actions Real, Perſonal or Mixt for any Thing concerning the Poſſeſſions or Goods of his Monaſtery here in *England*, becauſe not in his own, but in the Right of his Monaſtery. *Co. Lit.* 129 a. b.

5. (f) An Alien that is condemned in an Information ſhall have a Writ of Error to relieve himſelf, *& ſic de Similibus. Co. Lit.* 129 a.

(6) (g) An Alien Enemy can have no Action as Executor, tho' it is in *auter droit*, *per Trin.* 31 *Eliz.* (h) *Anonymus. Cro. Eliz.* 142. adjudged.

7. A Merchant Stranger ſhall have an Action for ſaying he is a Bankrupt, for by Law he may have perſonal Actions, and theſe Words tend to impair his Credit in his Trade. *Hill.* 8 *Jac.* between (i) *Tuerloote* and *Moriſon. Yelv.* 198. adjudged.

(b) 1 And. 25. S. P. per Curiam. Dier 2 b. S. P. per Curiam. Br. Denizen 10. 15. S. P.

(c) Dier 2 b. S. P. per Curiam. Br. Denizen 10. S.P.

(d) Bet in Moor 431. Pl. 605. it is adjudged that Debt upon a Bond lies by an Alien Enemy, but I ſuppoſe this ſhould be an Alien Friend, and that there is a Miſtake in the Point. (e) Palm. 13. S. P. arguend'. Molloy 370. S. P. Br. Denizen 15. S. P. (f) 1 Brownl. 42. like Point ſaid, (g) Wentw. Off. Ex. 22. S. P. Cro. Eliz. 683. S. P. ſeems adjudged Con. but Q. and vid. Cro. Car. 9. S. C. cited Cart. 50. S. P. adjorn' 19. adjudged Con. Molloy 370. (h) Owen 45. S. C. adjudged. (i) Tirlot & Morris, 1 Bulſ. 134. S. C. adjudged by 3 Judges againſt 1.

The Manner of Pleading (a) Alien born.

(a) That he is an Alien Artificer within 32 H. 8. cap. 16. vide Freeman & King, 1 Sid. 357. 2 Keb. 315.

1. In an Aſſize *tempore Jac.* 1. the Defendant pleaded that the Plaintiff was born *apud E. infra regnum Scotiæ, ac infra ligeantiam dicti domini regis dicti regni ſui Scotiæ, ac extra Ligeantiam dicti domini regis regni ſui Angliæ*, and this was held no good Plea, becauſe it refer'd Ligeance and Faith to *England*, and not to the King. *Trin.* 6. *Jac. Calvin's* Caſe. 17 *Co.* 1. 9 b. adjudged.

(b) Litl. Rep. 26. S. P. arguend'.

2. But the moſt uſual and beſt Pleading in this Caſe is both excluſive, and incluſive, *viz. extra Ligeantiam domini regis*, &c. *& infra Ligeantiam alterius regis.* 7 *Co.* 16 b. in *Calvin's* Caſe.

3. (c) If one born in *Jerſy* or elſewhere within the King's Obedience brings a real Action, and the Tenant pleads, that the Demandant is an Alien born underthe Obedience of the *French* King, and out of the Ligeance of, *&c.* the Demandant may reply, that he was born at ſuch a Place in *England* within the King's Alligeance, *&c.* and ſuch hath ever been the Manner of Pleading in ſuch Caſe. *Co. Lit.* 161 a. b.

(c) 7 Co. 26, 27. in Calvin's Caſe, S.P.—6 Rep. 47 a. in Dowdal's Caſe, like Point, 2 Keb. 98. 1 Sand. 8.

S. P. per Curiam. Freeman & King S. P. 1 Sid 357. adjudged. 2 Keb. 315. adjudged. S. P. appears. 1 Leon 78, 79. S. P. appears. Cart. 50. vide Raſt. Ent. 6. 5 b.

When it shall be pleaded to the Writ, and when to the Action.

1. If an Alien Friend brings a real, or mixt Action, the Tenant or Defendant shall not plead Alien-Born (a) to the Writ or Action, but in Disability of the Person. *Co. Lit.* 129 b.

2. But if an Alien Enemy brings an Action, the Defendant (b) may conclude (c) to the Action. *Co. Lit.* 129 b.

(a) Br. Denizen 3. vide.
(b) Cart. 49. 193. Rast. Ent. 605 b.
(c) Dy to the Writ. Rast. Ent. 252 b.

Alienation.

(*) Without the King's (a) Licence.

(b) Fine (c) for it.

(*) Where if A. had a Licence to Alien to B. tho' no Uses were mentioned in it, or if the Alienation was pardoned, no Fine should be paid for the Execution of any Use arising out of the Estate of B. and the Clause in 27 H. 8. intended where Uses are raised out of the Estate of the Covenantor, and not of the Feoffees, &c. by Transmutation of the Possession. 6 Co. 27, 28. 9 Co. 1. 7 a. Moor 262. Pl. 412. and per 1 Car. cap. 3. all Licences of Alienation (other than where Uses are raised out of the Estate of the Covenantor) shall be general without expressing any Use. (a) Concerning Licences and Pardons of Alienation, and the Pleading thereof. Vide 32 H. 8. cap. 1. Paragraph 3. 34 H. 8. cap 5. Paragraph 13. 1 Car. cap. 3. Co. Ent. 638, 639. (b) Upon what Reason this Prerogative first began Vide Moor 172, 173. 1 Leon 8. (c) The Common Fine to obtain a Licence was one third Part of an Year's Value of the Land, but the Fine for an Alienation without was an Year's Value. 2 Inst. 67. Sav. 16.—But per 3. 34 H. 8. cap. 5. where Lands are devised by Force of that Act, and the Devisee sues out a Pardon, he shall pay a third Part of the yearly Value only. (d) 2 Inst. 65, 66. S. P. So Sav. 16. Br. Alienation 6. 10.——But 1 Leon. 8. it is said by Manwood, that this Prerogative was by the Common Law, and not by any Statute.

1. (d) BEfore the Statute of *Magna Charta* no Fine for an Alienation without Licence was due to the King, and no Record can be found that either a Licence or Pardon of Alienation was sued or obtained before the 20 *H.* 3. *Co. Lit.* 43. a. b.

2. But it being Enacted by the State of the *Magna Charta*, *Cap.* 32. that none shall give or sell so much of his Land, that of the Residue the Lord of the Fee may not have his Services, the King after claimed a Fine upon an Alienation without his Licence. *Co. Lit.* 43 a.

3. But upon Construction of this Act, it was a Question whether the Land aliened without Licence was forfeited to the King, or whether it should be seised in Nature of a Distress, and a Fine paid for the Trespass. 2 *Inst.* 66. but by my Lord *Coke*, the latter was the better Opinion.

4. And by the Statute of 1 *Edw.* 3. *Cap.* 12. it was Enacted, that from thenceforth, Lands holden of the King in (e) chief should not be forfeited but of (f) such Lands (g) so aliened without Licence a reasonable Fine taken in Chancery (h) by due Process.

(e) This extends to Lands held by grand Sergeantry. 2 Inst. 66. and per 17 Edw. 2. cap. 7. it is declared, that when Sergeantries are aliened without Licence, the King hath used to rate them at a reasonable Extent. (f) But per 4 Leon. 47. per Curiam, not only the Lands aliened, but the other Lands of the Alienee are chargeable. (g) But the Act must be taken according to Justice and Reason, and if the Alienation had been made by a Disseisor, and the Disseisee had entered, the Land should not have been seised for the Fine. 2 Inst. 67. 1 Leon. 8. ——but the Person of the Feoffee charged with it. 1 Leon. 8. 2 Leon. 55.——So upon an Alienation of the Husband, the Estate of the Wife should not have been charged. Sav. 65, 66. adjudged——So if a Fine had been levied by the Reversioner, the Estate of the Tenant for Life should not have been charged, because his Estate was before the Alienation. 2 Inst. 67. Sav. 65.——But in such Case the Tenant for Life must have pleaded his Estate, and thereupon Process should have been stay'd.

ſtay'd. Sav. 17. But per 1 Leon. 8. if the Tenant for Life had attorned to the Grant, the King ſhould have ſeiſed preſently.—but if Tenant in Capite had made a Gift in Tail, upon Condition the Donee ſhould not have aliened, and he had aliened and the Donor had entered, the Land ſh'd have been ſeiſed for the Fine, for this was a Charge paramount by reaſon of the Tenure. Treſham's Caſe, Moor 172. Pl. 305. adjudged. 1 Leon. 8. adjudged. Sav. 65. cited, and vide 2 Leon. 55. (h) 2 Inſ. 67. vide, where the Writ Quo titulo ingreſſus eſt, ſhould have iſſued out of the Exchequer.—and where the Proceedings by Scire facias. Co. Ent. 633. Moor 172.

5. (i) And tho' by the 18 *Edw.* 1. *Cap.* 1. it is Enacted, that it ſhall be lawful for every Freeholder to ſell all, or any Part of his Land, ſo that the Feoffee hold of the chief Lord of the Fee by ſuch Services and Cuſtoms as the Feoffor held, yet this did not take away the Fine due to the King upon the Alienation of his Tenant, for tho' this Statute takes away the Reſtraint of Alienation, *ſecundum quid* as to the Avoidance of the Eſtate, yet it does not *ſimpliciter*. 2 *Inſ.* 66.

(i) 2 Inſ. 501. S. P. Co. Lit. 43 b. S. P. and ſaid the Fine is not taken away by this Act, becauſe the King is not named. and by the Statute de Prerogativa regis, Cap. 6. it is enacted, That none holding of the King in Chief by Knight's Service, may without his Licence alien ſo much of his Lands, that the Reſidue will not ſuffice to do his Service; but it is not to be underſtood of Members and Parcels thereof. (k) Sav. 45. A Quære where the Tenure was ad feodi firmam in libero Soccagio & non in capite, for it being in libero Soccagio, and not of any Manor, it was ſaid, the Words & non in capite were repugnant, and vide 37 H. cap. 20. Paragraph 3. (l) And per 1 Edw. 3. cap. 13. it is enacted, That upon ſuch Alienation, Lands holden of an Honour ſhall not be taken into the King's Hands, as if held in Chief of the King as of his Crown, and if ſuch Alienee was diſturbed, he might have had a Writ grounded upon this Statute, which vide F. N. B. 175. A.

6. If Lands were held of the King as of an Honour and not *in* (k) *Capite*, they (l) might have been aliened without Licence. *Br. Alienation* 11.

7. And tho' held in chief, they might have been charged without Licence. *Br. Alienation* 12.

8. So if the Tenure was not immediate of the King, as if the King was Lord Paramount, and there was a Meſne, and Tenant, tho' the Meſne could not alien without Licence, yet the Tenant might. *Br. Alienation* 27.

9. But *per* 12. *Car.* 2. *Cap.* 24. all Fines for Alienations, Seiſure and Pardons for Alienations are taken away and diſcharged, except only Fines for Alienations due by particular Cuſtom of particular Manors and Places, other than Fines for Alienation of Lands holden immediately of the King in *Capite*.

(a) Ambaſſadors.

Their Privilege and (b) Protection.

1. If a Foreign Ambaſſador (being *Prorex*) committeth a Crime, which is *contra jus gentium*, as Treaſon, Felony, Adultery, *&c.* he loſes the Privilege and Dignity of an Ambaſſador, and may be puniſhed here as any other private Alien, and is not to be remanded to his Sovereign but of Curteſy. (c) 4 *Inſ.* 153.

(a) An Agent repreſents the Affairs only, but an Ambaſſador the Grandure of his Maſter. Molloy 128. ——by the Law of Nations, none under Quality of a Sovereign Prince can ſend Ambaſſadors. Molloy 129.—and 4 Inſ. 153. it is ſaid, there can be no Ambaſſador without Letters of Credence from his Sovereign to another that hath Sovereign Authority.—but the Electors and Princes of the Empire, ſend or receive Ambaſſadors touching Matters which concern their own Territories. Molloy 129.—And ſo the Hans Towns being free imperial Cities, have the ſame Regalia by Preſcription or Grant. Molloy 129.—but a King deprived of his Kingdom and Royalty hath loſt his Right of Legation. Molloy 120. Margine.—And per 4 Inſ. 153. if ſent from a King or abſolute Potentate, tho' in his Letters of Credence he is termed an Agent or Nuncius, yet he is an Ambaſſador or Legate.—His Office implies not a private Procuration but for the Publick, and not for a particular Subject, otherways than it concerns the King and his Miniſters to protect them in foreign Kingdoms in Nature of a Negoriation of State, and therefore tho' he may proſecute and defend for a private Subject at the Council-Table, which is a Court of State; yet when he comes to ſettled Courts, he muſt obſerve the Eſſential Forms of their Proceedings. vide Hob. 114. (b) If a Man that is baniſhed is ſent Ambaſſador to that Place from which he is baniſhed, he cannot be detained or offended there. 4 Inſ. 153. (c) Molloy 139. Same Rule cited. 1 Rol. Rep. 175. Same Rule agreed by the Civilians. So 3 Bulſ. 28.

2. So

2. So upon (d) Contracts which are good *jure gentium*, he muſt anſwer here. 4 *Inſt.* 153.

(d) But Molloy 141. it is ſaid that moſt certainly by the Civil Law his Moveables which are accounted an Acceſſion to his Perſon, cannot be ſeiſed on as a Pledge, or for Payment of a Debt, tho' by Leave of the King or State where he reſides; for all Coaction ought to be far from an Ambaſſador, as well that which touches his Neceſſaries as his Perſon; if therefore he hath contracted a Debt, he is to be called upon kindly, and if he refuſes Payment, Letters of Requeſt are to go to his Maſter, ſo that the ſame Courſe may be taken with him as with Debtors in another Territory, and takes Notice of this Opinion of my Lord Coke, which ſeems to the contrary, and 3 Bulſ. 28. it is agreed by the Civilians, that the Perſon of an Ambaſſador cannot be arreſted.

3. But if a Thing be only *malum prohibitum* by Act of Parliament, private Law, or Cuſtom of the Realm, and is not *malum in ſe jure Gentium, nec contra jus gentium* an Ambaſſador reſiding here ſhall not be bound by it. (e) 4 *Inſ.* 153.

(e) Molloy 139. ſame Rule cited, 1 Rol. Rep. 175. ſame Rule agreed by the Civilians.

4. In the Biſhop of *Roſs*'s Caſe, *Anno* 13 *Eliz.* the Queſtion being an *Legatus qui Rebellionem contra principem ad quem legatus concitat, legati Privilegiis gaudeat, et non ut hoſtis pœnis ſubjaceat*; it was reſolved he had loſt the Privilege of an Ambaſſador and was ſubject to Puniſhment. (f) 4 *Inſ.* 152.

So 3 Bulſ. 28. (f) Molloy 33. S. C. cited and ſaid, that Ambaſſadors cannot by the Law of Nations be defended, when they act againſt the State or Perſon of the King with whom they reſide; and vide 3 Bulſ. 28. and 1 Rol. Rep. 185. in which laſt Book the King's Attorney makes a Difference between a Conſpiracy to kill the King, and other Treaſons committed by an Ambaſſador. Vide.

5. If *A.* is ſent as Ambaſſador of the King of *Morocco* to the States, and by them accepted as an Agent, and there being War between the King of *Morocco* and the King of *Spain*, the King of *Morocco* makes a Commiſſion to *A.* to take *Spaniards* and their Goods, and the King of *England* grants him Letters of ſafe Conduct as a publick Miniſter, and the States Licence him to levy Men to furniſh his Ships, *&c.* and there being a League between *England* and *Spain*, and *England* and the States, and War between *Spain* and the States, *A.* takes at the *Canaries* a *Spaniſh* Ship laden with Goods, and by Streſs of Weather is driven to *Plimouth*, he ſhall not be tried as a (g) Pirate here, for by the Law of Nations an Ambaſſador ought to be ſafe and ſure in every Place. *Hill.* 12. *Jac.* (h) *Palache*'s Caſe. 4 *Inſ.* 152, 153, 154. reſolved by the Chief Juſtice, the Maſter of the Rolls, and the Judge of the Admiralty, upon a Reference to them by the Lords of the Counſel, upon the Prayer of the *Spaniſh* Ambaſſador to proceed againſt him as a Pirate upon the Statute. 28 *H* 8. *Cap* 15. and it was by them reſolved, that if he had not been an Ambaſſador, he could not upon that Statute have been indicted as a Pirate, becauſe there was Enmity between the King of *Spain* and the King of *Morocco*, and one Enemy cannot be a Felon for taking the Goods of another, and the Words of the Act are, that the Commiſſioners ſhall proceed as if the Offence had been committed at Land, and according to the Courſe of the Common Law.

(g) But 1 Rol. Rep. 175. it was agreed by the Civilians that he might proceed civiliter for the Goods, becauſe in ſolo amici, tho' the Reporter makes a Quære thereof; and 3 Bulſ. 29. a Suit being in the Court of Admiralty, againſt ſeveral Merchants that had bought Goods, the Civilians held, becauſe they were brought in ſolo amici, Proceedings might be for them in the Court of Admiralty. And it is ſaid, that accordingly the Court denied a Prohibition, but per 4 Inſ. 154. tho' this was the Opinion of ſome of the Civilians in Palache's Caſe, yet the contrary had been reſolved. 2 Jac. (h) 1 Rol. Rep. 175 S. C. cited per Coke, 3 Bulſ. 27, 28. S. C. cited per Coke.

Amendment.

Fol. 196.

(A) At (b) Common Law.

1. If A. brings a Writ of Error upon an Attainder of Murder before the Juſtices of Aſſiſe, and aſſigns for Error that the Record certified by the Clerk of the Aſſiſes is, that he was indicted before B. and C. Juſtices of Aſſiſe, &c. 18 Day of March, 8 Caroli, and that he was tried before the ſame Juſtices, 20 Day ejuſdem Menſis Martii; this Certificate of the Clerk of the Aſſiſes cannot be amended by making the Clerk of Aſſiſe to come into Court to amend it according to the Record before the Juſtices of Aſſiſe, it being miſtaken in the Tranſcribing, (c) becauſe it is Error in Point of Fact, Scilicet, whether there was a (d) Continuance between the 18th Day and the 20th Day, and (e) therefore the Conſequence being to hang a Man upon ſuch an Amendment, it being (f) ſo penal it is not to be ſuffered. Hill. 14 Car. B. R. this was (g) Sampſon's Caſe, in which the Court was divided, Scilicet Brampſton and Jones, that it ſhould not be amended, and Croke and Berkly econtra, in the Argument of which theſe Books were cited. (h) 22 H. 7. 25. 2 R. 3. 9. 22 Edw. 4. 12. (i) 10 E. 4. 15. no Amendment, but in ſeveral of them the Parties diſmiſt. Co. 4. 48. 8 H. 5. a Writ of venire facias iſſued to the Jury in the ſame County to amend.

(b) An Original Writ was not amendable at Common Law, unleſs in Caſe of the King; but in his Caſe a Quare impedit præſentere was made præſentare, per 8 Co. 156. b. præſentare ad rectoriam made ad Eccleſiam. 4 Leon. 12.

(c) Stil. 339.

(d) The want of the Entry of a Continuance or Eſſoign, which was the Miſtake of the Court it ſelf, in the Form of their Entry was amendable by the Common Law. 8 Co. 156. b. reſolv'd in Blackamore's Caſe. 1 Rol. Abr. 199. Pl. 27.—But vide Cro. Eliz. 619. where per Curiam, if a Continuance is entered and given to two, when it was given but to one, that is the Miſentry of the Clerk and amendable, but where no Continuance is given to the Party but to a Stranger, it is the Act of the Court and not amendable; and vide Stil. 339. where in the Continuances a Term was omitted, and 2 Mod. 316. where in one of the Continuances there was a Blank. And vide Yelv. 155. 1 Rol. Abr. 205. Pl. 6. 199. Pl. 27. (e) Two were indicted for Felony, and found Guilty, and the Indictment being laid in the ſingular Number, Judgment was ſtaid; but after by the Opinion of 9 Judges Nemine Contradicente, it was amended, and the Parties hang'd. 1 Bulſt. 35. cited, per Yelv. Juſtice, to have happened before himſelf. But per 1 Lev. 189. an Information of Perjury may be amended. (f) But where a Man was Indicted at the Aſſiſes for a Nuſance, and in the joining of Iſſue, the Word Similiter was omitted. 2 Rol. Rep. 59. the Record being after removed in B. R. it was held by all the Juſtices, in as much as the Verdict paſſed for the King, the Clerk of the Aſſiſe ſhould come into Court and amend it, and that otherways an infinite Number of Indictments would be avoided thro' the Negligence of the Clerk. Cro. Jac. 502. (g) 1 Jon. 420. S. C. and 2 Judges againſt 2, & adjornatur. (h) Br. Indictment 32. S. C. Br. Cauſe a Remover, Plea 27. (i) Fitz. Indictment 20. S. C. Br. 34. S. C.

2. (i) In a (k) *Quo warranto* Judgment with Conſent of Parties was given by Diſclaimer of any Claim *virtute literarum patentium gerent' dat.* 17 *Jac.* but the Words *gerent' dat'* 17 *Jac.* were omitted in the Ingroſſing the Judgment, yet becauſe the Paper Book was right, and the Agreement ſo, and this the Miſtake of the Clerk only, it was reſolved to be amendable by the Courſe of the Common Law. *Mich.* 4 *Car.* (l) Sir *Humphry Tuſton*'s Caſe. *Cro. Car.* 144. amend accordingly.

(i) 3 Mod. 167. like Point dubitatur.

(k) Whether the Statute of Amendments and Jeofails extends to a Quo Warranto, or other Action, where the King is Party. Q. and vide Cro. Car. 144, 312. 1 Jon. 320. 3 Mod. 167. 2 Lev. 139. (l) Poph. 180. S. C. but S. P. does not appear; the Report thereof being very different. Vide.

(B) Amendment *per* 8 *H.* 6.

(a) Default of the Clerk.

(a) Stile 412.

(b) Vide Hob. 328. Goulſ. 184. Cro. Eliz. 258. Pl. 38, 39. Cro. Eliz. 256, 586. Stil. 374. (c) Ow. 61. S. C. adjudged. (d) 1 Brownl. 174. like Point.

1. If Tippett be returned in the Venire facias, and in the Habeas Corpora and diſtringas juratores he is named Typper; yet if his true Name be Tippett, according to the Venire facias, and Tippet is Sworn, and tries the Iſſue, it ſhall be amended. Trin. 39 Eliz. B. R. between (c) Hugo and Payne, adjudged in a Writ of Error.

2. (d) If a Juror be ſworn by a falſe Name, yet this ſhall be amended if it be depoſed that he was the ſame Man who was returned upon the Panel. Paſch. 40 Eliz. B. Marſhal's Caſe adjudged. Mich. 13 Jac. B. between (e) Arundel and Blanchard adjudged, where he was called Liſney in the Venire facias, and Liſtny with a t in the Jurata.

(e) Hob. 64. S. C. adjudged, becauſe idem ſonantia. 1 Brownl. 174. S. C. adjudged; and vide 2 Rol. Rep. 168, 483.

3. If upon the Diſtringas a Juror be called Ap Pell, and upon the Jurata Ap Bell, this is ſuch a Variance between the Names, that it cannot be intended the ſame Man, for this is not the ſame Name in the Welch Language where this Trial was, and therefore cannot be amended by the Court (f) after the Death of the Sheriff. Trin. 13 Jac. B. R. between (g) Floyd and Bethell, per Curiam.

(f) Vide 21 Jac. cap. 13. (g) 1 Rol. Rep. 200. S. C. per Curiam, Bridg. 56. S. C. but S. P. does not appear.

4. But if the Sheriff who made the Return had been living, he might have come into Court and amended it. (h) Trin. 13 Jac. B. R. per Curiam agreed.

(h) 1 Rol. Rep. 200. S. C. and S. P. per Curiam. Bridg. 56. S. C. but S. P. does not appear.

Fol. 197.

5. If in the Venire facias a Juror be called Samuel Hame, and ſo well named in the Writ of Diſtringas, but in the nomina juratorum annex'd to the Diſtringas, he is named Daniel Hame, and by this Name Sworn, and this appears by the Record it ſelf, and he with the other Jurors at the Niſi prius gives a Verdict for the Plaintiff, tho' he be miſnamed in the Chriſtian Name, and ſo not within the Stat' of Jeofails of 21 Jac. 1. yet when upon the Examination of the Juror himſelf, it appeared that he was the Perſon returned, and that there is no other of that Name within the Pariſh, and that his Name was Samuel Hame, and that he appeared ſuppoſing himſelf to be called Samuel by the Crier, there being a great Noiſe at the Time he was Sworn, and gave a Verdict, and upon Examination of the Sheriff and his Clerk, it did appear he had the Diſtringas before him when he wrote the nomina juratorum, and miſtook Daniel for Samuel, this ſhall be amended, becauſe the Venire & Diſtringas were well, and this only the Miſtake of the Clerk. Mich. 15 Car. B. R. between (i) Rowe and Bond per Curiam adjudged upon good Advice between Mich. 15 Car. R. Vide Co. 5. 41, and 42. (k) Codwell's Caſe, where it is held, if the Venire facias be well, and the Miſnomer in the (l) Chriſtian Name in the Diſtringas or Poſtea, it is amendable.

(i) Cro. Car. 563. S. C. adjudged. 1 Jon. 448. S. C. adjudged. (k) 1 Rol. Abr. 198. Pl. 10. S. C. (l) Diverſity where the Chriſtian and where the Sirname is miſtaken. Cro. Eliz. 57. But for this vide Cro. Eliz. 222. Cro. Car. 203. Cro. Eliz. 866. Cro. Jac. 116. and the expreſs Words of the Statute, 21 Jac. cap. 13.

6. If in the Venire facias a Juror be called Pearſe Thomas, and ſo in the Hab' Corp' but in the nomina Jurator' annex'd to the Habeas Corpor' he is called Peeſe Thomas, and ſworn by this Name, yet if upon Examination it appears to the Court that he was the ſame Perſon return'd, this ſhall be amended. Trin. 42 Eliz B. R. Rot. 1092. and this being aſſigned for Error, this Record was ſhewn in Court upon

on the Debate of the Caſe before between (m) Rowe and Bond, and the Judgment was affirmed, and this Matter amended in the Record.

(m) Jones 448. S. C. and S. C. cited.

7. (n) If in the Venire facias a Juror be called William Browne de Hamthorne, and in the Diſtringas or Habeas Corpora William Browne de Hampthorpe, who is Sworn, yet this is good, becauſe it may well be that he was of one Place at the Return of the Venire facias, and of another Place at the Return of the Diſtringas or Habeas Corpora, and it may be that the ſame Place is known by one Name as well as the other, and by the Common Law the Place of the Habitation of a Juror was not of Neceſſity to be expreſſed, nor was in Uſe till the Statute inflicted a Penalty upon the Sheriff for the not doing thereof, but it is a good Panel tho' no place be expreſſed. Hill. 20 Jac. B. R. between (o) Radford and Ramſey adjudged, which intratur. and then a Record was ſhewn. 14 Jac. B. R. between (p) Stanhopp and Stanhopp. Rot. 612. Where a Juror was named in the Venire facias John Collington de Gartlington, and in the Habeas Corpora John Collington de Cortlington, and he was Sworn, and yet adjudged good in a Writ of Error for the Cauſe aforeſaid.

(n) Cro. Jac. 353. like Point adjudged, and vide Cro. Eliz. 258. Cro. Jac. 28. 244. 2 Rol. Rep. 111.

(o) Cro. Jac. 653. S. C. adjudged. Palm. 336. S. C. adjudged.

(p) Cro. Jac. 457. S. C. adjudged. Palm. 337. S. C. cited.

8. (q) In a Writ of Dower, if in the Venire facias a Juror be called Thomas Andrews, and in the Habeas Corpora he is called ſo alſo, but in the Panel of the Habeas Corpora he is called Thomas Androſe, and by this Name Sworn, yet if upon the Examination of the Sheriff it appears, that this was the ſame Man, it ſhall be amended (r) for it is all one in ſound. Paſch. 8 Car. B. R. between (ſ) Prewel and Drake in a Writ of Error upon a Judgment in Banco adjudged, this being aſſigned for Error.

(q) Cro. Jac. 354. like Point adjudged. 1 Rol. Rep. 168. like Point, and vide Cro. Jac. 534. Francus intended only an Abbreviation of Franciſcus. (r) And vide Allen 91. 300. S. C. but S. P. does not appear. 1 Jon. 315. S. C. but S. P. does not appear.

(ſ) Cro. Car.

9. (t) If Robert Moore be returned upon the Venire facias and Diſtringas, but in the Panel before the Juſtices of Niſi prius by Miſtake he is named Robert Mawre, and ſo upon the Poſtea, yet if it appears upon Examination that his right Name was Moore, ſo that he was well named in the Venire facias, this ſhall be amended; (u) but otherwaps it had been, if he had been miſnamed in the Venire facias. Co. 5. Earl of Rutland. 42. reſolved.

(t) Cro. Eliz. 57. like Point adjudged. 222. like Point adjudged.

(u) Cro. Jac. 458. S. P. adjudged. Moor 762. Pl. 10. 59. S. P. adjudged. 1 Rol. Abr. 204. Pl. 1. But this is helpt after Verdict by the expreſs Words of 21 Jac. cap. 13. ſo as it appear upon Examination, that he is the ſame Man that was meant to be returned.

10. If in the Panel of the Venire facias a Juror be named (x) Palus (y) Chele, and in the Diſtringas & Poſtea Paulus Chele this ſhall not be amended upon Examination, becauſe he was (z) miſnamed in the Venire facias which was the Ground and Foundation of all; but otherwaps it had been if he had been well named in the (a) Panel upon the Venire facias and miſnamed upon the Diſtringas, or in the Poſtea, for there upon Examination it ſhould be amended. Co. 5. 42. b. (b) Codwell's Caſe reſolved.

(y) Fol. 198.

(x) This Miſtake being in the Chriſtian Name, perhaps 'tis not helpt by any Stat. C.

(z) Noy 140. (a) Lit. Rep. 253. (b) Cro. Eliz. 319. S. C. adjudged. Goulſ. 104. S. C. cited. Cro. Car. 203. S. C. cited, and ſaid that it was adjudged, becauſe the Miſtake in the Venire, which was the firſt Proceſs, and ſhould warrant the reſt.

11. (c) If upon the (d) Note of a Fine the Proclamations are well entered, but upon the Foot of the Fine they are entered, that 13 Proclamatio (e) tenta tali die & term 13 Proclamatio, where it ought to have been 14 Proclamatio, this ſhall be amended. Paſch. 8 Jac. B. per Curiam.

(c) 13 Co. 54. like Point adjudged. Hut. 122. like Point adjudged. (d) The Record remaining with the Cuſtos brevium, ſhall be amended by the Record remaining with the Chirographer, which is the principal Record. 3 Leon. 106, 107, 183. Godb. 103. 13 Co. 54. Hut. 122. 5 Co. 44. a. (e) This is according to the Original, which ſeems miſprinted.

12. If the Imparlance Roll in Bank, and the Plea Roll vary in Matter of Subſtance, and the Plea Roll is well, but the Defect is in the

the Imparlance Roll, (g) altho' the Imparlance Roll being the Warrant for the Plea Roll it cannot be amended by the Plea Roll, yet if it appears upon Examination, that the Plaintiff's Attorney gave right Instructions to the Clerk, it shall be amended. Hobart's Reports, Case 310. between (h) Lees and Arrowsmith adjudged.

(g) 2 Rol. Rep. 152, 153 like Point, where adjudged that the first Declaration in Banco should not be amended by the second, for the second is only a Recital of the first; beginning alias pront patet, &c. and vide 1 Rol. Abr. 207. Pl. 19. (h) Hob. fol. 246. S. C. adjudged. Moor 892. Pl. 1256. S. C. adjudged. Hut 83. S. C. adjudged.

13. (i) If a Note be delivered to the Cursitor, and the Plaintiff A. B. is named Knight, but the Cursitor draws it and names him A. B. Gentleman, and in all the Process after he is named also Gentleman, yet upon Examination of the Cursitor of the Truth thereof, this shall be amended, for this was the Default of the Cursitor. Mich. 8 Jac. B. between Sir Lenthrop Franke and Sir John Millecent adjudged and there cited, also the same Term Perseval Hart's Case adjudged, Hobart's Reports 164. between (k) Brickhead and the Bishop of York adjudged accordingly, (l) Viccar pro Vicar. vide same Case. Mich. 8 Jac. B. in Co. 8. 156. Blackamore's Case Vid. Hob. Rep. 171. between (m) Oglethorp and Mawd.

(i) 2 Vent. 46. like Case 49. like Case 130. vide Cro. Eliz. 644. like Point adjudged. 1 Sid. 412. like Point adjudged. (k) Hob. fol. 118. S. C. adjudged. Hut. 56, 57. S. C. cited. (l) Ecclesia pro Vicaria, amended according to the Instructions given the Cursitor. Cro. Car. 74. per Curiam; but if the Instructions were wrong, 'tis not amendable, per Litl. Rep. 50. (m) Hob. 128. S. C.

14. If an original Writ of Ejectione firmæ be, that J. S. divisit to him such Land, &c. for Years, &c. where this should be demisit, tho' the Word divisit be a Latin Word, for it signifies to divide, yet because this appears to be the Default of the Cursitor, he may be suffered to come into Court and amend it, and he being decrepit and not able to come, his Servant may do it. Pasch. 17 Jac. B. between (n) Marsh and Sparry adjudged. Hobart's Reports, Case 324. same Case.

(n) Hob. fol. 249. S. C. adjudged.

15. If G. G. Armiger is bound in a Statute Merchant, and after is made Knight and Baronet, and after a Certificate is made by the Mayor into the Chancery, and upon this a Capias is awarded against G. G. Armigerum as he is named in the Statute, and this is returned in Banco, and upon this several Extents awarded, which were executed and returned, where the Capias ought to have been against G. G. Militem & Baronettum, qui per nomen G. G. Armigerum recognovit, &c. (o) this cannot be amended, because this is not the Default of the Clerk, because this was Matter which ought to come from the Information of the Party. Hobart's Reports, 173. (p) Sir G. Grisly's Case adjudged.

1 Brownl. 130. S. C. adjudged. (o) 1 Vent. 154. vide. (p) Hob. fol. 129. S. C. adjudged.

16. In an Action upon the Case upon a Promise for Wares sold, if the Plaintiff declares that he sold tres virgatas Anglice Silk, and omits the Word Serici, and after a Verdict for the Plaintiff upon Examination of the Clerk, that the Word Serici was inserted in the (q) Paper Draught, and so the Party not deceived, it was amended by the Paper Draught, for this was meerly the Default of the Clerk. Mich. 5 Car. B. R. between Young and Skipwith per Curiam adjudged.

(q) Where an Amendment shall be by the Paper Draught vide 1 Rol. Abr. 207. Pl. 17. N. Dier 260. b. Margine.

17. If in a Writ of Debt against an Executor upon an Obligation it be laid in the Writ to be made in the County of the City of York, and in the Imparlance Roll the Margent is Civit' Eborum, but the Declaration is, that the Testator apud villam novi castri super Tinam concessit se teneri, &c. but in the Plea (r) Roll it was well, Scilicet that the Testator concessit se teneri apud civitatem Eborum, the Imparlance Roll shall not be amended according to the original Writ. Hobart's Reports, Case 130. between (s) Fetherston Haugh and Topsal per Curiam.

(r) Fol. 199.

(s) Hob. fol. 251. S. C. per Curiam.

18. (t) If an Habeas Corpus be to have the Jury Summonitos in curia nuper Reginæ, and after the Diſtringas is to diſtrain the Jury Summonitos in Curia noſtra, and after Judgment is given, this is Erroꝛ not amendable, foꝛ the Jury cannot be ſummoned upon any other Writ but the (u) venire facias, and after they are attached and diſtrained and not ſummoned. Tr. 3 Jac. B. R. (x) 7. between (y) Knowles and Burtenſhawe adjudged.

(t) No Judgment to be ſtaid or reverſed after Verdict for want of Form in any Judicial Writ, per 18 Eliz. cap. 14. But in Cro. Jac. 89. notice is taken of this Statute, and ſaid it is not helpt, for one Proceſs ought to warrant the other, vide. Infra Pl. 26. (u) Vid. Cro. Car. 99. (x) This Figure 7 is in the Original, but I ſuppoſe it the Miſtake of the Printer; but if not, I know not what is intended by it. (y) Cro. Jac. 89. S. C. N. Dier 105 b. Margine. S. C. Cro. Jac. 162. S. C. cited and agreed to be Law, becauſe the Writ apponere decem tales to the Jury ſummonitos in Cur' noſtra, ſo that he had no Power apponere juratoꝛes, but to thoſe firſt ſummoned in Cur' noſtra; but if no ſuch Command it was agreed per Cur' it had been amendable.

19. But if J. S. is Bail foꝛ J. D. in an Action, and he ſues an audita Querela, and upon this a Scire facias that recites the audita Querela, and the Capias againſt the Principal, and the Return thereof, which Capias was awarded in the Time of Queen Elizabeth, and the Scire facias recites this to be per Breve dominæ Reginæ Angliæ vice comiti noſtro de S. directum, which is to the Sheriff of the King who is dead, (z) this ſhall be amended, foꝛ it is the Default of the Clerk. Paſch. 3. Jac. B. R. between Barns and Worlich adjudged.

(z) 2 Vent. 105.

20. If an Executoꝛ brings an Action of Debt upon an Obligation againſt J. Lord Marquis of Wincheſter, and charges him as Son and Heir to his Father, W. Lord Marquis, and makes the uſual Declaration again him, and in the End thereof ſhews, becauſe the Debt was not paid by J. the Father, noꝛ by J. the Son, he hath brought this Action, where it ought to be by W. the Father, &c. and after Judgment was given foꝛ the Plaintiff, and Erroꝛ brought, this ſhall be amended. H. 38. Eliz. B. R. between Fitch and the Lord Marquis of Wincheſter adjudged.

21. In a Replevin by Original if the Defendant in the Writ is named Whorewood with a W. and in the Count Horewood without a W. (a) this ſhall be amended after Verdict, foꝛ this is all one in ſound. M. 32. 33. El. B. R. between (b) Bradly and Whorewood adjudged, but it does not appear that it was amended.

(a) However I take this to be aided by 16 & 17 Car. 2. cap. 8. (b) Cro. Eliz. 204. S. C.

22. In an Action again Henry B. if the Defendant imparles by the Name of Richard, but in the reſt of the Pleadings he is named by his true Name, this ſhall be amended. Hill. 43 Eliz. B. R. Drury's Caſe adjudged.

23. But otherways it had been if his Name had been miſtaken (c) in the (d) Beginning of the Plea, foꝛ then it had been Matter of Subſtance. Hill. 43 Eliz. B. R.

(c) The Name of the Attorney in the Declaration amended by the Warrant of Attorney, becauſe Precedent to it. Moor. 711. Pl. 996. (d) And ſo it was in the Caſe of Phillips and Hugre. Cro. Jac. 13. Yelv. 37. and agreed per Curiam, it could not be amended. Yet vide Cro. Eliz. 904.

24. (e) In an Action, if in any Part of the Recoꝛd the Defendant be named Segear, and in another Part of the Recoꝛd Segar, this ſhall be amended, foꝛ theſe are idem Sonantia. Mich. 14. Jac. in Camera Scaccarii adjudged.

(e) Cro. Jac. 354. like Point.

25. In an Action upon the Caſe by A. if the Plaintiff declares that B. the Defendant impoſed the Crime of Felony to the Plaintiff foꝛ ſtealing a Mare ipſius A. who was the Plaintiff, but he intended the Defendant; after Verdict foꝛ the Plaintiff, yet this ſhall not be amended becauſe this is Matter of Fact, foꝛ it may be true. Hill. 14 Car. B. R. between Miller and adjudged per Curiam, and after the ſame Term the Judgment was reverſed foꝛ this Cauſe in Camera Scaccarii in a Writ of Erroꝛ.

26. If a Diſtringas iſſues apponere thereto decem tales, this is Erroꝛ not amendable, foꝛ they cannot be oppoſed but to the firſt Jury ſummoned by the Venire facias. Trin. 3 Jac. B. R. between (g) Knowles and Burtenſhaw adjudged.

(g) Supra Pl. 18. S. C. Cro. Jac. 89. S. C. but S. P. does not appear. Cro. Jac. 161, 162. S. C. cited and agreed to be Law.

(h) Cro. Eliz. 435. like Point adjudged.

(i) Fol. 200.

27. (h) In an Ejectioue firmæ by John Weeks Plaintiff against Thomas Veale Defendant, if the Defendant pleads not guilty, & prædictus Thomas (i) Similiter, where it should be & prædictus Johannes similiter, yet this shall be amended. Mich. 10 Car. B. R. between Weeks and Veale adjudged per Curiam, this being moved in Arrest of Judgment after a Verdict for the Plaintiff, where the Course of the King's Bench is not to enter any Continuances till Issue, and after, before Judgment to enter all the Continuances upon the Roll, tho' no Continuance be entered after Issue before Judgment, but a Judgment is entered without the Entry of them, yet this shall be amended, (l) for this is the Default of the Clerk. Tr. 16 Jac. B. Sir George Trencher's Case adjudged.

(l) 1 Brownl. 26. 1 Rol Abr. 196. Pl. 1. vide and my Notes thereupon.

28. In Trespass for an Assault-battery and Imprisonment vi & armis, if the Defendant quoad vi & armis pleads quod ipse est inde culpabilis, where it ought to be non culpabilis, & quoad residuum transgressionis he pleads a special Plea after Judgment as a Mistake it shall be amended, for this is but Matter of Form, and the Default of the Clerk. Trin. 7. Jac. Scaccario. between Nois and Jackman. per Curiam.

29. In Trespass for a Trespass done ultimo die Junii 1 Jac. if the Plaintiff in the Replication says, quod prædicto ultimo die Junii Anno 5 Jac. where it ought to be primo according to the Declaration after Verdict and Judgment for the Plaintiff, it shall be amended, for prædicto ultimo die Junii had been sufficient without expressing the Year, and (m) then the false expressing what was not necessary shall not vitiate the pleading. Trin. 7 Jac. Scaccario Louworth's Case.

(m) 1 Sid. 135.

(n) Yelv. 65. S. P. adjudged. Cro. Jac. 67. S. P. adjudged, 587. S. P. admit. Cro. Eliz 752. like Point adjudged. Palm. 524. like Point per Curiam.

30. (n) In Trespass, if the Defendant pleads his Freehold, to which the Plaintiff replies and traverses it, & hoc petit quod inquiratur per patriam, and it is entered & Querens similiter, where it should be & Defendens similiter, and (o) so no Issue joined, this shall be amended, for this was the Default of the Clerk. Mich. 9 Car. B. R. between Browne and Cleave adjudged after a Verdict. 10 H. 7. 23 b. several Cases there cited accordingly. 11 H. 7. 2. D. 9. Eliz. 260, 261. adjudged. Co. 8. Blackmore 161. where it was & prædict' Similiter omitting the Christian Name of the Party who joined the Issue.

(o) Misnomer in joining Issue upon an Information. Stil. 167.

(p) In the Adjudication of the Venire upon the Roll, the Day of the Return was omitted. Moor 710. Pl. 993. vide.

31. In an Action, if the Venire facias be Vicecomiti London Salutem, &c. præcipimus tibi quod, &c. where it should be præcipimus vobis, after Verdict this shall be amended (p) for it is the Default of the Clerk. Mich. 38. 39 Eliz. B. R. Rot. 211. between (q) During and Retrel per Curiam. Hill. 39 Eliz. B. R. adjudged.

(q) Ow. 62. S. C. Cro. Eliz. 543. S. C. adjudged.

(r) Willoughby & Gray, like Point. Cro. Eliz. 467. adjudged. Moor 465. Pl. 657. Noy 57. adjudged.

32. (r) If a Venire facias be & habeas ibi hoc breve, without these Words nomina juratorum, which ought to be in of Necessity, for else otherways the Court cannot know who are the Jurors, nor whom to demand to be Sworn, yet after Verdict it shall be amended, this being (s) a judicial Writ. Mich. 32. 33 Eliz. B. R. (t) Taylor's Case per Curiam.

2 Brownl. 167, 168. like Point adjornatur. (s) 3 Bulst. 208. (t) 1 Rol. Abr. 204. Pl. 7. S. C.

(u) Cro. Car. 38 S. P. per Curiam con. because a judicial Process, and the Default of the Clerk. Willoughby and Gray. Cro. Eliz. 467. like Point adjudged con. Moor 465. Pl. 657. like Point adjudged con. Noy 57. adjudged con. Ow. 59. adjudged con. 2 Brownl. 102. like Point con. Cro. Eliz. 553. 572. 258. Moor 684. Pl. 944. like Point adjudged con. Cro. Jac. 442. S. P. adjudged con.

33. (u) If a Venire facias be dated 7 Julii, and made returnable, 6 Julii, a Day before the Date of the Writ, this is not amendable after Verdict. Mich. 32. 33 Eliz. B. R. between (x) Bennet and Bradish per Curiam.

(x) Cro. Eliz. 203. seems S. C. con. vide 1 Rol. Abr. 204. Pl. 1.

34. If a Writ of Entry dated 14 Februarii, be returnable Craſtino purificationis, ſo that the Teſte is after the Return this is not amendable. Paſch. 2. 3 M. 129. 62. adjudged.

35. (*) If a Venire facias be awarded upon the Roll to be returnable Octabis Trinitatis, and the Writ is made (y) returnable ſix Days after Scilicet (z) a Day out of Term, but the Diſtringas is well without any Fault, and after the Jury impanelled find for the Plaintiff; this Writ of Venire facias ſhall be amended by the Roll, for this was the Default of the Clerk only, for the Roll is the Warrant of the Writ. Trin. 39 Eliz. B. R. between. (a) Chaundle and Grills adjudged in a Writ of Error.

(*) Cro.Car. 38. like Point per Curiam. Litl. Rep. 54. like Point, per Curiam. Dolphin & Clerk, like Point. Cro. Jac. 64. adjudged.

Woolley and Moſely, like Point. Cro. Eliz. 760. adjudged. Moor 711. Pl. 998. adjudged. Moor 696. Pl. 967. like Point adjudged. (y) The Teſte of the Venire is not amendable by the Roll, but otherways of the Return thereof, becauſe the Roll warrants it, but the Roll makes no Mention of the Teſte per Cro. Eliz. 820. per Curiam. Yet Q. of this Difference, and vide Cro. Jac. 162. (z) 2 Syd. 7. 12. a Capias ad Satisfaciendum was made returnable out of Term; and per Glin. Ch. Juſtice it ſhall not be amended and made returnable the laſt Day of the precedent Term, according to the Inſtructions given the Clerk by reaſon of the Damage which by ſuch Amendment may accrue to the Sheriff; but yet vide 2 Jon. 41. (a) Ow. 62. S. C. adjudged.

36. (b) So if the Award of a Venire facias upon the Roll be well, and the Writ of Venire facias wrong, (c) yet (d) this ſhall be amended by the Roll, the Roll being the (e) Warrant of the Writ. (f) which is the Act of the Court, and the Default is only the Miſtake of the Clerk. Mich. 38. 39 El. in Camera Scaccarii between Thorpe and Fulſhaw adjudged (g) in a Writ of Error cited. Trin. 39 Eliz. B. R.

Fol. 201.

(b) Moor 599. Pl. 826. S. P. (c) But if by the Roll the Venire be awarded de vicineto of the right Place, but the Venire it ſelf is of a Wrong, and thereupon a Jury is returned and tries the Cauſes, it ſhould not be amended, for it appears that the Trial was not had by ſuch a Jury as the Roll and Law requires. Hob. 76. 67. and vide Lit. Rep. 253.—So if there be no Place upon the Roll to warrant the Venire. Latch. 194. (d) So a Writ of Inquiry may be amended by the Roll. but not e converſo. Cro. Eliz. 677. 709. adjudged. (e) The Award upon the Roll was in a Cauſe againſt 2 Defendants, but the Venire againſt one; and amended. 3 Bulſ. 311. adjudged, and vide Winch. 73. Cro. Jac. 78. Yelv. 69. (f) But if the Roll is defective, as if by it the Venire is awarded returnable out of Term, it ſhall not be amended. Moor 465. Pl. 657. (g) The Original is ou un brief, &c. and ſo appears to be miſprinted.

37. (h) If the Writ of Venire facias out of the King's Bench be Venire facias 12 liberos & legales homines coram nobis apud Weſtmonaſterium ubicunq; fuerimus in Anglia, but the Roll is well, Scilicet without the Words apud Weſtmonaſterium, this being in B. R. (i) the Writ ſhall be amended by the Roll, for this is but Matter of Form. Trin. 11 Jac. B. R. between (k) Orde and Mooreton adjudged.

(h) Willoughby and Gray, like Point. Cro. Eliz. 467. adjudged. Noy 57, 58. adjudged.

Ow. 59. adjudged. (i) Co. Eliz. 618. Winch. 73. a Diverſity taken between original and judicial Proceſs. (k) 1 Bulſ. 129. S. C. adjudged. 1 Brownl. 150. S. C. and Yelv. 211. S. C. but S. P. does not appear. Cro. Jac. 254. S. C. but S. P. does not appear. Hob. 138. S. C. but S. P. does not appear.

38. If an original Writ upon which a common Recovery of ſeveral Manors, &c. was ſuffered. being larger than the other Writs upon the ſame File, thro' the Negligence of the Officer, and by continual Handling is ſo obliterated and worn out, that but a Letter of the Names of ſeveral of the Manors can be ſeen, but the Names of the Manors are truly recited in the Count, and in the *Habere facias ſeiſinam*, the Original ſhall be amended according to the other Parts of the Record. *Trin.* 24 *Eliz.* between the (l) Earl of *Arundel* and the Lord *Lumly*. 8 Co. 160. cited, to have been adjudged by all the Judges of *England*, *Una voce eo potius*, becauſe a common Recovery.

(l) 1 And. 79, 80. S. C. adjudged by all the Judges of England,

and there is a Nota by the Reporter, that all the Parchment remained intire, and if not, that perhaps it might have been otherways; and vide 1 And. 170.

39. So if the Original, or other Part of the Record be ſtole, taken away, withdrawn, or avoided by any Clerk, (m) tho' this be Felony. *Per* 8 *H.* 6. *Cap.* 12. yet this may be ſupplied, and amended by the other Parts of the Record; but if ſuch Part ſtole, &c. or obliterated cannot be ſupplied by the Record or any Exemplification thereof, then it ſhall not be amended. *Trin.* 24 *Eliz.*

(m) 1 Rol. Abr. 108. Pl. 22 vide and the Notes there.

24 *Eliz.* in the Caſe of the Earl of *Arundel* and Lord *Lumly* reſolved by all the Judges of *England* as cited. 8 *Co.* 160 b.

40. If a Fine is levied of the Manor of *E.* and of a great Number of Acres of Land, Meadow, *&c.* of the Value of 20 Marks *per Annum*, ſo that the Fine in the Hamper is 26 s. and 8 d. which is endorſed upon the Writ of Covenant, but the King's Silver or Poſt-Fine, which is always as much as the Fine in the Hamper, and one half more, is entered thus, *N. B. Dat Domino Regi* 40 *s. pro licentia concordandi & in placito conventionis* of ſo many Acres of Land, Meadow, *&c.* omitting the Manor, yet becauſe it appears by all the Parts of the Fine to be only the Miſtake of the Clerk in the Entry of the King's Silver, and the Value entered upon the back of the Writ of Covenant, is the Warrant for the Entry of the King's Silver, tho' the Tranſcript of the Fine is removed by Writ of Error, yet becauſe the Body of the Record remains in *B.* it ſhall be amended there. *Mich.* 38 and 39 *Eliz. Bohun's* Caſe. 5 *Co.* 43, 44. amended accordingly by the Advice of all the Juſtices of *Serjeants Inn.*

41. A Fine was levied the 4 *Eliz.* and the Writ of Covenant bore date 24 *April* returnable. 15 *Paſch.* which in Truth that Year was the 15 *April*, and ſo the Return was before the Teſte, yet after a Writ of Error brought, and this aſſigned for Error, it was amended, *Trin.* 41 *Eliz.* (n) *Gage's* Caſe. 5 *Co.* 45 b. reſolved *per totam Curiam.*

(n) Noy. 171. S.C. adjudged con. Moor 571. Pl. 781. S. C. adjudged con.

42. (o) If a Common Recovery is had of the Manor of *Iſfield*, but the Record is *Iffield*, either thro' Negligence or Corruption of the Clerk, it ſhall be amended, *eo potius* becauſe a common Recovery. *Trin.* 41 *Eliz.* (p) *Cook's* Caſe. 5 *Co.* 46.

(o) Winch. 99. 100. like Point, where the Bargain, and Sale, and Indenture to lead the Uſes was of the Manor of Sutton, but the Writ of Entry of the Manor of Sulton and amended.

43. If in an *Ejectione firmæ* againſt two, the Declaration be laid *quod intraverunt*, but the Expulſion and Ejectment is laid in the ſingular Number *expulit & ejecit*, this ſhall be amended after Verdict for the Plaintiff, becauſe a plain Miſtake of the Clerk only. *Mich.* 10 *Jac.* between (*) *Odington* and *Darby.* 2 *Bulſ.* 35. adjudged upon a Writ of Error by three Judges. *Abſente Fleming* Chief Juſtice.

(p) Thompſon and Warner. Noy 1. S. C adjudged 2 Brownl. 236. S. C. cited. 1 Bulſ. 7. S. C. cited. (*) 1 Brownl. 149. S. C. adjudged Yelv. 224, 225. S. C. adjudged. Cro. Jac. 306. S. C. adjudged upon a Motion in Arreſt of Judgment, tho' objected the Jury could not find both guilty when the Declaration ſuppoſed but one guilty.

44. If in a *Formedon* in *Banco*, the Tenant is admitted by Guardian before a Judge of the Court, and it is entered in the Plea Roll *quod conceſſum eſt per Curiam* that the Defendant by his Guardian ſhould proſecute, *&c.* and ſo it is entered in the Remembrance, but the Philizer's Roll is, that the Defendant by *J. S.* (q) his Guardian *ad hoc admiſſus per Curiam obtulit ſe*, &c. but it is not entered in the Philizer's Roll as uſual *quod conceſſum eſt per Curiam quod petens ſequatur per* J. S. his Guardian; yet ſince the Admittance was *ad proſequend'*, the not entring thereof was only the Omiſſion of the Clerk, and ſhall be amended. *Mich.* 3 *Car.* between (r) *Young* and *Young. Cro. Car.* 86. *per Curiam*, notwithſtanding a Writ of Error brought.

(q) This Entry was obtulit ſe per J. S. attornat' Suum per Hetl. 52. Lit. Rep. 60.

(r) Hut. 92. S. C. per Curiam Hetl. 52. S. C. per Curiam Litl. Rep. 60. S. C. 1 Jon. 177. S. C. but S. P. does not appear.

45. (s) If in Debt againſt the Son and Heir of *J. S.* upon an Obligation entered into by his Father, theſe Words are omitted in the Declaration, *viz. et ad eandem ſolutionem faciend' obligo me et hæredes*, and the Defendant pleads *riens per diſcent*, and it is found againſt him, this ſhall be amended, (t) if the Miſtake of the Clerk only, and that he had the Obligation before him, and Inſtructions to draw it againſt the Defendant as Heir. *Hill.* 4. *Car.* between (u) *Forger* and *Sales. Cro. Car.* 147, 148. by two Judges againſt one, *Hide* Chief Juſtice inclining accordingly, but to prevent further Diſputes, it was ordered to be amended by Conſent, and that the Defendant ſhould plead *de novo.*

(s) Litl. Rep. 279. S. P. put as a quære per Richardſon.

(t) Palm. 123. per Houghton, there is a Diverſity when a Clerk acts as an Officer of the Court, and when as Attorney for the Party, vide. (u) 1 Jon. 199. S. C. 3 Judges againſt 1. prima facie, but after mended by Conſent. Winch. 20. S. C. 2 Judges contra but adjornatur.

46. If in a Debt upon a Bond by an Executor, he is called Executor in the Declaration, but theſe Words & (x) *profert hic in Curia Literas teſtamentarias* are omitted, and he hath Judgment by Default, it ſhall not be amended, for whether the Plaintiff is Executor or not, is Matter of Fact, and there is no Reaſon to allow that as true, which may be otherways, without other Proof than the Plaintiff's own Suggeſtion. *Paſch.* 25 *Car.* 2. between (y) *Young* and *Cage Raym.* 223. adjudged.

(x) The Omiſſion thereof is helpt after Verdict, per 16 and 17 Car. 2. cap. 8. (y) 3 Keb. 138. S. C. adjudged.

(C) Amendment *per* 8 *H.* 6. of Judgments in Names.

1. If the Parties are right named in the Record, and in the Entry of the Judgment one of the Parties is miſnamed, this ſhall be amended, for this is the Fault of the Clerk. Mich. 40, 41 El. B. R. per Curiam. Mich. 14 Car. B. R. between Meriel and Doe per Curiam adjudged in a Writ of Error, and the firſt Judgment affirmed accordingly, which was at the Day in Bank it was entered after Verdict, at which Day prædictus Stephanus, where it ſhould be Carolus, Scilicet the Defendant for the Plaintiff, Intratur, Hill. 10 Car. Rot. 1343.

2. If a Man recovers in an Action of Debt againſt Elias Shortwel, and the Judgment is quod prædictus Georgius capiatur, where it ought to be quod prædictus Elias capiatur, it ſeems this ſhall be amended, tho' this be in a Judgment, for this is the Miſtake of the Clerk. Contra Paſch. 40 El. B. R. between Skaring and Shortwell adjudged.

3. (a) If in an Action by Ralph Rogers, againſt Thomas Lake, the Judgment be quod prædictus Rogerus recuparet, this ſhall not be amended, tho' this be the Miſtake of the Clerk, for this is the Judgment of the Court. Mich. 40, 41 El. B. R. between (b) Rogers and Lake per Curiam.

(a) Welcome and Gill, like Point. Cro. Eliz. 400. adjudged. Goulſ. 124. adjudged. Moor 366. Pl. 501. adjudged. Wild and Wheeler, like Point. Cro. Eliz. 865. cited con. Hob. 327. cited con. Hut. 41. cited con. Raym. 39. cited con. Wolf and Stepny, like Point. Cro. Eliz. 864. adjudged con. Hob. 327. cited con. 1 Vent. 217. like Point adjudged con. (b) 1 Brownl. 56. S. C. amended; but after the Amendment withdrawn, and made as before.

4. In a Writ of Debt, if the Judgment be quod Humphry Joyner recuparet debitum, &c. nec non damna, &c. eidem Humfredo Skinner adjudicata, this ſhall be amended Scilicet Skinner for Joyner between (c) Ognell and Joyner adjudged in a Writ of Error in Camera Scaccarii cited. Mich. 40, 41 El. B. R. to be lately adjudged.

(c) Cro. Eliz. 865. S. C. cited. Moor 697. Pl. 970. S. C. adjudged.

5. (d) If a Judgment be ideo videtur, where it ſhould be ideo conſideratum eſt, this ſhall not be amended, between Savaker and the Biſhop of Glouceſter cited. Mich. 40, 41 El. B. R.

(d) This was as no Judgment, and therefore the Court may order their Judgment to be entered, per Thatcher and Dampozt's Caſe. 2 Leon. 1, 2. adjudged. Cro. Eliz. 145, 215. adjudged.—So if a Judgment be entered ideo conceſſum eſt, where it ſhould be conſideratum eſt it ſhall be amended. 1 Sid. 70. by 2 Judges.

6. If a Judgment be ideo Defendens in Meſericordia, for Miſericordia this ſhall be amended. Mich. 10 Jac. B. R. between Meghen and Dune.

7. In an Action, if the Declaration be againſt Amias, and in the Reſidue of the Record he is named prædict' Annas (without any Point Supra) and the Judgment is given againſt prædict' Annas, yet this ſhall be amended. Mich. 10 Jac. B. R. between Procter and Clifton adjudged.

8. If in an Original one of the Parties is named Barnabas, and after in the Pleading he is named Barnabias, this ſhall be amended by the Original. Paſch. 17 Jac. 3. between Marſh and Sparry adjudged.

9. If in an Action against Dematy Mowry in the Venire facias he is right Named, Scilicet Dematy, but upon the Panel he is named Demacy, this shall be amended. Mich. 17 Jac. B. between Symons and Mowty adjudged.

10. If in an Action of Debt upon an Obligation against *Rob. H.* conditioned that if *Henry H.* or *Rob. H* the Defendant should pay, *&c.* Judgment is entered that the Plaintiff *recuperet debitum & damna* against the said *Robert, & prædict' Henricus in Misericordia*, where it should have been *Robert*, for *Henry* was no Party to the Record, this shall be amended, for 'tis only the Mistake of the Clerk. *Hill.* 15 *Car.* 2. between *Pelham* and *Hemming*. *Cro. Car.* 594. amended accordingly.

Fol. 202.

(D) Amendment after Verdict.

In what Cases.

(a) Stil. 207. 3 Bulst. 161. S. P. per Coke Chief Justice.

1. (a) Where by the Amendment the Jury should be subject to an Attaint, there should be no Amendment. 20 H. 6. 15.

2. If the Record of nisi prius does not agree with the original Record, this may be amended after Verdict, (b) if the Amendment does not change the Issue. Mich. 10 Jac. B. R. per Curiam. P. 14 Jac. B. R. between (c) Blackborn and Planke per Curiam, and otherways econtra.

(b) But if the Issue shall be thereby changed, there shall be no Amendment. Lit. Rep. 349. Hetl. 164. Moor 681. Pl. 935. and vide 2 Rol. Rep. 312. (c) 1 Rol. Rep. 371. S. C. no Judgment.

2. In Trespass with a Continuance from such a Day till the Day of the Writ purchased, Scilicet such a Day which is mistaken, after Verdict this shall not be amended, because the Jury gave Damages according to the Day alledged, and therefore if it should be amended according to the Date of the Writ, the Jury should be subject to the Plaintiff's Attaint for giving too small Damages. Contra 20 H. 6. 15.

4. In an Action, if the Plaintiff makes Title by a Demise made by Thomas Bull and Agnes his Wife, and the Parties are at Issue, and the Record of Nisi prius was entered by the Clerk, that the said Thomas Bull and Anne his Wife made a Demise, &c. so the Record of Nisi prius differs from the Roll this shall not be amended, for if the Record should be amended the Jury might be Attainted, in as much as they found a Lease made by Thomas Bull and Agnes his Wife, and perhaps this Lease will not prove a Lease by Thomas Bull and Anne his Wife. Mich. 42, 43 Eliz. B. R. between (d) King and King per Curiam.

(d) Cro. Eliz. 776. S. C. adjudged.

5. In an Action upon the Case, if the Record of Nisi prius be, that the Testator of the Defendant in Consideration of such a Thing in certain to him given, 30 October, 11 Jac. did assume to pay so many Quarters of Barly before such a Day next ensuing, and for Non-payment the Action is brought; and the Record in Court is, that the Promise was made 30 October, 10 Jac. to pay the said Quarters at the said Day next ensuing. After a Verdict for the Plaintiff this cannot be amended, because if this should be amended (e) this would alter the Issue, tho' the Mistake is only in the Day of Payment of the Quarters of Barley. P. 14 Jac. B. R between (f) Cooke and Lancaster, per Curiam.

(e) There shall be no Amendment in such Case. Lit. Rep. 349. Hetl. 164. Moor 681. Pl. 935. (f) 3 Bulst. 161. S. C. adjudged. 1 Rol. Rep. 353. S. C. adjudged.

(g) 8 Co. 162. a. S. P. 1 Rol. Rep. 211. like Point adjudged, and vide

6. (g) In Trespass if the Record be to the Damage of 400 l. and the Nisi prius to the Damage of 40 l. and the Jury found Damage to 400 l. the Record of Nisi prius shall be amended accordingly. 20 H. 6. 15. 2 H. 4. 6 Co. 8. Black. 157.

Cro. Jac. 669, 670.

7. In

7. In an Action of Debt upon 2 E. 6. if all the Record be in placito debiti, but the Jurata in the Record of Nisi prius which is in placito transgressionis after a Verdict for the Plaintiff it shall be amended, for this is only the Default of the Clerk. Mich. 8 Car. B. R. between Lemarchant and Rawson adjudged per Curiam, (k) for the Justices have Power to take the Nisi prius by the Writ of Distringas, and the general Commission to take them.

(h) This in 1 Jon. 302. is in placito terre.

(i) Cro. Car. 275. 278. S C. adjudged. 1 Jon. 302.

S. C. adjudged. (k) The Record of Nisi prius is amendable by the Roll, if the Record of Nisi prius hath sufficient Matter in it either expressed or implied to give the Justices Authority to try the Issue, else not. vide 8 Co. 161. b. 2 Brownl. 47. N. Dier 260. b. Margine.—Trials by Nisi prius out of the King's Bench are warranted by the Distringas, in which are the Words Nisi prius justitiarii, &c. but out of the Common Pleas they are warranted by the Habeas corpora, in which are the Words Coram Justiciarius, &c. Lit. Rep. 252, 253.

8. In Partition against A. and Anthony B. A. confesses the Partition and Judgment given accordingly, sed cessat executio, and B. pleads to Issue, and in the Record of Nisi prius it is & prædictus similiter, omitting Anthony, but the principal Record was perfect, and the Jurata in the Record of Nisi prius is between the Plaintiff and A. and B. Defendants, where A. had confessed the Action, and Judgment given thereupon, and so he is a Stranger to the Issue, yet both Faults shall be amended, because it is the Fault of the Clerk. D. 9 Eliz. 260. 24. between (l) Wootton and Coke adjudged.

(l) 3 Bulst. 161. S. C. cited. 8 Co. 162. a. S. C. cited. 1 Rol. Abr. 200. Pl. 30.

9. (m) In an Action upon the Case for Words, if the Roll be right, and the Bill upon the File right, and the Nisi prius wrong, scilicet, He (prædictum Willielmum modo querentem innuendo) is a Thief where William was Defendant; and upon Not guilty pleaded the Jury find him Guilty, and the Postea is endorsed, that the Defendant is guilty modo & forma prout the Plaintiff interius allegavit, this Mistake of the Plaintiff in the Innuendo shall be amended; because if the innuendo was omitted, it would be perfect enough. P. 5 Jac. B. R. between Peirce and Gore adjudged.

Fol. 203.

(m) Cro. Jac. 157. like Point adjudged.

10. In an Action of Debt upon an Obligation against Richard Carey, of which the Condition was, That if Richard Carey, or John Carey, do pay such a Sum to the Plaintiff, that then, &c. and the Record is further, Et (n) idem Johannes dicit quod ipse solvit the said Sum mentioned in the Condition to the Plaintiff, Et hoc paratus est verificare, and the Plaintiff replies, Quod prædictus Richardus non solvit the said Sum & hoc petit quod inquiratur per patriam & prædict' Richardus similiter, and the Issue was found for the Plaintiff, the Word Johannes shall not be amended and made Richardus, tho' this was the Mistake of the Clerk, for this will alter the Issue, for the Issue was joined between other Parties. Pasch. 40 Eliz. B. R. between Heath and Carey, per Curiam.

(n) Q. If this is not helpt after Verdict, per 16 and 17 Car. 2. for that the Plaintiff might have demurr'd.

11. If an Issue be joined whether J. S. recovered 200 l. Debt and 30 s. Costs against B. or not, and the Record of the Nisi prius is so also; but in the Venire facias & Distringas this is 200 l. Debt and 20 s. Costs, and the Jury find the Recovery of 200 l. Debt and 30 s. Costs, according to the Record, yet the Venire facias & Distringas shall not be amended, for it appears that the Jury had no Warrant to find 30 s. Costs, and the said Writs are the Warrant of the Jury; and therefore if this should be amended, the Verdict should be altered. Mich. 18 Jac. B. R.

12. If a Man being rob'd, brings an Action of Debt upon the Statute of Winchester, against the Hundred, and upon the general Issue pleaded, the Jury find for the Plaintiff, and the Verdict is entered in this manner, Dicunt pro querente 222 l. and Damages 12 d. and Costs 6 d. where in this Action all ought to be given in Damages, yet because the Intent appears this shall be amended. Mich. 11 Jac. B. R. Painter's Case adjudged.

13. (o) In

(o) Stil. 232. like Point adjudged. 2 Vent. 49, 50. like Point adjudged.

13. (o) In an Action of Treſpaſs for a Treſpaſs in the Time of King James, but the Action was brought in the Time of King Charles, and it is contra pacem dicti nuper regis, and the Defendant pleads of his own Wrong, and the Jury find him Guilty, but it is entered that he did it of his own Wrong contra pacem domini regis nunc, this ſhall be amended. Mich. 14 Car. B. R. between Meriel and Doe, per Curiam, adjudged in a Writ of Error, and the Judgment affirmed accordingly. Intratur Hill. 10 Car. Rot. 1343.

14. In an Action upon the Caſe upon an Aſſumpſit for 43 l. for Arrears due upon an Account, and an Aſſumpſit to pay it, the Defendant pleads non Aſſumpſit, and this is entered in the Plea Roll, but the Iſſue upon the Niſi prius Roll is entered Not guilty, and upon this a Verdict for the Plaintiff, this ſhall be amended; for this is the Miſtake of the Clerk, having the Plea Roll before him, out of which he tranſcribed the Niſi prius Roll, and this does not alter the Verdict, for Not guilty in an Action upon the Caſe upon a Promiſe hath been held good after Verdict, and Not guilty is non Aſſumpſit, and more, for he cannot be Guilty unleſs the Aſſumpſit was made, and ſo the Iſſue is all one in Effect, and this Amendment cannot attaint the Jury. Paſch. 15 Car. B. R. between Still and Jacob adjudged per Curiam. Intratur Hill. 14. Rot. 376.

15. If in an Aſſumpſit againſt the Executrix of Sir *William Wade*, the Defendant pleads *Non Aſſumpſit*, and it is found againſt her, and the Iſſue, Record, and *Venire* were right, but the *Habeas Corpora* was to have *Corpora*, &c. between the Plaintiff and the Executrix of Sir *Hen. Wade*; this ſhall be amended becauſe the Iſſue, *&c.* were right, and this Amendment will not alter the Verdict. *Paſch.* 2 *Car.* between (p) *Smith* and the Lady *Wade*, Executrix of Sir *William Wade*. *Cro. Car.* 32. adjudged.

(p) Hut. 81. S. C. adjudged.

16. If the Day when, and Place where the Aſſizes was to be held, is not mentioned in the *Diſtringas*, it ſhall be amended by the Roll, for if there had been no *Diſtringas*, the Trial had been good, becauſe the *Jurata* is the Warrant to try the Cauſe, and that was right. *Paſch.* 1 *Jac.* 2. between *Jackſon* and *Warren*. 3 *Mod.* 78. adjudged.

Fol. 204.

(E) Amendment *per* 8 *H.* 6. *Cap.* (a) 15.

(a) Q. If this ſhould not be cap. 12.

1. (b) If the Venire facias be erroneous, and the Diſtringas good, and the Trial upon the Diſtringas, this ſhall not be amended; becauſe the principal Proceſs is not good Hungerford's Caſe adjudged, cited. Trin. 38 Eliz. B. R. Earl of Rutland 42. Cook 5.

(b) 1 Rol. Abr. 190. Pl. 1. 197. Pl. 9. 198. Pl. 10.—Hungerford and Meſy. Cro. Eliz. 433. Moor 402. Pl. 535. 1 Rol. Abr. 200. Pl. 33.—But in what Caſes it is now helpt after Verdict, vide 18 Eliz. cap. 14. 21 Jac. cap. 13.

(c) 3 Bulſt. 220. S. P. adjudged. Cro. Jac. 528. S. P. per Curiam. Noy 115. S. P. adjudged. 5 Co. 41. 42. S. P. adjudged. Cro. Eliz. 587. S. P. adjudged. 1 Brownl. 43. S. P.

2. (c) If upon the Venire facias the Sheriff makes no Return, nor any Name of the Sheriff appears upon the Back of the Writ, Nec quod executio iſtius brevis patet in quodam pannello huic brevi annexo, but this is album breve, this ſhall not be amended by this (d) Statute after Verdict, upon Examination of the Sheriff, becauſe this is the principal Proceſs. Co. 5. Roteland 41. b. adjudged and there cited. 35 Eliz. B. to be ſo adjudged.

(d) But by 21 Jac. cap. 13. it is helpt after Verdict; So that a Panel of the Jurors be returned and annexed to the Writ.

(e) Moor 868. Pl. 1203. S. P. adjudged, but vide Cro. Eliz. 704.

3. (e) But if the Venire facias be well returned, but the Iſſue is tried upon the Habeas corpus, and this is album breve and no Return thereupon, yet in as much as the Venire facias which is the principal Proceſs is well, this ſhall be amended upon Examination of the

the Sheriff by this Statute, for this is a Default in a Return, as the Statute mentions, Contra, My Reports 10 Jac. B. between Porter and Blunt adjudged, and Hobart's Reports 174 between (f) Wilby and Wansey.

(f) Hob, fol. 130. S. C.

4. (g) So if the Venire facias be well returned, and the Issue is tried upon the Distringas, and this is album breve, and no Return thereupon, this shall be amended upon Examination of the Sheriff, because the principal Process is well, for this is a Default in a Return, as the Statute mentions. Mich. 15 Jac. B. R. between Churcher and Wright, adjudged per totam Curiam. Trin. 39 Eliz. B. R. between Wortley and Broadhead adjudged, the Sheriff not being out of his Office, and the Record being in the same Court where it was returned, contra, My Reports 10 Jac. Chaplin and Somes adjudged.

(g) Holsworth & Proctor. S. P. con. Yelv. 110. adjudged, the Trial being by Misi prius. Cro. Jac. 188. adjudged. Cro. Jac. 443. S. P. adjudged 527.

S. P. adjudged. Cro. Eliz. 466. that it may be amended the same Term, and vide 2 Rol. Rep. 111. 210.

5. (h) If upon the Return of the (i) Habeas Corpora of a Jury, the Surname of the Sheriff be omitted, as if it be Bartholomæus Miles Sheriff and Michell, which was his Surname omitted, this shall be amended. Hobart's Reports 158. between (*) Kent & Hall adjudged.

(h) Cro. Eliz. 310. like Point adjudged. 509. (i) But perhaps if his Name be not set to the Return of an Original upon which the Defendant is outlawed, this shall not be mended to make the Outlawry good. Goulf. 113. adjudged, vide Moor 65. Pl. 176. (*) Hob. fol. 113. S. C.

6. In Trespass if the Venire facias and Habeas Corpora are in placito debiti, and thereupon a Verdict is found for the Plaintiff, (k) this shall be amended. Hobart's Reports, (l) Case 306.

(k) vide Cro. Jac. 528. (l) Hob. fol. 246. S. C.

7. If a Venire facias be & habeas ibi hoc breve without these Words Nomina juratorum, which ought to be in of Necessity, because otherways the Court cannot know who are Jurors, nor whom to call to be sworn, yet after a Verdict upon this Writ, it shall be amended, this being a judicial Writ, it seems to be intended by this Statute. Mich. 32. 33 Eliz. B. R. (m) Taylor's Case per Curiam. Hobart's Reports between (n) Priddy & Massie adjudged.

(m) 1 Rol. Abr. 200. Pl. 32. S.C. with References. (n) Hob. fol. 68. S. C.

8. If a Venire facias be quorum quilibet quatuor libras terræ, so that this Word (habeat) was omitted out thereof; this shall be amended after a Verdict. Mich. 40. 41 Eliz. B. R. adjudged.

9. If the Word Duodecim be left out of the Venire facias, yet this shall be amended after a Verdict B. R. between Willoby & Gray adjudged, cited Mich. 40. 41 Eliz. B. R.

10. If the Words quorum quilibet are omitted out of the Venire facias, it shall be amended after Verdict. Mich. 35 Eliz. B. between Haley & Lawes, cited Mich. 40. 41 Eliz. B. R.

11. If the Words qui nulla affinitate attingunt are left out of the Venire facias, it shall be amended, because this is a Judicial Writ, and the Fault of the Clerk. Mich. 16 Car. B. R. between Woodland & (*) Danvers adjudged, this being moved in Arrest of Judgment.

(*) Fol. 205.

12. (o) After Issue joined, if upon the Roll a Venire facias be awarded to the Sheriff of the County of Somerset, &c. and upon this a Venire facias is made in this manner, Carolus dei gratia Somersett salutem, &c. leaving out the Word (Vicecomiti) and upon this the Sheriff of Somerset returns a Jury, and upon this a Verdict, &c. this shall be amended by the Roll, because this was the Fault of the Clerk meerly, having the Roll before him when he made the Writ by which he was directed to direct the Writ to the Sheriff of Somerset. Mich. 16 Car. B. R. between (p) Child & Sloper adjudged per Curiam, in a Writ of Error upon a Judgment in Banco, and the Judgment affirmed per Curiam. Intratur Mich. 15 Car. Rot. 651.

(o) Yelv. 64. S. P. cited. (p) Cro. Car. 595. S. C.

13. If in Debt for 19 l. 10 s. the Plaintiff declares upon a Lease of Copyhold Lands rendring 38 *l. per Annum*, and upon a Lease of Freehold Land rendring 20 *s. per Annum*, and demands 19 *l.* for half a Year's Rent of the Copyhold, and 10 *s.* for the Freehold, and upon *nil debet* pleaded, it is found

for the Plaintiff *quoad* the 10 *s.* for the Freehold, and for the Defendant *quoad* the 19 *l.* for the Copyhold; but in the (q) *Poſtea* it was returned that they found for the Plaintiff *quoad* Ten Shillings, Part of the ſaid 19 *l.* 10 *s.* and *quoad* the Reſidue *non debet*, ſo that it is altogether uncertain which of theſe Rents were paid, yet if the Judge that tried the Cauſe remembers, that *quoad* the Copyhold Rent the Jury found for the Defendant, and *quoad* the Freehold for the Plaintiff, the (r) *Poſtea* ſhall be amended accordingly. *Mich.* 9 *Car.* between *Eliott* and *Skypp*, *Cro. Car.* 338. adjudged, the Iſſue being tried before Juſtice *Barkly*.

(q) The Poſtea is amendable by the Notes of the Verdict taken by the Clerk of Aſſize. Moor 689, 690. Pl. 952. Cro. Eliz. 112. con. 150. Godb. 57. Stil. 110. 120. 191. Cro. Jac. 239. Poph. 102. and vide Poph. 203. Moor 686. Pl. 947. (r) And vide 2 Jon. 211. where the Milentry of the Verdict ſhall be amended. Cro. Eliz. 677, 678.

(F) (a) Amendment *per* 8 H. 6. (b) 15. of a (c) Judgment.

(a) No Amendment ſhall be by any Statute in Defeaſance of Judgments or Verdicts. 1 Leon. 134. per Curiam.

1. (d) A Judgment may be amended in Matter of Fact, where it is the Miſtake of the Clerk.

8 Co. 158 b. (b) Q. If this ſhould not be 12. (c) A Space left in Ejectment for the Coſts, which were not taxed, filled up after Error brought. Hard. 505. Vide 8 Co. 161. (d) 1 Bulſ. 217. like Point adjudged.

2. In an Action upon the Caſe, if the Plaintiff recovers Coſts, and further the Record is entered that he ſhall recover per incrementum aſſeſſed by the Jur' 10 l. where it ought to be per Curiam, for the Court increaſes it, and not the Jury, tho' here be but a Letter miſtaken, ſcilicet an J. for a C. yet becauſe this is in a Judgment it cannot be amended by the Statute. Mich. 38, 39 (e) Eliz B. R. (f) Biſhop's Caſe adjudged in a Writ of Error.

(e) The Original is Ed. not El. ſo appears miſprinted. (f) Goulſ. 151. ſeems to be S. C. adjudged. Cro. Eliz. 497. S. C. adjudged.

3. In an Action upon 2 Edw. 6. of Tithes, if the Plaintiff declares that the Defendant was Occupier of certain Lands, and ſowed it with Buck, Wheat, Barly, &c. and after cut the ſaid Wheat, Barly, &c. growing upon the ſaid (g) Lands, and carried it away without ſetting out the Tithes, and upon nil debet pleaded, a Verdict was given for the Plaintiff for the Wheat, Barly, &c. and after Judgment is given to recover the ſaid Debt given by the Jury for the ſaid Buck, Wheat, Barly, &c. this ſhall be amended, for in all the Record no mention is made of Buck, but only that it was ſown and perhaps it did not encreaſe, and the Judgment refers to the Verdict, which was before the Clerk, and ſo perhaps his Fault. Tr. 1650. between (*) Gibon & Kent, adjudged in a Writ of Error upon a Judgment in B. Intratur 24 Car. Rot. 60.

(g) The Original is ſur le dit Sc. & ceo impoſt, &c. So appears to be miſprinted. (*) Stil. 212. S. C. but S.P. does not appear.

4. If a Judgment be given againſt the Plaintiff upon a Demurrer, and the Judgment is entered in this Manner, at ſuch a Day the Plaintiff exactus non venit, ideo nihil capiat per breve, which is the Form of the Entry of a Nonſuit, and not of a Judgment upon Demurrer; for upon the Demurrer it is not quod exactus non venit, this ſhall be amended, for this is the Fault of the Clerk. Hill. 13 Jac. B. R. between Wheeden & Sugg adjudged.

(h) 3 Bulſ. 114 like Point adjudged. 8 Co. 162. like Point. Palm. 509, 510. like Point dubitatur. Dier 55. 8 b. like Caſe adjudged. (i) Like Amendments in a Declaration, where the total Sum is miſcaſt and where not. Vide 1 Bulſ. 171, 179, 180. 2 Bulſ. 149. per Dod'. Yelv. 5. Noy 44 Poph. 209. (k) 1 Rol. Rep. 272. S. C.

5. (h) If a Jury finds for the Plaintiff, and gives 2 s. Damages and ſo much for Coſts, and the Clerk in the Entring thereof ſays 2 s. for Damages, and ſo much for Coſts, and ſo much pro incremento quæ in toto ſe attingunt to ſo much, in which Sum the 2 s. is not comprehended; this ſhall be amended, becauſe this is the Fault of the Clerk only (i) in miſcaſting the total Sum. (k) Mich. 13 Jac. B. R. adjudged.

6. In Treſpaſs for a Battery, if the Defendant appears and imparles to a Day the ſame Term, and no idem dies is given to the Plaintiff, tho' it be entered that the Defendant habuit diem, &c. uſq; &c. per Curiam, &c. ſo that this is the Judgment of the Court, and tho' after Judgment be given by nihil dicit againſt the Defendant, yet this ſhall be amended, (*) being the Fault of the Clerk (l) not to enter the Continuance. Paſch. 10 Car. B. R. between Margſe & Melhuiſe, adjudged per Curiam, after a Writ of Error brought in Camera Scaccarii thereupon.

* Fol. 206.

(l) 1 Rol. Abr. 196. Pl. 1. vide and the Notes there.

7. (m) In an Ejectione firmæ for a Meſſuage, two Cottages, and certain Lands, and the Jury find the Defendant guilty for a Moiety of the Meſſuage and Land, and not guilty for the two Cottages and the other Moiety of the Meſſuage and Land, and Judgment is given quod querens recuperet terminum ſuum prædict' de medietate tenementorum prædictorum & eat ſine die for the reſt, and this Judgment, tho' it may be intended that the Judgment is given for the Moiety of the two Cottages, of which he is found not guilty, in as much as it is tenementorum prædictor', (n) yet this ſhall be amended, being only the Default of the Clerk having the Poſtea before him when he entered the Judgment. Mich. 13 Car. B. R. between Sawyer & Hawkins per Curiam amended, and they ſaid this was amendable by the Common Law without the Help of any Statute.

(m) 1 Jon. 9. like Point adjudged Raym. 39. like Caſe cited. Palm. 198, 199. vide a good Diverſity where Matter of Fact is miſentered, and where Matter of Law which is the the Act and Reſolution of the Court, as a Capiatur for a Miſericordia. 1 Sid. 70. Raym. 38, 39.

(n) Cro. Jac. 631, 632. like Point adjudged. Raym. 398. vide.

8. In an Ejectione firmæ of Land, if upon not guilty pleaded a Verdict is found for the Plaintiff, and Coſts and Damages given per Curiam, and thereupon Judgment is given quod querens recuperet the Damages and Coſts, and not quod recuperet terminum ad the Uſe is, this is the Fault of the Clerk, this being the uſual Judgment in this Action, tho' it be but a Treſpaſs in its own Nature, and therefore it ſhall be amended. Hill. 15 Car. B. R. between Belch & Pate per Curiam, amended upon a Motion after a Writ of Error brought in Camera Scaccarii.

9. In an Action upon the Caſe againſt Baron and Feme for Scandalous Words ſpoke by the Feme, and Judgment given for the Plaintiff, and the Feme only (o) in miſericordia, where the Baron alſo ought to be, and yet if it be right (p) in the Prothonotary's Book it ſhall be amended. Hobart's Reports 27. between (q) Scarſe & Nelſon.

(o) No Judgment after Verdict, Confeſſion by cognovit actionem or relicta verificatione ſhall be reverſed for want of a miſericordia, per 16 and 17 Car. 2.

(p) In the Common Pleas there are Dockets of every Judgment, and if the Entry thereof in the Roll be Defective, they frequently amend it by the Dockets. Raym. 39. and vide infra 16. (q) Hob fol. 127. S. C. Moor 869. Pl. 1206. S. C. adjudged. Cro. Jac. 633 S. C. cited. 1 Brownl. 16. S. C. adjudged. 1 Rol. Abr. 215. Pl. 3.

10. If the Mayor, Commonalty, and Citizens of London bring an Action of Debt againſt B. and recover, and Judgment is given that the Mayor, Commonalty and Citizens recover the Debt and 20 s. Coſts de incremento ad requiſitionem Majoris & Communitatis, and it is not Civium as it ought to be, for Coſts de incremento (r) ought not to be given without the Aſſent or Requeſt of the Plaintiff, yet if the Docket, which is the Warrant to the Clerk for the Entry of the Judgment be right, and the Word Civium therein, it ſhall be amended, for this was the Fault of the Clerk. Hill. 15 Car. B. R. between (s) the Mayor and Commonalty of London and Heyling, after a Writ of Error brought, and this aſſigned for Error.

(r) But no Judgment ſhall be reverſed, for that the Increaſe of Coſts after a Verdict in an Action, or given per 16 Nonſuit in Replevin are not entered at the Requeſt of the Party for whom Judgment is and 17 Car. 2. cap. 8. (s) Cro. Car. 574. S. C. adjudged.

11. In an Action of Debt in the Common Pleas by Bill againſt an Attorney, (as it ought to be) if Judgment be given upon Demurrer againſt the Plaintiff, but it is entered quod querens nil capiat per breve, where it ought to be per billam, the Action being brought by Bill, yet

yet this shall be amended, because this was the Fault of the Clerk, in as much as he entered it having the Record before him. Mich. 16 Car. B. R. between (s) Burbidg and Raymond adjudged per Curiam, in a Writ of Error upon such a Judgment in Banco. Intratur Trin. 15 Car. Rot. 1657. and the Judgment in Banco affirmed accordingly.

(s) Cro. Car. 580, 581. S.C. adjournatur.

12. If the Defendant in an Action in B. R. appears and pleads but does not put in any Bail after a Verdict for the Plaintiff against the Defendant, he shall not have Advantage of his own Fault to stay the Judgment, but he shall be compelled to put in Bail. Tr. 39 Eliz. B. R. between the Lord Darcy & Tirret adjudged contra. Mich. 11 Jac. B. R. per Curiam.

Fol. 207.

13. But in an Action of Trespass in B. R. against two, if one puts in Bail and the other not, but both plead to Issue, and a Verdict passes for the Defendants, and after the Plaintiff shews this Matter to the Court that no Bail was entered for one of the Defendants, the Defendants shall not after be received to put in Bail, because this was their own Fault. Tr. 16 Jac. B. R. between Gabriel Dennys Plaintiff, against Smallridge & Bremblecombe Defendants, adjudged in Arrest of Judgment per totam Curiam.

14. If A. recovers against B. but there is not any Common Bail filed for B. and the Attorney of B. is dead, but it appears to the Court the Attorney had received his Fees for the Entry thereof, and this appears by the Attorney's Book, tho' the Attorney cannot now be examined, yet this shall be entered upon this Matter. Pasch. 14 Jac. B. R. between (t) Denham & Cumber. adjudged.

(t) 1 Rol. Rep. 372. S. C. adjudged. 3 Bulst. 181. S. C. adjudged per totam Curiam.

15. (u) If a special Verdict be found, and a material Thing is not entered in the Record, but this Thing is found in the Notes under the Hands of the Counsel of both Parties for the special Verdict, this may be amended by the Notes, tho' the Record was made up and the Judgment given without the finding of this Thing; for the Jury found all that was in the Notes. Mich. 12 Jac. B. R. between (x) Bowlde & Walter adjudged. H. 4. Jac. B. R. between Hill & Prowse adjudged.

(u) Hetl. 52. S. P. per Curiam. Litl. Rep. 61. S. P. per Curiam. Cro. Car. 144, 145. S.P. per Curiam.

(x) 1 Rol. Rep. 82. S.C. adjudged.

16. A Record may be amended according to the Book of the Office. Hobart's Reports 249. (y) Chamberlyn's Case per Curiam.

(y) Hob. fol. 184. S. C.

17. In an Ejectione firmæ, if the Bill be not (z) perfect, (a) but Spaces left for the Quantities of the Land and Meadow, and after the Paper-Book given to the Party is made perfect, and the Plea-Roll and Nisi prius Roll, but the Bill upon the File is not yet made perfect, and after a Verdict is given for the Plaintiff; this Imperfection of the Bill shall be amended, because the Party is not deceived thereby, (b) because the Paper-Book which he had was perfect, and this was the Neglect of the Clerk not to amend the Bill when the Party gave him Information of the Quantity. Tr. 15 Jac. B. R. between (c) Leeson & Weste adjudged.

(z) If a Declaration is delivered with Blanks by the Course of the Common Pleas, if there be no Recordatur or Rule to the contrary, it may be filled up afterwards. Hetl. 142. Lit. Rep. 278.—And Latch. 165. it is said till a Recordatur the Roll is in the Power of the Clerk; so that he may amend and perfect it, so it be not in the Foundation of the Action: but the Recordatur takes away the Power of the Clerk to amend without special Direction of the Court. And vide Ray. 53.——And where and when the Clerks may fill up Blanks left in the Venire. Vide 2 Mod. 316, 317.——And vide 2 Leon. 120. where the Defendant's Counsel prayed a Recordatur of an Erroneous Outlawry, for fear of Amendment by Rasure or otherways. (a) If in an Action of Assault and Battery, upon the Imparlance Roll there is no Day nor Year, but Spaces left to insert them, but being alledged contra pacem regis nunc, and the Issue Roll perfect it is amendable. Sir Francis Mozlly's Case, Latch 164. adjudged after Verdict per totam Curiam; and tho' it had been amended by Contrivance of the Plaintiff's Attorney, tho' they disapproved of the Manner, yet they would not make the Record as before, but gave Judgment for the Plaintiff, it appearing the Clerk had perfect Instructions at the Beginning; and it was said that in transitory Actions it is usual to enter Declarations in this Manner, and after upon joining Issue, or after, to make the Roll perfect. Hetl. 142, 143. adjudged. Lit. Rep. 278. (b) Chamberlain and Ewer like Point. Cro. Jac. 365. adjudged. 2 Bulst. 339. adjudged.——Where an Amendment shall be by the Paper-Book. Latch. 86. vide. 8 Co. 162 b. Cro. Eliz. 258. 1 Rol. Abr. 198. Pl. 16. (c) Latch. 165. S. C. cited and several like Cases. Vide Litl. Rep. 278.

18. In Debt against an Executor, if the Defendant pleads nothing in his Hands, &c. and the Plaintiff replies Assets die impetrationis billæ scilicet, and leaves a Blank for the Day, and after in the Paper-Book a Day

Day is put in, and in the Niſi prius Roll, but no Day is in the Bill upon the File, and after it is found for the Plaintiff, ſcilicet that the Defendant had Aſſets, &c. the Plea Roll ſhall be amended according to the paper Book and the Niſi prius Roll; for neither the Party nor Jury are deceived thereby. Mich. 12 Jac. in Camera Scaccarii, between Dame Platt and Goldſmith, adjudged: quod vide. Mich. 12 Jac. B.

19. (d) If the Imparlance Roll in Bank differs from the Plea Roll in Matter of Subſtance, yet this ſhall not be amended by the Plea Roll, but the Plea Roll may be amended by the Imparlance Roll, becauſe the Imparlance Roll is the Ground of all. Mich. 13 Jac. B. between (e) Barker and Parker, per Curiam.

(d) Woolfe and Holt like Point, Cro. Car. 92. per Curiam. Litl. Rep. 72. Hut. 92, 93.

per Curiam. Hetl. 59. no Judgment. Wilward and Wabv. 3 Bulſt. 227. S. P. adjudged. Litl. Rep. 278. vide 1 Brownl. 57. Hut. 82. and vide 1 Rol. Abr. 198. Pl. 12. Hetl. 143. 3 Bulſt. 328. Cro. Jac. 415. 1 Rol. Rep. 448. (e) Hob. 76. S. C. per Curiam. Hut. 84. S. C. adjudged. 1 Brownl. 9. S. C. adjudged. Litl. Rep. 279. S. C. cited. Hetl. 142. S. C. cited. Latch. 165. S. C. cited and ſaid the Plaintiff had Judgment, tho' a recordatur was entered.

20. In Trover and Converſion, If the Bill upon the File be, that he was poſſeſſed of Goods at D. and loſt them, and the Defendant found them, and after converted them to his own Uſe, and no Place is put of the Converſion; nor any Space left for the Place of Converſion; but after the Declaration is made perfect with a Place of Converſion, ſcilicet D. where the Poſſeſſion and Trover was, and the Paper Book given to the Defendant, and the Niſi prius Roll and all the Record was perfect, beſides the Bill upon the File which is not amendable, and upon not guilty pleaded a Verdict is given for the Plaintiff, and (*) this being aſſign'd for Error in Camera Scaccarii was amended per Curiam. Trin. 7. Car. B. R. between Rouch and Browne adjudged, becauſe neither Party nor Jury are deceived thereby, and upon the ſhewing of this Amendment in Camera Scaccarii, the Court there affirmed the Judgment without a new Writ of Diminution.

(*) Fol. 208.

21. If it appears to the Court that in a Venire facias the Word Chimly is raſed and made Himly, this ſhall be amended. Mich. 10 Jac. B. R. adjudged per Curiam.

22. (f) In an Ejectione firmæ upon a Leaſe made the 10 May, and after a Verdict for the Plaintiff, this is raſed and made 11 May, by which it is erroneous; yet if it appears to the Court that it was raſed and made ſo without lawful Authority, it ſhall be amended tho' the Raſure be Felony. Mich. 2 Car. B. R. between (g) Foſter and Taylor adjudged in a Writ of Error, this being alſo mended before in Banco.

(f) 2 Rol. Rep. 80, 81. S. P. adjudged, tho' objected that if the Record ſhould be amended the Delinquent could not be impeached for Felony; for to make it ſo by the Statute, the Raſure muſt be ſuch that the Judgment be defeated thereby; but per 2 Judges the Raſure of the Record is the Offence, and not the Annulling the Judgment thereby. And per 11 Co. 34. b. the Raſure of a Record by which an Outlawry was made good, was held Felony. (g) Latch. 162. S. C. adjudged. Poph. 196. S. C. adjudged, per totam Curiam. 1 Rol. Abr. 209. Pl. 3. S. C.

23. If an Award of a Repleader is entered in this Manner, *quia placitum eſt ſufficiens in lege*, where it ſhould be *quia eſt minus ſufficiens*, yet it ſhall not be amended becauſe the Fault is in the Judgment it ſelf, which is the Act of the Court. *Hill.* 36 *Eliz. Walter's* Caſe, *Ow.* 19. *per Curiam*; but *Glanvill* and *Popham* contra.

24. If in a *Quare Impedit* to preſent to the Vicarage of *E.* after Verdict for the Plaintiff Judgment is entered *quod recuperet Præſentationem ſuam ad Eccleſiam prædict', & quod habeat breve*, &c. *ad admittend' Clericum ſuum ad Eccleſiam prædict'*, this ſhall be amended (h) being the Miſtake of the Clerk only. *Paſch.* 18 *Jac.* between (i) *Sherly* and *Underhill. Hob.* 327. adjudged.

(h) So when in Debt Judgment is entered quod recuperet the ſume pro miſis & cuſtagiis inſtead of pro debito prædict' and amended. 1 Vent. 132. adjudged. (i) Hut. 41. S. C. adjudged. Cro. Jac. 633. S. C. cited. Moor 894. Pl. 1258. S. C. but S. P. does not appear.

25. If in Replevin, the Defendant demurs to the Plaintiff's Plea in Bar to the Defendant's Avowry, and Judgment is entered *quod viſis præmiſſis*, &c. *videtur Juſticiariis quod placitum prædict'*, &c. *Minus ſufficiens*, &c. but theſe Words *ideo conſideratum eſt quod* the Plaintiff *nil capiat per breve ſuum ſed ſit in Miſericordia & præd'* Defendant (k) *eat inde ſine die* are totally omitted, yet this ſhall be amended. *Hill.* 20 and 21 *Car.* 2. between *Pool* and *Longeville*. 2 *Sand.* 289. amended after a Writ of Error brought, and the firſt Judgment affirmed accordingly.

(k) Everard and Boſvill, S. P. Raym. 39. cited. 1 Sid. 70. cited.

26. In an Ejectment brought by two if Judgment be entered, that the Plaintiffs *recuperet*, this is a plain Miſtake of the Clerk, and ſhall be amended. *Paſch.* 34 *Car.* 2. between *Devoren & al'* and *Walcot.* 2 *Jon.* 199. adjudged.

27. If Judgment is given upon Demurrer, and a Writ of Enquiry awarded, but in the Entry thereof upon the Roll, theſe Words *per Sacramentum duodecim probarum & legalium hominum* are left out, this ſhall be amended, being only the (l) Miſentry of the Clerk. *Trin.* 2 *Jac. Anonymus.* 3 *Mod.* 112. *per Curiam.*

(l) A Miſentry of a Writ of Error amended by the Writ it ſelf. Sid. 219.— A Miſentry of Bail amended. 1 Bulſt. 107. and vide Sid. 321. Moor 407. Pl. 548. Cro. Eliz. 459.

(G) Per 8 *H.* 6.

In what Caſes it may be.

1. IN Treſpaſs in London, if the Declaration be entered in the Roll and dies interloquendi given, and becauſe a (a) Space was left for the Pariſh and Ward which were not put in the Roll, the Plaintiff would have amended it, but the Defendant would not ſuffer it, and adjudged that it ſhould not be amended, but Judgment given againſt the Plaintiff. (b) 20 H. 6. 18.

(a) For this vide 1 Rol. Abr. 207. and the Notes there, and a Difference where a *retro datur* is entered or not.

(b) Fitz. Amendment 28. S. C. Br. 5. S. C. Br. Count. 12. S. C.

2. If a Thing which the Plaintiff ought to have entered himſelf, being a Matter of Subſtance, be totally omitted, this ſhall not be amended; but otherways it is, if it be not totally omitted, but only in Part, and miſentered. 10 H. 7. 23. b. per Curiam.

(c) 8 Co. 161. a. S. P.

3. (c) If in an Aſſiſe the Tenant pleads in Bar, that A. a Stranger, was ſeiſed, who enfeoffed B. who died ſeiſed, whoſe Eſtate he himſelf hath, and the Plaintiff claiming in by a Deed of Feoffment, &c. upon which D. entered upon whom the Plaintiff entered, where it ſhould be upon whom the Tenant entered; ſo that there is only a Miſtake of Plaintiff for Tenant, in giving Colour this ſhall be amended, becauſe the Fault of the Clerk. (d) 10 H. 7. 23. in a Writ of Error. 11 H. 7. 2.

(d) Br. Amendment 112. S. C.

(e) 8 Co. 161. a. S. P.

4. (e) If a Defence is omitted, as an (f) Averment, ſcilicet which Matter he is ready to aver, this ſhall not be amended. (g) 10 H. 7. 23. b.

(f) Want thereof helpt after Verdict, per 16 and 17 Car. 2. cap. 8.

(g) Br. Amendment 112. S. C.

(H) At (a) what (b) Time it may be.

(a) Per 11 H. 4. cap. 3. the Records and Proceſs of Pleas, real and perſonal, Aſſiſes of Novel Diſſeiſin, and Mortdanceſtor, and Certifications, and of other whereof Judgment is given and inrolled, or Things touching

1. (c) If a Writ of Error be brought in Camera Scaccarii upon a Judgment in B. R. and this allowed, and a Tranſcript of the Record certified (as the Uſe is, for the Record remains in B. R.) yet after this, the Judges of the King's Bench may amend the Record, which is there in a Matter Amendable, for thereupon the Party may alledge Diminution, and ſo make the Amendment appear in Camera Scaccarii, and ſo be helpt. Tr. (d) 15 Jac. B. R. per totam Curiam adjudged, præter Houghton, who held ſtrongly econtra. Mich. 15 Jac. between the Leſſee of Sir Walter Coap and another adjudged per totam Curiam; for when the Record is amended here, the Clerk of the Court may go in Camera Scaccarii, and amend the Tranſcript according to the Record. Trin. 16 Jac. B. R. Sir George Trencher's Caſe adjudged.

ſuch Plea, ſhall not be amended or impaired by new entring of Clerks, or by the Record or Thing certified in any Term after ſuch Judgment given and inrolled. (b) Where after Iſſue joined or Plea pleaded, and where not. Stile 117. 1 Bulſt. 186. 2 Rol. Rep. 266. Dal. 83.—Where after a Return, &c. is filed, and where not. 1 Vent. 336. Stil. 33, 85.—Where after Demurrer, 1 Bulſt. 204. March 1. Yelv. 38. Cro. Jac. 13, 14. 1 Leon. 24. 3 Mod. 235. 1 Sid. 54, 107. Raym. 231. 2 Vent. 142. 3 Lev. 39. (c) 2 Bulſt. 149. like Point per Curiam. 2 Rol. Rep. 80, 81. like Point per Curiam, 471. like Point per Curiam. (d) Cro. Jac. 429. ſeems to be S. C.

2. (e) If a Man recovers in a Replevin in B. and after a Writ of Error is brought thereupon, and a (f) mittitur entered upon the Record, yet they may after receive a (g) Warrant of Attorney, and (h) it ſhall be entered. Trin. 9 Jac. B. R. between Chalke and Peeter dubitatur.

Fol. 209.

(e) Cro. Car. 86. like Point per Curiam, arquend'. (f) What Amendments may be made after a Mittitur entered. vide March 72. Hard. 505. Palm. 199. (g) 8 Co. 162. a. and want thereof after Verdict is helpt, per 18 Eliz. cap. 14. (h) Vide Dier 105. Pl. 16. 225. Pl. 34, 230 Pl. 58. 180. Pl. 48.

3. In an Ejectione firmæ upon a Leaſe made 10 May, after a Verdict for the Plaintiff, it is made the 11 May by a Raſure, and thereupon a Writ of Error is brought and aſſigned for Error, that he hath declared upon a Leaſe made 11 May, which is plain Error; yet if upon Examination it appears to the Court that it was made bad by a Raſure, it may be amended and made the 10 May as it was before, tho' this be Error aſſigned. Mich. 2 Car. B. R. between (i) Foſter and Tayler adjudged and amended, this being alſo before amended in Banco.

(i) Poph. 196. S. C. adjudged. Latch 162. S. C. adjudged. 1 Rol. Abr. 208. Pl. 22. S. C.

4. In an Aſſumpſit for Wares ſold, the Plaintiff declares that he ſold tres Virgatas, anglice Silk, and leaves out the Word Serici, and after Verdict and Judgment for the Plaintiff in B. R. a Writ of Error was brought in Camera Scaccarii and this aſſigned for Error, and the Court inclined to reverſe the Judgment; but upon Examination of Mr. Pye and his Servant in B. R. it appears that the Paper Book was well, and the Word Serici inſerted therein before Plea pleaded, and thereupon the Record there was amended accordingly: And after the Court in Camera Scaccarii cauſed Mr. Wright, the Clerk of the Errors, to bring the Tranſcript of the Record in B. R. and there to amend it by the Record. Mich. 5 Car. between Young and Skipwith adjudged.

5. In a Trover and Converſion of Goods, If the Bill upon the File in B. R. be, That the Plaintiff was poſſeſſed of Goods at D. and loſt them there, and that the Defendant found them there, and after, &c. converted them to his own Uſe, and does not ſet forth any Place of Converſion, but in the Declaration thereupon, a Place of Converſion (Scilicet D. the ſame Place where the Poſſeſſion loſs and finding were laid) is ſet forth and not guilty pleaded, and all the Record after hath the ſaid Place of Converſion, and alſo the Paper Book delivered to the Party, and after a Verdict for the Plaintiff, a Writ of Error was brought in Camera

mera Scaccarii, and this aſſigned for Error, and the Bill certified without any Place of Converſion, yet after in B. R. upon ſhewing of this to the Court, and that the Party or Jury were not deceived, it was amended there, and upon ſhewing this in Camera Scaccarii the Judgment was affirmed, without any Amendment of the Tranſcript.

6. If in a *Quo Warranto* Judgment with Conſent of Parties is given by Diſclaimer *virtute Literarum patentium gerent' dat'* 17 *Jac.* but the Words *gerent' dat'* 17 *Jac.* are omitted in the ingroſſing the Judgment, yet becauſe the Paper Book was right, and the Agreement ſo, and this was the Miſtake of the Clerk only, by the Courſe of the Common Law it may be Amended as well (k) in another Term, (l) as in the Term when entered. *Mich.* 4 *Car.* Sir *Humphry Tufton*'s Caſe. *Cro. Car.* 144. amended accordingly.

(k) The Clerk's fault in the Entry of a Judgment amendable in another Term. 1 Vent. 132. (l) At Common Law the Judges might the ſame Term as well amend their Judgment, as any other Part of the Record, for during the Term the Record is in the Breaſt of the Judges, and not in the Roll. 8 Co. 156. b. Co. Lit. 260. a.

7. If in a Writ of Error to reverſe a Judgment in a Writ of Dower in *B.* it is aſſigned for Error, that the Defendant being an Infant was amerced, and after it is amended in *B.* and after upon a *Certiorari* it is certified, that it was miſcertified before, it ſhall be (m) amended in *B. R. Trin.* 11 *Car.* between *Smith* and *Smith*, for it ſhall be intended in *B. R.* that the Judgment was ſo entered at firſt. *Cro. Car.* 410. amended accordingly.

(m) But vide 2 Jon. 212. where there was juſt Cauſe to bring a Writ of Error, and it was afterwards amended, and the Defendant in Error paid Coſts. 3 Lev. 344, 345.

(n) 1 Sid. 175.

8. (n) If upon a *Certiorari* an Indictment is certified in *B. R.* but there is a Miſtake of the Clerk in the Certificate of the Caption, this may be amended in the ſame Term it comes in, but not in another Term. *Paſch.* 21 *Car.* 2. *Falkner*'s Caſe. 1 *Sand.* 249. *per Curiam.*

9. In an Action of Debt *qui tam*, &c. for 100 *l.* againſt a Juſtice of Peace for denying his Warrant to Suppreſs a Conventicle, the Meeting was laid to be at the Manſion-Houſe of *T.* but in Truth was not there, but near it, and after Iſſue joined and the Cauſe ſet down to be tried, (o) it was not allowed to be amended being a Penal Statute, and there being no Precedent in ſuch Caſe. *Hill.* 28 and 29 *Car.* 2. 2 *Mod.* 144. Sir *William Turner*'s Caſe adjudged.

(o) 3 Executors bring Debt, and 1 only declared, and being ready for Trial in the Country, it was moved the Names of the other might be inſerted, but denied. Poph. 128.—The Plaintiff inſerts the Word Annuatim in a Declaration after Plea pleaded, &c. Vide 2 Raym. 160.

(I) By (a) (b) whom it may be done.

(a) Not by that Court before whom the Record is not, but is only recited in Pleading. Vide Cro. Eliz. 459. Moor 407. (b) Per 9 H. 5. cap. 4. Whereas by the Statute of 14 Edw. 3. Power is given to amend Proceſs in a Letter or Syllable, it is declared and ordained, That the Juſtices before whom the Plea or Record is made, or ſhall be depending by Adjournment, Error, or otherways, may amend as well after as before Judgment, by Force of the ſaid Act of Edw. 3.

1. A Variance between the Record of Niſi prius and the Original Record may be amended as well in B. R. as in Banco, being by Writ of Error removed out of the Common Pleas. 20 H. 6. 15. b.

(c) March 134. at the Bottom like Point per Curiam arguendo. —and vide Goulſ. 151. 2 Rol. Rep. 471. 8 Co. 162. a. (d) Vide Cro. Eliz. 677, 678. March 78.

2. (c) If a Judgment be Miſentered in Banco through the Default of the Clerk, this may be amended in B. R. (d) where the Record comes by Writ of Error, as well as it could before in Banco. H. 13 Jac. B. R. between Wheden and Sugg adjudged.

3. If a Thing be miſentered (e) in an inferiour Court which is amendable by the Statutes, yet if a Writ of Error be brought, and thereupon the Record is removed in B. R. or B. this ſhall not be amended there, becauſe it is not uſual to amend Records in inferiour Courts. Mich. 9 Car. B. R. between Taylor & Norris, ſaid per Curiam to be the conſtant Practice of the Court.

4. (f) As in an Action upon the Caſe in an inferiour Court after Verdict and Judgment for the Plaintiff, a Writ of Error is brought in B. R. where the Record is certified that the Defendant pleaded non Aſſumpſit, & de hoc ponit ſe ſuper Patriam & quærens ſcilicet for ſimiliter without any Dash through it; ſo that this is to be taken for ſcilicet rather than for ſimiliter, and ſo no Iſſue. And tho' this ought to be amended if it had been a Writ of Error upon a Judgment in Banco, yet it ſhall not be amended, (g) being certified out of an inferiour Court. Mich. 9 Car. B. R. between Norris & Taylor adjudged, and the Judgment given in Graveſend Court, reverſed accordingly. Intratur Trin. 9 Car. Rot. 803.

(e) But a Judgment in a Quare impedit before Juſtices of Aſſize, was amended in B. R. where it was removed by Error. Hob. 327. Hut. 41.

Fol. 210.

(f) Cro. El. 435. S. P. appears con. Cro. Eliz. 459. like Point admit con. Moor 407. like Point admit con.

(g) If the Record out of an inferiour Court be not truly certified, the Return ſhall be amended, vide 2 Jon. 103.

Amendment.

(a) (b) Of Returns of (c) Writs of Habeas Corpus, *&c.*

1. Upon a *Certiorari* an Indictment was returned to be taken *apud* S. *in Com' Lincoln*, but it did not appear in which of the Diviſions (there being in that County 3 Diviſions, and ſeveral Commiſſions of the Peace; ſo that the Juſtices of one have nothing to do in the other). *Paſch.* 9 *Jac. Thorny's* Caſe. *Cro. Jac.* 276, 277, and agreed the Indictment ſhould be diſcharged if the Record with the Clerk of the Peace was ſo; upon which it was ordered that the Record ſhould be brought into Court, that it might be viewed, (d) for it was urged that there could iſſue no other *Certiorari* in this Caſe, but if upon view of the (e) Record, there appeared a Miſpriſion in the Certificate it ſhould be amended.

2. If *A.* being committed by the College of Phyſicians by (f) *Habeas Corpus*, is brought to the Bar, and in the Return there is no Cauſe of his Commitment ſhewn, this ſhall not be amended: (g) for tho' Matter of (h) Form is amendable, yet Matter of Fact which goes to the Juſtification of the Impriſonment is not. *Mich.* 12 *Jac.* Dr. *Alphouſe's* Caſe. 2 *Bulſ.* 259. adjudged.

(a) Where by Certiorari a Record was removed into Chancery, and thence by Mittimus ſent in B. and there being a Miſtake in the Mittimus it was amended. Latch. 217.

(b) Where there can be no Amendment after a Return is filed. 1 Vent. 336. 33. 85.

(c) After Error aſſigned, that the Sheriff had not returned any Pledges de proſequendo, the Sheriff was permitted to amend his Return. 3 Lev. 345. and vide Raym. 51. 1 Sid. 84. But vide Title Pledges.

(d) Becauſe in Judgment of Law the Record being removed by the firſt, there remains nothing to be removed by the ſecond; but if the Return is in the Preterperfect Tenſe, ſo that a Hiſtory that there is ſuch a Recoad is only returned, another Certiorari may go. 1 Sid. 230.——And per 1 Sid. 155. Where an Indictment is removed out of London by their Charter, they return only tenorem recordi, ſo that the Record remains with them, and that which is certified may be amended by it, and vide 1 Rol. Abr. 394. 1 Vent. 13. (e) But Q. when the Record is removed out of any other County, except London, becauſe in other Caſes the Law ſuppoſes the Record it ſelf removed; ſo that nothing remains by which it can be amended. 1 Sid. 155. (f) For Amendments of the Return of an Habeas Corpus, vide Stil. 32, 33, 35, 96. (g) So an Inquiſition taken before a Coroner may be amended in Matter of Form, but not in Matter of Subſtance, King & Glover. 1 Sid. 259. 1 Keb. 907, 908. and there vide what Proceſs ſhall go out againſt the Coroners to bring them to make the Amendment. (h) Where a Return being imperfect or uncertain was amended, 1 Leon. 145. 3 Mod. 120.

Amendments per (a) 14 Edw. 3. Cap. 6.

(a) Per 4 H. 6. cap. 3. it is ordained that as well this Statute, as 9 H. 5. cap. 4. shall take effect in every Record

1. By this Act no (c) Process shall be annulled or discontinued by Misprision of a Clerk in one (d) Syllable or Letter, but when perceived by Challenge of the Party, or in other Manner it shall be amended.

and Process as well after Judgment upon a Verdict, as where Matter of Law is pleaded, provided it should not extend to Records and Processes in Wales, or whereby any Person is outlawed. (b) But upon this Act there were different Opinions, whether the Justices before whom the Plea was depending by Adjournment, Error or otherways could amend; and also if they could amend as well after Judgment as before, which Doubts were explained and declared by the 9 H. 5. cap. 4. and 4 H. 6. cap. 3. 8 Co. 157 b. (c) This extends not to an Original, or other Writ in Nature thereof, for those are not included within the Word Process. 8 Co. 157 a. (d) Upon this Statute it was long a Doubt whether a whole Word should be amended. 8 Co. 158 a.

Amendment.

Of an (a) Original per 8 H. 6.

(a) Where an Appeal in favorem vitæ is not amendable. 1 Bulst. 69, 71. 142.

1. If there be a Mistake in the (b) legal Form of the Writ, it is not amendable, for the Clerks in Chancery by the Duty of their Place ought to be learned therein, and if the Form thereof should be neglected, Ignorance the Mother of Error and Barbarity would soon ensue. 8 Co. 159 a.

(b) There is a Diversity between the Negligence and the Nescience of the Clerk, for the Negligence (as he hath a Copy of the Bond and doth not follow it) shall be amended; but his Nescience or Ignorance in the legal Form and Course of Originals, is not amendable. 8 Co. 159 a. and Vide 1 Lev. 2.

(c) And vide 5 Co. 36. and my Notes upon 18 Eliz. cap. 14. Post.

2. As if an Action of Debt is brought against Executors in the *Debet & Detinet*, when it ought to be brought in the *Detinet* only, (c) it shall not be amended. 8 Co. 159 a.

3. So if a Writ be *Præcipe quod solvat* where it should be *Præcipe quod reddat*, it shall not be amended. 8 Co. 159 b. at the top.

(d) 1 Rol. 198. Pl. 13.

4. But if the Party, in order to have a Formedon in Descender, draws (d) Instructions that the Land descended to him as Son and Heir of the Donees, &c. and the Clerk draws the Writ that the Land descended to him as Son, and omits Heir, if the Clerk shews his Instructions, and will make Oath thereof, it shall be amended. 8 Co. 159 b.

(e) Moor 866. Pl. 1196.

5. But false Latin is not amendable in an Original, as (e) *hos breve*, because this must be imputed to the Ignorance of the Clerk, and is a Mistake in the legal Form thereof. 8 Co. 159 b.

(f) But this Diversity between false Latin and no Latin. 1 Lev. 2. was denied by Twisden and Windham, who said the contrary had been often adjudged, and that the Difference was when the Word is of the Substance of the Writ or not, for if it be not of the Substance of the Writ whether it be false or no Latin. 2 Vent. 173. (g) Moor 5. Pl. 17. S. P. cited N. Bendl. 33. Pl. 53. S. P. cited. 1 And. 25. S. P. cited. (h) In a Quare impedit the Word ad was omitted and amended. Goulst. 78. Cro. Eliz. 119.—In a Formedon of Lands in L. the Word in was omitted and amended. Noy 73. (i) Vaughan & Bury, S. P. 1 And. 24. adjudged. N. Bendl. 35. Pl. 53. adjudged. Moor 5. Pl. 17. adjudged. Dal. 5. adjudged. 5 Co. 45 b. cited.

6. (f) But a Mistake in the negligent Writing of a Word which is not Latin, as *imaginavit* for *imaginatus est*, (g) *avæ* for *aviæ*, is amendable. 8 Co. 159 b.

7. So the negligent (h) Omission of what the Clerk in course ought to have inserted (as the Omission of *Dei gratia*) in the Stile of the King shall be amended. 8 Co. 160 a.

8. (i) So in a Writ of Partition, the Omission of the Words *ostensurus quare non fecerit* was supplied. 8 Co. 160 a.

9. But the Addition or Omiſſion of any Thing which alters the Form of the Writ is not amendable. 8 *Co.* 160 a.

10. The Teſte of a Writ of Aſſize was *duodecno regis* for *duodecimo*, and (k) becauſe the Date is of the very Subſtance of the Writ it could not be amended. *Mich.* 12 *Car.* between *Heath* and *Paget*, 1 *Lev.* 2. adjudged *per totam Curiam*; but it was agreed that if it had not been of the Subſtance of the Writ, whether it had been falſe, or no Latin, it had been amendable.

(k) Diſtrictionem when it ſhould have been Deſtructionem, in a Writ of Waſte not amendable. Freeman's Caſe, 5 Co. 43. adjudged. Cro. Eliz. 462. adjudged; the Word there being Diſtrictionem, with an i, not an e. 2 Bulſ. 51. cited. —— And vide Hut. 56. Indicari for Indictari, and 2 Rol. Rep. 255.

11. If in an Action of Covenant againſt 2 the Writ be (l) *quod teneat conventionem* inſtead *of teneant*, it ſhall be amended. *Paſch.* 1 *Will. & Mar'*, between *Cooke* and *Romney*. 2 *Lev.* 173. amended accordingly after a Writ of Error brought, and ſaid that of late Amendments have been made of a Word miſtaken in an Original.

(l) So where in a Writ it was reddat inſtead of reddant. 2 Sand. 38.

12. If (m) Inſtructions are given to the Curſitor for drawing a Writ againſt *Weſtby*, and he by Miſtake makes it *Weſtly*, and ſo are all the Proceedings afterwards, this ſhall be amended. *Hill.* 1 *Will. & Mar'*. *Weſtby*'s Caſe. 2 *Vent.* 152. the Court ordered the Curſitor to attend, who ſatisfying them that his Inſtructions were right, (n) they ordered the Original to be amended in Court, without any Application to the Chancery or Order thence; and they amended all the Proceedings after.

(m) But where an Original ſhall be amended according to the Inſtructions given the Curſitor.

Vide 1 Rol. Abr. 198. Pl. 13. 2 Vent. 46. 49. 130. Cro. Eliz. 644. 1 Sid. 412. (n) 1 Rol. Abr. 198. Pl. 14. 1 Sid. 45. 412.

Amendment. Per 8 H. 6. Cap. 12.

1. By this Act for Error aſſigned in any Record, Proceſs, or Warrant of Attorney, Original Writ or Judicial Panel, or Return by raſing or interlining, or by Addition, Subſtraction or Diminution of Words, Letters, Titles, *&c.* no Judgment or Record ſhall be reverſed or annulled; but the Judges in any Record, Proceſs, Word, Plea, Warrant of Attorney, Writ, Panel or Return in Affirmance of Judment may amend all that which to them ſeems to be the Miſpriſion of the Clerk (except Appeals, Indictments of Treaſon, Felony and Outlawries of the ſame) and the Subſtance of the proper Names, Sirnames and Additions left out in Originals and Exigents contrary to the (a) 1 *H.* 5. and other Writs containing Proclamation, and if certified Defective, the Parties in Affirmance of Judgment may alledge the Variance between the Record and Certificate, and if found and certified it ſhall be amended.

(a) 3 Mod. 139.

Amendments Per 8 H. 6. Cap. 15.

1. By this Act the Judges in any Records or Proceſſes before them by Error or otherways, or in Returns of Sheriffs, Coroners, Bailiffs of Franchiſes, or others, may amend the Miſpriſion of the Clerks of the Courts, or of the Sheriffs, Coroners their Clerks and other Offices whatſoever, in writing a Letter or Syllable too much or too little, except in Records and Proceſſes in (a) *Wales*, and of Felonies and Treaſons, and the Dependants thereof.

(a) But by the Statute of 27 H. 8. cap. 26. by which it is enacted, That the Laws of England ſhall be uſed, practiſed and executed there; this Exception ſeems to be annulled. 2 Sand. 40. per Curiam.

(a) Jeofails.

(a) Jeofails.

What Defects are ſupplied per 32 H. Cap. 30.

(a) Per 36 Edw. 3. cap. 15. It is enacted, That by the ancient Terms and Forms of Pleader, no Man ſhall be prejudiced; ſo that the Matter of the Action be fully ſhewed in the Declaration and Writ.

1. (b) By that Act it is enacted, That if (c) any Iſſue be (d) tried (e) by the Oath of 12 Men for the (f) Party, Plaintiff or Demandant, or for the Party, Tenant or Defendant, in any Courts of Record, Judgment ſhall be given any Miſpleading, Lack of Colour, inſufficient Pleading or Jeofail, any Miſcontinuance or (g) (h) (i) (k) Diſcontinuance or (l) Miſconveying of (m) (n) Proceſs, Misjoining of the Iſſue, (o) Lack of Warrant of Attorney of the Party (p) againſt whom the Iſſue ſhall be tried, or other Negligence of the Parties, their Counſellors or Attornies, and the Judgment ſhall ſtand (q) according to the ſaid Verdict, without Reverſal.

(b) Q. Where the King is concerned. Palm. 330. and whether the Statutes of Jeofails and Amendments extend to Quo Warranto's, &c. where the King is Party, and vide Cro. Car. 144. 312. 1 Jon. 320. 3 Mod. 167. 2 Lev. 139. (c) But yet an Iſſue upon the vi & armis is not within the Act, but it muſt be one joined upon the ſpecial Matter alledged. Cro. Jac. 599. and vide 1 Sand. 81, 82. (d) But if in Replevin, the Plaintiff is Nonſuit after Evidence, and the Jury aſſeſs Damages for the Avowant, this is no Trial within the Act; for the Inquiry of the Jury is only in Nature of an Office of Inqueſt. Cro. Eliz. 339. adjudged 412. adjudged; and vide Goulſ. 49. Hob. 69. (e) So that an Iſſue upon Null tiel record is not within the Act. 11 Co. 8 a. Cro. Jac. 304. (f) In Treſpaſs againſt A. and B. A. pleads Not Guilty, and B. confeſſes the Action, and a Writ of Inquiry is awarded upon the Roll, but after quoad B. there is no Continuance entered, and after the Iſſue is found for the Plaintiff, (admitting there is a Diſcontinuance quoad B.) yet it is aided by the Statute; for B. was Party to the Original, and is Privy to the Verdict, being liable to the Damages. Sir John Heydon's Caſe, 11 Co. 6 b. adjudged, 1 Rol. Rep. 31. adjudged; and vide Cro. Jac. 304. and vide Cro. Car. 313. ——But an Iſſue between the Demandant and Vouchee is not within the Act. 1 And. 29. Kelw. 207 b. 5 Co. 37 b. 11 Co. 6 b—But per Hob. 281. this Opinion is queſtioned, it not being ſaid, Party to the Original. (g) If as to Part the Defendant joins Iſſue, but ſays nothing as to the reſt, and this Iſſue is found for the Plaintiff, he ſhall have Judgment; Gomerſal and Gomerſal, 11 Co. 6 b. 2 Leon. 194. Godb. 55. So 1 Rol. Rep. 161. Cro. Jac. 353. Hob. 187. 3 Lev. 39. and vide Goulſ. 109. 1 Bulſ. 25. Cart. 51.——But if the Matter is pleaded to the whole, tho' in Fact but an Anſwer to Part; this is a bad Plea, and not helpt by the Statute. Hard. 331. (h) This extends as well to thoſe on the Part of the Plaintiff, as of the Part of the Defendant. 1 Rol. Rep. 161. (i) Diſcontinuances after as well as thoſe before Verdict are within this Act. Cro. Eliz. 489. Cro. Jac. 528. and vide Cro. Car. 236. Cro. Jac. 211. Cro. Eliz. 320. (k) Diſcontinuances are helped by the Statute, but not imperfect Verdicts. 2 Leon. 196. Cro. Eliz. 133. Godb. 57. 3 Lev. 55. (l) But if upon an Information of Perjury the Court awards a Subpœna againſt the Defendant, this is not a miſconveying, but a diſorderly Proceſs, and not aided by the Statute, Toplif and Waller, 1 And. 48. adjudged. Kelw. 214. adjudged, and there ſaid this is no more helpt by the Statute than if in Ejectment, the Court ſhould award a petit cape, or in a real Action a Diſtreſs or Attachment; for ſuch Diſorders were never intended to be redreſſed by the Statute.——And vide Cro. Jac. 89. where one Proceſs does not warrant the other.——So when a Venire is awarded to a wrong Officer, and he returns it, and thereupon a Trial is had, this is a Miſ-trial and not helped. 8 Brownl. 124. Cro. Eliz. 574, 586. Moor 356. Pl. 482. Yelv. 15. 5 Co. 36 b.——But that Miſ-trials, as where the Venue was awarded of a wrong Place, &c. were not aided by this Statute. Vide Cro. Eliz. 468. Goulſ. 38. 47. Winch. 69. 4 Leon. 85. Cro. Jac. 647. Lit. Rep. 365. Moor 91. Pl. 212. Kelw. 212. 5 Co. 36 b. (m) But if there be any Defect in an Original, or in the Return thereof, it is not helpt by this Act. Kelw. 207 b. 1 And. 27. (n) As if a Diſtringas is awarded where it ſhould be an Habeas corpora. Savil. 37. (o) Vide 1 Leon. 175. Cro. Eliz. 145, 153. where the Entry was that the Defendant Obtulit ſe per Higgins attornatum ſuum, without ſhewing his Chriſtian Name, and it was argued, that it was helped by this Statute; and in Cro. Eliz. 150. it was ſaid, That if there were any Warrant of Attorney, and his Name appears, then it may be amended by it; but for this vide 1 Rol. Abr. 289. H. 3. (p) 1 Leon. 175. and vide 18 Eliz. cap. 14. by which a Proviſion is made againſt the Want of any Warrant of Attorney. (q) But if the Judgment is not given upon the Verdict, it is not within the Act, as in Debt againſt an Heir upon the Bond of his Anceſtor, he pleads riens per Diſcent, except 20 Acres in D. and the Plaintiff replies, he hath more in S. upon which they are at Iſſue, and it is found for the Defendant; but the Plaintiff takes Judgment upon the Confeſſion of the Aſſets. Molineux and Molineux. Yelv. 169. reverſed by reaſon of a Diſcontinuance. Cro. Jac. 286. reverſed accordingly, and ſaid the Statute muſt be intended where the Verdict is the Occaſion of the Judgment; and vide Cro. Jac. 211. Cro. Eliz. 339. 412.

Jeofail.

(a) Where (b) no Iſſue (c) is joined.

Where they (d) meet not.

1. If the Plaintiff declares upon a Promiſe to find the Plaintiff, his Wife, and 2 Servants with Meat and Drink for 3 Years upon Requeſt, and the Defendant pleads, That he promiſed to find the Plaintiff and his Wife with Meat, *&c. abſq*; *hoc*, that he promiſed to find, *&c.* for 2 Servants, *&c.* and the Plaintiff replies, that he did promiſe to find, *&c.* for 3 Years next following, *Et hoc petit*, &c. and thereupon a Verdict is found for the Plaintiff, yet he ſhall not have Judgment; for the Promiſe in the Replication is not the ſame with that in the Declaration, which was traverſed by the Defendant, and ſo there is no Iſſue joined, and (e) therefore 'tis not helpt by the Statute. *Mich.* 19 and 20 *Eliz.* between (f) *Kirlee* and *Lees.* 3 *Leon.* 66. adjudged upon a Motion in Arreſt of Judgment.

(a) For this vide the Subdiviſions of Iſſue, under Title Pleading.

(b) Where as to Part Iſſue is joined, and as to the other Part no Iſſue, and a Verdict for the Plaintiff, and general Damages. Stil. 150, 198, 210. Cro. Jac. 239.

(c) Where the Feme pleads without her Baron. Vide the Pleadings after Title Baron and Feme.

(d) In Treſpaſs the Defendant pleads an Accord between the Plaintiff and J. S. of the one Part, and the Defendant of the other, &c. and the Plaintiff replies, quod non habetur talis concordia between the Plaintiff and Defendant, qualis the Defendant hath alledged and thereupon Iſſue is joined, &c. this is not helpt, for the talis hath Reference to a qualis where there is no ſuch, for the Concord alledged was between the Plaintiff and J. S. of one Part, &c. 1 Rol. Rep. 86.

(e) The Diverſity is where an Iſſue is miſjoined, and where there is no Iſſue. 2 Rol. Rep. 187. Cro. Jac. 580. 2 Leon. 195. 3 Leon. 67. Godb. 56.

(f) 2 Leon. 195. S. C. cited. Godb. 56. S. C. cited.

2. (g) If in Debt upon a Bond conditioned for the Payment of 105 *l.* at a certain Day and Place, the Defendant pleads, that at the Day and Place he paid *prædict'* 100 l. *quas ſolviſſe debuit ſecundum formam & effectum conditionis*, and the Plaintiff replies, *quod non ſolvit præd'* 105 l. &c. and a Verdict is found *quod non ſolvit* the ſaid 105 *l.* yet the Plaintiff ſhall not have Judgment, for *prædict'* 100 ſhall not be intended the 105 *l.* and ſo they meet not, and there is no Iſſue. *Mich.* 18 *Jac.* between *Sandbanck* and *Turvy*. *Cro. Jac.* 585. adjudged upon a Writ of Error, and the firſt Judgment reverſed accordingly.

(g) Cro. Car. 593. S. P. adjudged upon Error. Hob. 113. S. P. adjudged.

3. If in a *Scire facias* upon a Judgment againſt the Adminiſtratrix of *J. S.* the Defendant pleads that the ſaid *J. S.* made *B.* within Age his Executor, and that Adminiſtration *durante minore ætate* of the ſaid *B.* was committed to the Defendant, and that ſuch a Day the ſaid *B.* attained the Age of 17, and then refuſed to be Executor, *&c.* and that when the ſaid *B.* attained his ſaid Age, the Defendant had fully Adminiſtred, *&c.* and the Plaintiff replies, that at the Time the ſaid *B.* came to his ſaid Age, *devaſtavit diverſa bona*, *&c.* and the Defendant rejoins *quod ipſa non devaſtavit*, &c. and thereupon Iſſue was joined and found for the Defendant, ſhe ſhall have Judgment, for the Devaſtation muſt be intended by the Adminiſtratrix, and the Plaintiff ſhall not avoid the Verdict by an Exception to his own Replication. *Mich.* 3 *Car.* between (h) *Oxford* and *Rivett*. *Cro. Car.* 79, 93. by *Richardſon*, *Hutton* and *Harvy* contra *Yelv.* and *Cro.* who held there was no Iſſue, and ſo the Verdict void, and not aided by the Statute of Jeofails.

(h) Hetly 35. 60. S. C. adjudged by 3 Judges againſt 2. Lit. Rep. 52. S. C. but no Judgment.

(a) Where there is no Negative or no Affirmative.

(a) Hard. 2. vide. Where an absq; hoc is concluded to the Country, and an Issue thereupon joined, &c. vide 2 And. 6. 7. 102. 3 Mod. 203.

1. If in a Debt upon a Bond conditioned for the Payment of 8 *l.* at a certain Day, the Defendant pleads Payment at the Day, *& de hoc ponit*, &c. and thereupon Issue is joined and a Verdict for the Plaintiff; tho' here is no Negative, yet because the Plaintiff hath joined with him, and the Jury hath found the Money was not paid, 'tis well enough, and aided by the Statute. *Trin.* 9 *Car.* between (b) *Parker* and *Taylor*. *Cro. Car.* 316, 317. adjudged.

(b) 1 Sid. 290. S. C. denied arguend' 342. S. C. cited, and said no Notice was taken that it hath ever been denied.

2. (c) If in an Assumpsit for Wares sold, the Defendant pleads *quod tempore quo*, &c. he was an Infant, and the Plaintiff replies, that they were Necessaries, *Et hoc petit quod inquiratur*, &c. and thereupon Issue is joined, and a Verdict found for the Plaintiff, he shall have Judgment; for the Matter which is the Point of the Action is found by the Verdict. *Mich.* 19 *Car.* 2. between *Burton* and *Chapman*. 1 *Sid.* 341, 342. adjudged.

(c) Palm. 524. like Point adjudged. 1 Brownl. 225. vide. vide. Hardr.

3. (d) But if in Trespass the Defendant pleads in Bar, and the Plaintiff replies *de injuria sua propria*, but does not say *absq; tali causa*, and thereupon Issue is joined and a Verdict for the Plaintiff, he shall not have Judgment, for the Bar is not answered. *Mich.* 19 *Car.* 2. 1 *Sid.* 341. *per Curiam.*

(d) Cro. Jac. 599. S. P. adjudged. 1 Rol. Rep. 47. S. P. adjudged. Stil. 150, 198, 199. 210. 40. S. P. cited. 1 Vent. 70. S. P. said to have been adjudged.

(a) Informal Issue.

(a) Issue upon a Negative pregnant Cro. Jac. 87. vide Cro. Eliz. (457.) — In Trespass, &c. the Defendant pleads quod moderate Castigavit, and the Plaintiff replies, quod non moderate Castigavit and thereupon Issue is joined, &c. where he should have replied de injuria sua propria, &c. helpt after Verdict. 1 Sid. 444, 445. per Curiam. 1 Vent. 70. adjudged, tho' said non moderate castigavit does not necessarily imply that he beat him at all. (b) Turner and Tubervill, S. P. con. 2 Rol. Rep. 368. adjudged. Palm. 393. adjudged. (c) So in Debt, because 'tis only a misjoining of the Issue. Noy 56. per Curiam. Cro. Eliz. 778. and vide 2 Jon. 184. — In Debt against an Executor upon the Bond of his Testator, the Defendant pleads non est factum, &c. Hard. 458.

1. (b) If in an (c) Assumpsit the Defendant pleads Not guilty, and thereupon Issue is joined and found for the Plaintiff, he shall have Judgment, tho' this is an improper Issue in this Action, yet because there is a Disceit alledged, Not guilty is an Answer thereto, and 'tis but an Issue misjoined, which is aided by the Statute, *Pasch.* 38. between *Corbyn* and *Brown*. *Cro. Eliz.* 470. adjudged.

2. If in Debt against *A.* as Executor of *B.* the Defendant pleads that *B.* died Intestate, and that Administration of his Goods was committed to *C.* and the Plaintiff replies, that before the said Administration granted, divers Goods, *&c.* came to the Hands of the Defendant, which as Executor to the said *B. administravit seu aliter ad usum suum proprium disposuit & convertit*, &c. and thereupon in the Disjunctive Issue is joined and found for the Plaintiff, he shall have Judgment, for the Point in Issue is directly found, and so it is within the Statute, and this also is no improper Issue; for whether he administred or converted to his own Use, (d) both must be as Executor. *Trin.* 12 *Jac.* between *Keble* and *Osbaston*, *Hob.* 49. adjudged.

(d) Where the Parts of the disjunctive Issue are Synonima. Hard. 17, 19.

3. If in Replevin the Defendant avows for Damage-feasant, and the Plaintiff replies that he was seised in Fee of a Messuage, and of certain Land, and that *J. S.* was seised of another Messuage and Land, and that they two, and all those whose Estate, *&c.* had Common, *&c.* in the Place where, *&c.* and conveys to himself the other Messuage and Lands for Years, and so justifies, *&c.* and the Defendant traverses the Prescription, and it is found for the Plaintiff, tho' the Prescription thus confused for several is grosly faulty,

and (e) the Iſſue thereupon confuſed, yet after Verdict it is ſalved by the Statute. *Trin.* between *Stukely* and *Underhill*, *Hob.* 113. adjudged, *vide* the Book is miſprinted.

(e) If in Debt upon an Obligation, the Defendant pleads the Statute of Uſury, Et quod corrupte agreat' fuit, & quod quer' corrupte recepit the Uſury, and Iſſue is taken upon both, and found for the Defendant, he ſhall have Judgment, tho' this Iſſue is double, the one Part material, and the other not. Moor 574. Pl. 790.—If in Debt for Rent the Defendant pleads nil hab' in tenementis, and the Plaintiff replies, quod hab' bonum & ſufficientem Statum, &c. but does not ſhew what in particular; and thereupon Iſſue is joined, and found for the Plaintiff, he ſhall have Judgment; for tho' the Iſſue is Unformal, yet the Subſtance of the Matter is found, viz. That he had an Eſtate, &c. Glaſs and Gill, Yelv. 227. Cro. Jac. 312. 2 Bulſt. 41. which vide for the Report differs from Cro. and Yelv.

4. If (f) in an Action of Covenant the Plaintiff aſſigns a Breach, that the Defendant was not ſeiſed in Fee, *& ſic infregit conventionem*, and the Defendant pleads *non infregit conventionem*, and thereupon Iſſue is joined, and a Verdict for the Plaintiff, he ſhall have Judgment; for this is but an Unformal Iſſue. *Trin.* 17 *Car.* 2. between (g) *Walſingham* and *Combe*. 1 *Sid.* 289. adjudged upon a Motion in Arreſt of Judgment.

(f) So where the Covenant is to repair, and the Plaintiff aſſigns the Breach that the Defendant ſuffered the Houſes to be ruinous, & ſic non reparavit, and the Defendant pleads that he did not ſuffer them to be ruinous, &c. Hide and the Dean and Chapter of Windſor. Moor 399. Pl. 523. adjudged and affirmed upon Error. Cro. Eliz. 457, 552. adjudged and affirmed upon Error. 2 Leon. 116. vide. (g) 1 Lev. 183. S. C. adjudged.

Where the Iſſue is joined upon a (a) Matter impoſſible.

1. If in Treſpaſs for a Battery, the Defendant juſtifies and conveys to himſelf an Eſtate by Copy in Part of the Manor of *D.* whereof *J. S.* is ſeiſed, *&c.* and that the Plaintiff came thereupon, and the Defendant laid his Hands *Molliter*, &c. and (b) the Plaintiff replies and conveys to himſelf an Eſtate by Copy in another Part of the ſaid Manor, and then lays, that the ſaid *J. S.* &c. Lord of the ſaid Manor, for himſelf and his Tenants, had a Way over the Defendant's Piece, and thereupon Iſſue is joined and found for the Plaintiff, yet he ſhall not have Judgment; becauſe here is no Iſſue or Thing poſſible. *Hill.* 13 *Jac.* between (c) *Tasker* and *Salter*. *Hob.* 112, 113. adjudged, and ſo *per Hobert*, if they had found a Special Verdict, that the Cuſtom had been for the Way, as it ſhould have been pleaded, *& ſi ſic*, &c. for the ſpecial Matter of the Cuſtom would not bear the Iſſue as it is taken upon a Preſcription void in Law, and ſo upon the Matter it would be a Verdict without an Iſſue, and out of the Compaſs of the Iſſue.

(a) In Debt upon a Bill, the Defendant pleads a Delivery thereof to the Plaintiff as an Eſcrow, and thereupon Iſſue is joined and found for the Plaintiff, he may have Judgment upon the Plea or Verdict. Moor 696. Pl. 969. Cro. Jac. 85, 86. Hut. 55. and vide Yelv. 169. Cro. Jac. 236. (b) Nota according to the Report of this Caſe in Hob. there was a good Plea in Bar, which is not anſwered by the Replication, &c. (c) Moor 867. Pl. 1198. S. C. adjudged, according to which Book the Iſſue was taken upon the ſame Preſcription pleaded in Bar. Hard. 40. S. C. cited.

2. If in Treſpaſs Iſſue is taken that the Prebend of *A.* and all his Predeceſſors, *&c.* had uſed Time out of Mind to keep a Shepherd for the better keeping together their Sheep, feeding in the ſaid Paſture, from the Sheep of *T.* Earl of *S.* and the Iſſue is found for the Plaintiff accordingly, tho' tis ſenſeleſs and impoſſible that the Sheep of the Prebend, *&c.* Time out of Mind could be kept from the Sheep of the Earl of *S.* being but one Man's Life, yet the Plaintiff ſhall have Judgment; for the Subſtance of the Iſſue is the Keeping of the Sheep of the Prebend, *&c.* and the other Part is but a Conſequence thereof, that thereby they were kept from the Sheep of the ſaid Earl. *Trin.* 14 *Jac.* between *Napper* and *Jaſper*. *Hob.* 117. adjudged.

3. In Debt upon a Bond againſt an Adminiſtrator brought in *Hill.* Term 22 *Jac.* the Defendant imparled, and in *Eaſter* Term, 1 *Car.* the Defendant pleaded a Judgment upon a Bond dated *Anno quinto Regis nunc*, where it

it ſhould have been *regis Jac.* and that he had not Aſſets *ultra* to ſatisfy that Judgment, and thereupon the Plaintiff joined Iſſue that the ſaid Recovery was by Fraud and Covin, and it was found for the Plaintiff, tho' it was impoſſible there could be a (d) Recovery *Anno quinto regis Caroli*, which was not then come, yet the Plaintiff having a good Declaration had Judgment. *Hill.* 22 *Jac.* between *Knight* and *Harvy*. *Cro. Car.* 25. adjudged.

(d) So is the Report, vide, and Q. for by the Senſe it ſeems as if it ſhould be a Ben', Anno, &c.

4. If in Debt upon an Obligation conditioned for the Payment of 100 *l.* upon the 31ſt Day of *Sept.* following, the Defendant pleads Payment the ſaid 31ſt Day according to the Condition, and thereupon Iſſue is joined, and found that the Money was not paid upon the ſaid Day, the Plaintiff ſhall have Judgment, for tho' the Iſſue is upon an Impoſſibility, there being no ſuch Day; yet the Jury finding it not paid at the Day, or at any Time before, in Effect find it was never paid, which is a good Verdict. *Trin.* 3 *Car.* between (e) *Purchaſe* and *Jegon*. *Cro. Car.* 78. adjudged upon a Writ of Error, and the firſt Judgment affirmed accordingly.

(e) 1 Jon. 140, 141. S.C. adjudged.

Latch 158. S. C. adjudged. Noy 85, 86. S. C. adjudged.

(a) Where Iſſue is joined upon an (b) immaterial Point.

(a) Where Iſſue is joined, &c. upon a Matter not triable. Raym. 458. Cro. Eliz. 131.
(b) Where the Time is immaterial and yet made part of the Iſſue. Latch 92. 2 Sand. 318, 319. 2 Lev. 12. Hard. 40,

1. If in Replevin the Defendant avows for Rent, for that *A.* was ſeiſed in Fee, and took *B.* to Husband, and had Iſſue *C.* and died, and *B.* being Tenant by Curteſy, the Reverſion to *C.* in Fee, the ſaid *C.* granted a Rent-charge to the Defendant, and ſhews the Death of *B.* &c. and the Plaintiff ſays that *A.* was ſeiſed in Tail, and ſo conveys it to *C.* in Tail, who granted the Rent and died, and the Lands deſcended to the Wife of the Plaintiff as Heir in Tail *abſq; hoc* that *A.* was ſeiſed in Fee, and thereupon they are at Iſſue, and it is found for the Defendant, he ſhall have Judgment; for admitting the Seiſin of the Grantor only traverſable, and that this is an (c) unapt Iſſue, yet is it within the Statute and helpt. *Mich.* 2 *Jac.* between (d) *Pigot* and *Pigot*. *Cro. Jac.* 44. adjudged *per totam Curiam*, contra *Gaudy*.

43, and vide 1 Brownl. 200. (c) In Iſſue upon an immaterial Traverſe. Moor 693. Pl. 959. Cro. Eliz. 456. Winch 76. Cro. Eliz. 228. Goulſ. 39. Pl. 15. Sav. 78. 1 Sand. 22. (d) Yelv. 54. S. C. adjudged per totam Curiam, contra Gaudy.

(a) Where Iſſue is joined upon an (b) inſufficient Plea.

(a) Cro. Eliz. 227, 228, 446. Cro. Jac. 251.
(b) The Defendant as to Part pleads, and as to the other Part ſays nothing, and thereupon Iſſue is joined and

1. (c) If in Debt upon a ſingle Bill the Defendant pleads Payment without an Acquittance, and thereupon Iſſue is joined, and found for the Plaintiff, he ſhall have Judgment; for the Payment without an Acquittance is no Plea to a ſingle Bill, yet becauſe Iſſue was joined upon an Affirmative and a Negative, and a Verdict for the Plaintiff he ſhall have Judgment. *Mich.* 37 and 38 *Eliz.* (d) *Nichol's* Caſe, 5 *Co.* 43. adjudged upon a Writ of Error in *Camera Scaccarii*, and the firſt Judgment affirmed accordingly.

found for the Defendant, he ſhall have Judgment, tho' the Diſcontinuance was made by himſelf. 2 Rol. Rep. 161. adjudged. (c) 1 Brownl. 225. like Point adjudged. Cro. Jac. 377. like Point adjudged. 1 Brownl. 232. like Point adjudged, and vide 1 Vent. 165.—A Concord without Satisfaction pleaded, and Iſſue thereupon for the Plaintiff, &c. Cro. Eliz. 778. Latch 54. Moor 867. Cro. Eliz. 259.—An Entry without Expulſion pleaded, and Iſſue for the Defendant, &c. Hob. 326. but Q. if not miſprinted, and if it ought not to be for the Plaintiff.—One Bond in Diſcharge of another and Iſſue for the Defendant, &c. 1 Mod. 221, 225. 2 Mod. 137. Hob. 69. (d) Moor 692. Pl. 957. S. C. adjudged upon Error. Cro. Eliz. 455. S. C. adjudged upon Error. 3 Bulſt. 301. S. C. cited. Cro. Jac. 86. S. C. cited. Cro. Jac. 377. S. C. cited, and ſaid by Coke, That if the Verdict had been found for the Defendant, he ſhould not have had Judgment. Vide 1 Keb. 5. Pl. 13. Winch 76. Hut. 54. Jenk. Rep. 257. S. C. adjudged, and the ſame Difference taken as by Coke before, and vide Jenk. Rep. 69, 70, 86.

2. If in Debt upon a Bond conditioned for the Payment of 60 *l.* upon the 25th *June*, the Defendant Pleads Payment of the ſaid 60 *l.* upon the 20th Day of *June ſecundum formam & effectum conditionis*, and thereupon Iſſue is joined, and a Verdict found that he did not pay the ſaid 60 *l.* upon the 20th Day of *June*, the Plaintiff ſhall not have Judgment, for the Iſſue is taken (a) *debors* the Matter of the Condition, and ſo void, and it might not be paid the 20th, and yet might be paid the 25th. *Hill.* 13 *Jac.* between *Holms* and *Brocket*. *Cro. Jac.* 435. adjudged; but it is there ſaid if it had been found for the Defendant, *viz.* That the Money was paid the ſaid 20th Day, perhaps the Verdict would have made it good.

(a) An immaterial Iſſue no ways ariſing from the Matter, is not within the Statute, vide 2 Mod. 237. 1 Brownl. 229. Cro. Eliz. 227, 228.——becauſe by the Verdict the Court cannot tell for whom to give Judgment. 1 Lev. 32.

Jeofails.

What Defects are ſupplied, per 18 Eliz. cap. 14.

1. By this Act after Verdict given in any Action, Suit, Bill, Plaint or Demand in any Court of Record, Judgment (a) thereupon ſhall not be ſtaid or reverſed for want of Form, touching falſe Latin, or Variance from the Regiſter, or (b) other Faults in Form in any Writ, Original or Judicial Count, Declaration, Plaint, Bill, Suit or Demand, or for (c) (d) want of any Writ (e) Original or Judicial, or by reaſon of (f) any (g) imperfect or (h) inſufficient (i) Return, of any Sheriff or other Officer, or for want of any Warrant of Attorney, or for any Fault in Proceſs upon or after any Aid Prier and Voucher.

(a) But if in Treſpaſs againſt A. B. and C. A. pleads Not guilty, and it is found for him, but againſt the other 2 there is Judgment by Default, the want of an Original may be aſſigned for Error, for the Verdict being found for A. he is out of the Caſe, and it is as if the Action had been brought againſt the other 2 only; but if the Verdict had been for the Plaintiff, the want of the Original quoad the other had been cured. 1 Lev. 210. (b) But the Omiſſion of vi & armis in a Declaration of Treſpaſs is Subſtance, becauſe that is the Inducement for the King's Fine. Cro. Car. 407. March. 140. Cro. Jac. 443, 526, 536. but vide Cro. Jac. 130. 2 Rol. Rep. 285.—So in the Aſſignment of a Breach upon a Recognizance for good Behaviour. Cro. Jac. 412.——but as to the want of theſe Words in Judgments, vide 37 H. 8. cap. 8.——and as to what ſhall be ſaid Form and what Subſtance within the Statute of Jeofails, and the 27 Eliz. cap. 5. vide the Subdiviſions of Demurrer under Title Pleading. (c) 1 Leon. 30, 31. Vide where the Original was determined and not revived. (d) An ill Writ in Subſtance, or a good Writ which warrants not the Declaration, is not aided by the Statute. Cro. Eliz. 722. Goulſ. 126. Yelv. 108, 109. 1 Sid. 84. 5 Co. 37 b. 3 Bulſ. 224. 1 Rol. Rep. 432.——When the Variance is ſuch that it ſhall be taken as no Original. Cro. Eliz. 204. Hob. 251. Cro. Jac. 654, 655. Cro. Car. 327. Cro. Eliz. 286. 3 Mod. 136. 2 Rol. Rep. 382. 5 Co. 37 b.—but not ſo where the vicious Writ is certified to be the Writ upon which the Proceedings were, and that there is no other. Cro. Jac. 185, 479, 664, 675. Palm. 428. 1 Brownl. 96, 97. Cro. Car. 272, 281. 1 Jon. 304. Latch. 116. Yelv. 109.—but where it appears there was a good Original, no Averment ſhall be taken that the Proceedings were upon the vicious one. Cro. Jac. 597. Palm. 428.—and in Ejectment where the Declaration recited the Original to be ſummonitus eſt, there being none upon the File, the Court would not intend a vicious one, but that there was a good one which is loſt, and that the Plaintiff's Clerk miſtook in the Recital thereof. Redman & Edolph, 1 Sand. 317. 1 Mod. 3.—So the want of a Venire, diſtringas, &c. is aided, but not a vicious one, and where a vicious one ſhall be taken as none. Vide Cro. Eliz. (483.) Owen 59. Moor 465. Noy 57. Moor 684. Pl. 944. and vide Cro. Eliz. 215. 257. 259. 422. 433. 781. Cro. Jac. 65. 162. 396. Cro. Car. 90. Moor 402. Pl. 535. 623. Pl. 852. 696. Pl. 967. Godb. 194. 1 Leon. 329. 1 Bulſ. 130, 131. 3 Bulſ. 180. 1 Brownl. 78, 97. Yelv. 69. 1 Rol. Rep. 22. Stil. 8. 483. March. 26. 2 Rol. Rep. 285. (e) The want of a Bill upon the File which is in Nature of an Original is aided by the Equity of this Act. Hob. 130. 134, 264, 282. 1 Jon. 304. Cro. Car. 282. Stil. 91.——and Cro. Jac. 91. to the contrary is not Law.——Q. of the want of a Plaint in inferiour Courts, but however an erroneous Plaint is not helpt. Cro. Jac. 108, 109. Stil. 115. 1 Rol. Rep. 338. (f) But if there be no Return, as if the Writ be album breve or the Name of the Sheriff not endorſed, this is not helped. 1 Rol. Rep. 295. 5 Co. 41 b. Cro. Eliz. 310, 509. Yelv. 110. Cro. Jac. 188, 189. (g) Vide Stil. 91. 2 Rol. Rep. 247.——In the Return of the Venire the Words quilibet juratorum per plegios were wanting, and Cro. Jac. 534. per Curiam, it was held not as a Blank or no Return, but as an inſufficient one, and helpt 2 Rol. Rep. 87. adjudged, becauſe by the Appearance of the Jurors it was ſolved, and ſaid it was not like Br. Huſſy's Caſe, where Pledges were wanting upon an Original, which vide 3 Bulſ. 275, 276, &c. 1 Rol. Rep. 445, 446, 447. Cro. Jac. 414. Where it is ſaid the not finding Pledges upon an Original is meerly the Neglect of the Party, and ſo not helped.—If a Venire is awarded to the Coroners, and returned

returned by 2 of them only, whereas at the Time of the Award and Return thereof there were 3 more; this is only a Misreturn and aided. Lamb & Wiseman. Cro. Jac. 383. adjudged. Hob. 70. adjudged.—and yet if one Sheriff of London makes a Return without the other, this is not helpt being no Return at all, for they make but one Officer, and the Court knows that one Sheriff there is 2 Persons. Hob. 70. (h) Upon the Return of a Venire de medietate Linguæ, it did not appear which were Denizens and which Aliens. Cro. Eliz. 841. per Curiam, it is an insufficient Return, and aided by the Statute.—Upon the Venire 23 only were returned, but the Habeas Corpora was awarded against the 23 and A. and 11 of the other, and A. sworn and tried the Cause. Fines & North, 1 Jon. 302. adjudged it was not helped, for A. was not returned by the Sheriff. Cro. Jac. 278. adjudged.—but if 12 of the 23 only were sworn and tried the Cause, it had been helped. Cro. Car. 278. 5 Co. 36 b. 37 a. Cro. Eliz. 194. 1 Brownl. 274. 1 Jon. 357. and vide 1 Sid. 66.—So if the Trial had been by 11 of the 23, and 1 of the tales de Circumstantibus. Sankil & Stocker, Cro. Car. 223. adjudged per Curiam contra Croke. 1 Jon. 245. adjudged per Curiam Con' Croke; but vide 1 Brownl. 274. where it was adjudged according to the Opinion of Croke, vide Latch. 54.—but if 25 are returned, and the twenty fifth is sworn and tries the Cause, it is not helped, because a Mis-trial. Cro. Jac. 647. but where Mis-trials are not helped by this Act and 32 H. 8. vide the Notes upon that Act—but if tried by 12 of the other it is helped. Cro. Jac. 647. (i) In a Scire facias upon a Recognizance against the Heirs and Tertenants of the Conusor, the Sheriff returns J. S. Tertenant, but says nothing as to the Heir, and J. S. pleads to Issue, and it is found against him. Cro. Car. 295. adjudged by 3 Judges against Croke, that quoad the Heir there being no Return, it is not helped by the Statute, but per Croke, the Defendant having pleaded to Issue, and that being found against him, he shall not now take Advantage of the Heir's not being returned summoned; and Cro. Car. 312, 313. it was adjudged for the Plaintiff, because quoad the Heir, it was only a Discontinuance which is aided by the 32 H. 8. 1 Jon. 319. adjudged.

(l) Q. Whether the Statute of Amendments or Jeofails extend to a Quo Warranto or other Action when the King is Party.

2. But there is a Proviso, that it shall not extend to any Writ, Declaration, Suit of Appeal of Felony or Murder, (l) nor to any (m) Indictment or Presentment of Felony, Murder, Treason, or other Matter, nor to any Process upon any of them, nor to any Writ, Bill, Action or Information upon any popular or (n) penal Statute.

Q. and vide Cro. Car. 144. 312. 1 Jon 320, 3 Mod. 167. 2 Lev. 139.—but however, Cro. Car. 312. it is said by Noy. that perhaps the Statute of Jeofails does extend to a Quare impedit, when the Suit is directly between the King and Party. (m) Vide 3. Mod. 7. Hob. 328. 2 Sand. 308. (n) A Writ of Banishment of Ward upon the Statute of Westm. 2. cap. 35. is within the Proviso, for. Hussy & Moor, 3 Bulst. 275, 276. adjudged by 3 Judges contra Haughton, who held that such Actions as are both popular and penal, and not given with respect of Recompence of Damage, are within the Proviso, but where a Remedy is given by way of Recompence to the Party grieved, as upon the Statutes of Waste for not setting forth Tithe, forcible Entry, &c. tho' these may be said Penal, yet they are not within the Meaning of the Proviso, 1 Rol. Rep. 447, 448. adjudged by 3 Judges contra Houghton; but the Cases as to Waste and Tithes put by Houghton agreed per Curiam; because given meerly in Satisfaction of the Damages, but upon a Ravishment of Ward there is Imprisonment and Banishment, but per Croke and Dod', if this Action had only increased the Damages, it had been within the Proviso. Cro. Jac. 414. adjudged, Hob. 101 adjudged, and per Cro. Jac. 318. 2 Bulst. 66. an Action upon 2 Edw. 6. is not within the Proviso.

Jeofails.

What Defects are ſupplied, per 21 Jac. Cap. 13.

1. By this Act it is enacted, That after Verdict for Plaintiff or Demandant, Defendant or Tenant, Bailiff in Aſſize, Vouchee, Praice in Aid, or Tenant by Receipt, in any Action, Suit, Bill, Plaint or Demand in (a) any Court of Record, Judgment thereupon ſhall not be ſtaid or reverſed for any Variance in (b) Form only between the Original or Bill, and the Declaration, Plaint or Demand, or for (c) lack of the Averment of any Life, ſo it be proved they are living, or becauſe the *Venire*, *Habeas Corpora*, or *Diſtringas* was awarded to a wrong Officer upon any inſufficient Suggeſtion, or (d) for that the Viſne is in (e) ſome Part miſ-awarded, or ſued out of more or fewer Places (f) than it ought to be, ſo as ſome one Place be right named, or for miſ-naming any of the Jurors in (g) Surname or Addition in any of the Writs or Returns thereof, ſo as they be proved to be the ſame as was meant to be returned, or for that there is no Return upon any of the Writs, ſo as a Panel be returned and annexed thereto, or for that the Sheriffs or other Officers Name is not ſet to the Return of ſuch Writ, ſo as it appear by Proof the Writ was returned by him; or (h) for that the Plaintiff in Ejectment, or other perſonal Action being under Age, appeared by Attorney, and the Verdict paſſed for him.

(a) So that it extends to inferior Courts. 2 Sand. 258. (b) For what ſhall be Form, and what Subſtance, within the Meaning of the Statute of Jeofails, and the 27 Eliz. of Demurrers, vide the Subdiviſions of Demurrer, Title Pleading. (c) 1 Sid. 61. (d) Cro. Car. 17. 162. 284. 480. 1 Jon. 395. Stil. 201. 206. Raym. 67. (e) This Statute aids not unleſs the Venue ariſes from ſeveral Places, and one of thoſe Places is truly named. 1 Sid. 20.—but if it ariſe from ſeveral Places, tho' in ſeveral Counties, and it is tried by one only it is helped. 2 Lev. 122. per Hales. (f) By the Opinion of the greater Part of the Judges, where by particular Cuſtom a Trial was to be de vicineto, of the 4 Wards next adjoining, and the Venire is awarded de vicinet' of 2 of them only, it is helped by the Statute. 2 Sand. 258. but Sanders dubitavit whether it ſhould extend to aid any Proceedings except ſuch which were according to the Courſe of the Common Law. (g) But this extends not to any Miſtake in the Chriſtian Name. Cro. Car. 202, 203. (h) Stil. 158. 218.

2. Provided it ſhall not extend to any Writ, Declaration, or Suit of Appeal of Felony or Murder, nor to any Indictment or Preſentment of Felony, Murder, or Treaſon, nor to any Proceſs upon any of (i) them, nor to any (k) Writ, Bill, Action or Information upon any Popular or (l) Penal Statute.

(i) 1 Sid. 66. 244. (k) And the Original being excepted, by Conſequence all Proceſs thereupon is ſo. Stil. 307. (l) An Action of Waſte is not ſo within the Meaning hereof. 2 Sand. 258. but for this vide the Notes upon the Statute. 18 Eliz. ante.

Jeofails.

What Defects are ſupplied, per (a) 16 and 17 Car. 2. Cap. 8.

(a) This Act was only for 3 Years, but is made perpetual per 22 and 23 Car. 2. cap. 4.—and 1 Vent 100. by Twiſden; this is ſtiled an Omnipotent Act.

1. By this Act after Verdict in any Action, Suit, Bill or Demand in the Courts of Record at *Weſtminſter*, County Palatine of *Cheſter* or *Durham*, or of the great Seſſions in *Wales*, Judgment thereupon ſhall not be ſtaid or reverſed for want of Form or Pledges returned upon the Original, or becauſe the Name of the Sheriff is not returned upon the Original, or for want of Pledges upon any Bill or Declaration, or for want of a *Profert in Curia* of any Deed, or of Letters teſtamentary or of Adminiſtration, or for the Omiſſion of *Vi & armis* or *Contra Pacem*, or for the Miſtake of the Chriſtian or Surname of either Party, Sums, Day, Month or Year in any Bill, Declaration and Pleading, being right in any Writ, Plaint, Roll or Record preceding, or in the ſame to which the Plaintiff might have demurred and ſhewed

ſhewed the ſame for Cauſe, nor for want of *hoc paratus eſt verificare*, or *hoc paratus eſt verificare per recordum* or *prout patet per recordum*, or for that there is no right *Venue* ſo as the Trial was by a Jury of the (b) proper County or Place (c) where the (d) Action is laid; Nor ſhall any Judgment after Verdict, Confeſſion by *Cognovit actionem* or *Relicta verificatione* be reverſed for want of a *Miſericordia* or a *Capiatur*; or becauſe one is entered for the other, nor for that *ideo Conceſſum eſt per Curiam* is entered for *ideo conſideratum eſt*, &c. or for that the Increaſe of Coſts after Verdict in an Action or upon a Nonſuit in Replevin are not entred at the Requeſt of the Party for whom the Judgment was given; nor for that the Coſts in any Judgment whatſoever are not entered to be by Conſent of the Plaintiff, and that all ſuch Omiſſions, Variances and Defects, and (e) other Matters of like Nature, not being againſt the Right of the Matter of the Suit, nor whereby the Iſſue or Trial are altered ſhall be amended, where ſuch Judgments are or ſhall be removed by Writ of Error.

Provided it ſhall not extend to any Writ, Declaration, or Suit of Appeal of Felony or Murder, nor to any Indictment or Preſentment of Felony, Murder, Treaſon or other Matter, nor to any Proceſs upon them; nor to any Writ, Bill, Action or Information upon any Penal Statute, other than concerning Cuſtoms and Subſidies of Tunnage and Poundage.

(b) But this extends not to any Trial in an improper County. 1 Mod. 37. 2 Mod. 24. 1 Mod. 199.

(c) In Debt upon a Bond in London, conditioned for the Performance of Covenants, one of which was for the Enjoyment of Shrob Walk in the Forreſt of W. in Com' N. and the Defendant pleaded Performance generally; and the Plaintiff reply'd, That the Earl of N. having Title by Grant, &c. entered and ouſted him, and the Defendant pleaded the Earl of N. had no Title, and thereupon Iſſue was joined and tried by a Viſne of Shrob Walk, and found for the Plaintiff, and tho' no Viſne could ariſe of the Walk, and it could not be intended a Vill being only collaterally alledged as a Thing granted, and not as a Place where any Fact was done, yet being tried by a Jury of the County where the Matter of the Iſſue aroſe. Stirk & Bates, 1 Lev. 207, 208. It was adjudged for the Plaintiff by 3 Judges contra Twiſden, who ſaid it was not within the Words, and being a new Law, it ſhould not be taken according to the Intent againſt the Words, and after Error was brought, but the Parties agreed, the Defendant making the Plaintiff Satisfaction. 1 Sid. 326. adjudged per totam Curiam, præter Twiſden, tho' objected the Action being laid in London, the Iſſue ſhould have been there tried, unleſs ſome other Place had been ſhewed in the Record, and vide 2 Lev. 122. (d) The Plaintiff declared that the Defendant apud London, ſaid of the Plaintiff that he had ſtole Plate at Oxford, and the Defendant juſtified that he did ſteal Plate at Oxford, per quod he ſpoke the Words at London; and the Plaintiff replied de injuria, ſua propria, &c. and thereupon Iſſue was joined and tried in London, and found for the Plaintiff, and tho' it was admitted that the only Point in Iſſue was, whether the Felony was committed, which was triable at Oxford, yet the Plaintiff had Judgment, Craft & Boite, 1 Sand. 247, 248. by 3 Judges, who ſaid the Iſſue being tried by a Jury of the proper County, it was within the expreſs Words of the Statute, but Twiſden fortment contra; and by the Reporter this Judgment was given not only againſt the Opinion of Twiſden, but of ſeveral others as he was informed, and being of Counſel with the Defendant, he agreed that the Meaning of the Statute was, that the Iſſue ſhould be tried in the proper County where it ariſes, elſe it would be impoſſible by any Plea to remove the Trial from the County where the Action is laid. Raym. 181. adjudged that it was helpt by the Statute, but ſaid the Defendant might have demurred upon it. 2 Keb. 406. adjudged, 1 Vent. 263. cited to be adjudged. So Adderly & Wiſe, 2 Lev. 164, 165. adjudged. 1 Vent. 263. cited, and vide Raym. 392. where the like Point was in queſtion, et adjorn.' So 2 Jon. 82. et adjorn' and in the Caſe of Jenning & Hunking, 1 Vent. 263. (where the Court ſaid it was within the Words, but not the Meaning of the Act, for the Intention was ſo that the Trial was in the County where the Iſſue did ariſe) but in regard of thoſe Precedents cited they would not ſtay Judgment, but by the Report of this laſt Caſe. 2 Lev. 121. it does not appear how the Judgment was; but Hale Chief Juſtice, there ſaid, the Meaning of the Statute was, if the Iſſue was tried in the County where the Matter thereof aroſe, for it is not reaſonable to believe the Parliament intended to alter the whole Courſe of Trials, and to have Things tried in foreign Counties, et adjornatur, and by the Report of the ſame Caſe. 3 Keb. 350, 371. 509. the Parties agreed to amend, and lay the whole Matter in the County where the Action was laid, and ſaid the Court inclined ſtrongly againſt the Judgments cited. (e) 1 Vent. 272. Raym. 398.

(A) Amercement.

Fol. 211.

For what Things an Amercement ſhall be.

1. For a Rent diſtrainable no Amercement ſhall be in a Leet. 11 H. 4. 89. b.

2. (a) If the Deciners ought to pay a Rent to the Leet (b) pro certo Letæ (this is not properly a Rent, but a Sum in groſs) if they do not pay it they may be amerced; for this is due and payable at the Leet. (c) 13 H. 4. 9.

(a) Godfrey and Bullen S. P. a Cuſtom being laid. Yelv. 186. 187. admit. 1 Brownl. 190. admit. 6 Co. 77. b. S. P. does not appear. But if not warranted by Cuſtom perhaps 'tis otherways, Godfrey's Caſe, 11 Co. 44. b. 1 Rol. Rep. 32. 73. &c. (b) For the Original thereof vide. 6 Co. 77. b. 2 Inſt. 71. (c) Fitz. Avowry. 57. S. C. Br. Diſtreſs 18. S. C. 11 Co. 44. b. S. C. cited Infra pl. 2. S. C.

(B) What Perſon may be amerced.

1. (a) In a Writ of Partition againſt an Infant, if he pleads with the Demandant, and it is found againſt him, he ſhall be amerced. 9 H. 6. 7.

(a) 1 Rol. Abr. 214. D. vide throughout.

(C) Amercement.

Not for a Wrong to the Lord.

1. (a) A Man ſhall not be amerced in a (b) Leet for a Treſpaſs to the Lord himſelf, for he ſhall not be his own Judge. (c) 12 H. 4. 8. b.

2. But he may be amerced for Non-payment of Certum Letæ to the Lord, he being a Deciner. (d) 13 H. 4. 9.

(a) Raym. 160. S. P. adjudged. 1 Sand. 135. S. P. adjudged. 2 Keb. 139. 3 Keb. 644. 2 Leon. 242. S. P. per Gaudy. (b) But ſuch private Treſpaſs may be preſented there for the Lord's Information. 1 Sand. 135. 2 Keb. 139. (c) Fitz. Barre 187. S. C. Br. Cuſtom 16. S. C. Br. Amercement. 19. S. C. Br. Leet 12. S. C. (d) Fitz. Avowry 57. S. C. Br. diſtreſs 18. S. C. Supra pl. 2. S. C. with Notes upon it.

(D) Amercement (a) affeered.

In what Caſes it ſhall be affeered.

What

1. (a) An Amercement in Latin is called (b) Miſericordia, becauſe it ought to be aſſeſſed mercifully, and this (c) ought to be (d) moderated by Affeerment of his Equals, or otherways a (e) Writ de moderata miſericordia, lies Co. Lit. 126. b.

(a) The Statutes of Mag. Char. Cap. 14. and Weſt. 1. cap. 6. were but in Affirmance of the Common Law, per Glanvil cited 8 Co. 39. b. 2 Inſt. 27. (b) For this vid. 8 Co. 39. a. 59. b. F. N. Br. 75. H. (c) Kelw. 65. a. S. P. per 2 Judges. 8 Co. 39. a. S. P. (d) Liber homo ſalvo contenemento, mercator ſalva merchandiſa, villanus ſalvo wainagio perſona eccleſiaſtica ſecundum laicum non ſecundum eccleſiaſticum tenementum Mag. Chart cap. 14. explained. 2 Inſt. 27, 28, 169, 170. 8 Co. 39. (e) This Writ is grounded upon Mag. Char. cap. 14. for it recites that Statute per 2 Inſt. 28. vid. the Writ F. N. B. 75. Reg. 86. 184. 187.

2. If at a Court Baron according to the Cuſtom there uſed, a By-law is made, and the Penalty of 20 s. laid upon every Offender, and at another Court a Tenant is preſented for a Breach thereof, by which the ſaid Pe-

nalty is forfeited, this cannot be affeered, *Mich.* 7 & 8 *Eliz.* Between *Scarling* and *Criett.* *Moor* 75. pl. 205. adjudged.

(d) 3 Leon. 7. 8. S. C. adjudged. N. Bendl. 159. pl. 119. S. C. adjudged.

3. If at a Court Baron a Tenant is preſented for ſuch an Offence, and if he doth not amend it before the next Court, that he ſhall forfeit (e) ſuch a Pain, and at the next Court it is preſented that he hath not amended it, and ſo hath incurred the Pain, this need not be affeered, for there is a Diverſity between an Amercement and a Pain. *Paſch.* 31 *Eliz.* Between *Caſtle* and *Oldman.* 1 *Leon.* 203. admitted and agreed *per Anderſon* and *Windham* Juſtices.

(e) So where a certain Penalty is given by Statute for an Offence of which the Leet hath Conuſance, the Steward may impoſe it by way of Fine, without Affeerment. Cart. 28, 29. admit.

(f) 2 Inſt. 27. S. P. 11 Co. 43. b. S. P. Kelw. 65. a. S. P. where the Fine was by a Steward of a Leet.

4. (f) Fines impoſed by (g) any Court of Record, are not to be (h) affeered. 8 *Co.* 39. a. b.

5. (i) Although by the expreſs Words of *Mag. Char. Comites & Baronet non amercientur niſi per pares*, &c. yet long Uſage hath prevailed againſt it, for the Amercement of the Nobility is reduced to a Certainty, *viz.* (k) a Duke 10 l. an Earl 5 l. a Biſhop who hath a Barony 5 l. &c. 2 Inſt. 28.

(g) But if an exceſſive Fine is impoſed at the Seſſions it may be mitigated in B. R. per 1 Vent. 336. (h) But if a Juror appears and is adjourned upon a Pain, and makes Default in this Caſe, becauſe he ſhall be fined to the Value of his Lands per Annum. This ſhall be inquired by the reſt of his Companions of the Jury, per 8 Co. 41. a. vid. Fitz. Peine 3. (i) 6 Co. 54. a. S. P. 8 Co. 40. a. S. P. (k) Nota, therefore when a Nobleman is Plaintiff, 'tis Policy rather to diſcontinue the Action, than to be nonſuit. 2 Inſt. 28.

(E) By whom it ſhall be affeered.

(a) So upon a Nonſuit after the Jury are ready to give their Verdict, the Court may cauſe the Amercement to be immediately affeered by the ſame Jurors, per 8 Co. 35. b. 11 Co. 43. b.

1. IN an (a) Aſſiſe, if the Plaintiff does not appear or any for him yet three of the Aſſiſe may be ſworn to affeer the Amercement, and ſhall do it. (b) 28 Aſſ. 26. Adjudged.

(b) Br. Aſſiſe 40. S. C.

2. If a Man be amerced upon a Nonſuit, by the Bailiff of an inferior Court, this ſhall be affeered by his Equals. 10 E. 2. Action ſur le Statute 34.

3. 8 E. 1. Rot. patentium membrana 28 in Dorſo C. de L. aſſignatur ad tarandum per Sacramentum proborum & Legalium hominum de quolibet Hundredo comitatum Somerſet, Dorſet, Devon & Cornubie, & etiam Ballivorum Hundredorum aliorum omnia amerciamenta ad que homines comitatuum illorum amerciati fuerunt coram Juſticiariis noſtris de Banco, Annis Regni noſtri, 2. 3. 4. 5. and 6. & quorum nomina iidem Juſtitiarii noſtri vobis liberabunt, prout hactenus fieri conſuevit, & prout ad opus noſtrum magis videritis expedire, & mandatur vicecomitibus comitatuum (*) predictorum quod, &c. venire faciant coram vobis Sex probos, &c.

(*) Fol. 212.

(c) Fitz Amercement. 19. S. C. 8 Co. 40. b. S. C. cited.

4. If a Judgment is reverſed in a Writ of falſe Judgment, and the Suiters amerced, the Juſtices may affeer it. (c) 22 E. 3. 2.

5. The Amercement upon ſuch as have the Adminiſtration of Juſtice, or of any Officer or Miniſter that hath the Execution of Writs, &c. ſhall be affeered by the Judges of the Court where the Cauſe depends. 8 Co. 40. a.

(d) Vet Hob. 129. it is ſaid the Jury muſt amerce to a certain Sum, which may be mitigated and affeered by others, and therefore theſe Offices cannot be confounded.

6. (d) If a Jury in a Leet Tax an Amercement, (e) this is ſufficient without any other Affeerment, (f) for the Amercement is the Act of the Court, and the Affeerment of the Jury per 8 Co. 40. b.

(e) 1 Rol. Abr. 542. pl. 5. (f) Cro. Car. 275. S. P. adjudged. 1 Jon. 301. S. P. adjudged.

7. (g) But

7. (g) But if the Steward (h) affeers an Amercement (i) upon the Presentment of the Jury, it is void. 8 Co. 40. b.

8. (k) When the Demandant or Plaintiff is nonſuit, or Judgment given againſt the Plaintiff or Defendant, &c. the Entry is *ideo in miſericordia*, generally without Taxing or Aſſeſſing any Sum in certain, and in the Common Pleas the Clerk of the Warrants there makes the Eſtreats of theſe Amercements, and delivers them to the Clerk of the Aſſiſe within each Circuit, to deliver them to the Coroners in each County to affeer, and ſuch Aſſeſſment by the Coroners of the reſpective Counties hath been held a Satisfaction of Magna Chart. *Quod nulla prædictarum miſericordiarum ponatur niſi per Sacramentum proborum & legalium hominum de vicineto*, the Coroners being elected by the whole County. 8 *Co.* 39. *b.*

(g) Kelw. 65. a. (h) But it was ſaid to be the common Courſe throughout the Realm, for Stewards (even in Court Barons where the Suitors are Judges) to aſſeſs the Amercements. Cro. Eliz. 748. But it ought to be affeered by the Homagers or Affeerers. 2 Rol. Rep. 3. 4. (i) But no Amercement can be aſſeſſed at a Leet, for not appearing without a Preſentment, that the Offender owes Suit and Service to the Leet, for otherways non conſtat to the Steward, whether he is a Suitor or not. Cro. Eliz. 241. (k) F. N. B. 75. J. K. 76. A. S. P. in real Actions, but the Courſe in perſonal the Clerks had then forgot. Semble at this Day ſuch Amercements, whether in real or perſonal Actions are never affeered or levied. 1 Sand. 227.

(F) (a) In what Actions.

(a) No Judgment after Verdict, Confeſſion by cognovit actionem or relicta verificatione ſhall be reverſed for want of a

1. **In an Attaint againſt him who recovered in the firſt Action, if the Plaintiff recovers, the Defendant ſhall be** (b) **amerced.**

2. **If a Man recovers in an Aſſiſe, and dies, and his Wife is endowed in an Attaint againſt the Wife, if he recovers, the Wife ſhall be** (c) **amerced.** 40 Aſſ. 20. **adjudged.**

miſericordia or a capiatur, or becauſe one is put for the other, per 16 and 17 Car. 2. cap. 8. (b) But 8 Co. 60. It is ſaid, that if the Attaint paſs againſt the Defendant, if he was Party to the 1ſt Record, he ſhall be Fined and Impriſoned, otherways if he was not Party to the firſt Record. (c) Not fined, becauſe not Party to the firſt Record. 8 Co. 60. a.

3. In all judicial Proceſs, if the Plaintiff is barred, nonſuit, or his Writ abates, the Plaintiff ſhall not be amerced becauſe the Proceſs is founded upon a Record. 8 *Co.* 61. a.

(G) By whom it may be.

1. **The Juſtices in a ſpecial Aſſiſe may amerce the Sheriff, if he does not return the Aſſiſe.** 7 H. 6. 13.

(H) In what Caſes.

1. (a) **In a Formedon or** (b) **other Action, if the Tenant comes the firſt Day, and** (c) **renders the Land, he ſhall not be amerced.** 8 R. 2. **Amercement.** 26. **adjudged.** 1 E. 3. 11. **in a Warranty of Charters.** Co. Lit. 126.

(a) 5 Co. 49. a. S. P. arguendo. Cro. Eliz. 65. S. P. per Curiam arguendo.

But the Book is miſprinted, materia for miſericordia. 8 Co. 61. S. P. Cro. Car. 564. like Point adjudged. (b) But in ſuch Actions where the Offence is ſuppoſed with Force, or in diſceit of the Court, though the Defendant comes the firſt Day, and confeſſes the Action, yet he ſhall be fined and impriſoned. 8 Co. 61. b. ſemble becauſe the Fine is for the precedent Tort, and not for the Non-render upon the firſt Proceſs. (c) Vide Kelw. 116, 117.

2. **In Dower, if the Tenant renders to the Demandant her Dower after he hath taken a Day** prece partium, **he ſhall be amerced, though this Delay was by the Aſſent of the Demandant.** 18 E. 3. 39. adjudged, but Quære.

3. In

3. In Dower, if the Tenant after he is essoined renders Dower, and avers that he hath always been ready, &c. the Tenant shall not be in misericordia. 22 E. 3. 2.

Nor the Demandant in this Case. 22 E. 3. 2.

4. In Detinue for a Box of Charters by the Heir upon the Delivery of his Father, if the Defendant comes the first Day, and says that he hath been always ready to render them, and yet is, if the Plaintiff does not Traverse this, the Defendant shall not be amerced. 38 E. 3. 20. adjudged.

5. In a Writ of Dower, if the Tenant vouches the Heir of the Baron, and the Vouchee demands the Lien, and upon this the Vouchee enters into Warranty, as he who hath nothing by Descent, &c. and the Tenant says that he hath Assets by Descent, upon which Judgment is given that the Demandant shall recover against the Tenant, &c. The Vouchee shall be in misericordia, tho' he doth not counterplead the Warranty. 16 E. 3. Amercement 14. adjudged.

6. In a cui in vita, if the Tenant vouches and the Vouchee comes the first Day of the Summons, and renders, yet he shall be amerced, for when the Render is not at the first Day of the Original, an Amercement is due to the King. 14 E. 3. Amercement 16. adjudged.

7. In an Account as Receiver of 10 l. if the Defendant pleads never his Receiver, &c. and this is found against him by which he is adjudged to account, and after he comes and tenders the 10 l. and swears upon a Book, that after the Time that the Monies were delivered to him, he could not find any Thing to buy for Profit, this shall be a good Discharge of the Defendant, and he shall not be amerced, nor the Plaintiff neither. 46 E. 3. Accompt 40.

8. In an Account, if the Defendant comes the first Day, and tenders the Money, and the Plaintiff accepts it, none of them shall be amerced. 2 R. 2. Accompt 45.

Fol. 213.

9. In a Writ of Debt, if the Defendant comes the first Day and appears by Attorney and makes Defence, Scilicet defendit vim & injuriam quando, &c. and after the Attorney pleads non sum informatus, and thereupon Judgment is given against him, and that the Defendant is in misericordia, this Amercement is well assessed; for when he comes the first Day, if he will save his Amercement, he ought to render the Action to the Plaintiff, and not make Defence, as he hath done here. Mich. 4 Jac. B. R. Between Hobberlye and Lewis adjudged in a Writ of Error, but Mich. 9 Car. B. R. between Barecroft and Rookes adjudged contra in a Writ of Error upon a Judgment in Banco, but this was not moved. Intratur Trin. 9 Car. Rot. 664. but there he came the first Day by Summons.

10. So in a Writ of Debt, if the Defendant comes the first Day and imparles till the next Term, and then Judgment is given upon non sum informatus, the Defendant shall be amerced. H. 10. Jac. B. R. Between Dame Slaney and Vawtrey, adjudged quod capiatur, but it seems as if this was mistaken.

(a) Yelv. 108. S. P. adjudged.

11. (a) If in an Action of Debt the Defendant comes the first Day by Attorney, and says that non est informatus, and thereupon Judgment is given, the Judgment shall be against the Defendant for the Debt, Damages and Costs, but nihil in misericordia quia venit primo die per summonitionem, &c. Mich. 9 Car. B. R. between Barecroft and Rookes adjudged in a Writ of Error upon a Judgment in Banco, because this is all one as to the Plaintiff as if he had confessed the Action, for he is not more delayed by this, and this is the Course of the Common Pleas in such Cases. Intratur Trin. 9 Car. Rot. 664.

(b) Or rather fined upon the Statute of Marlbr' but such Fine must be in an Action founded upon that Statute. 2 Inst. 104, 105. 8 Co. 60. b. 2 Inst. 131. (c) Of Marlbr' made 52 H. 3. cap. 2. or cap. 15. which vide explained. 2 Inst. 104, 105, 131.

12. In a Replevin, if the Issue be whether the Place be hors de son fee, and this is found for the Plaintiff, yet the Avowant shall not be (b) amerced, because the Action is not founded upon the (c) Statute that Wills, that none shall Distrain out of his Fee. 28 E. 3. Amercement 24. adjudged.

13. In an Action of Debt upon a Bill, and upon an Emisset, if the Defendant as to the Bill pleads non est factum, and as to the Emisset non debet, and both are found against him, and Judgment to be given against the Defendant quod capiatur for denying his Deed; yet Judgment ought to be given quod sit in misericordia, as to the Emisset. Trin. 11 Car. B. R. between (c) Elconhead and Deereman, resolved and a Judgment given in the Marshalsea, reversed accordingly in a Writ of Error, because the Judgment was not that he should be in misericordia for this. Intratur H. 10. Rot. 876.

(c) All. 74 75. S. C. cited to be adjudged and reversed accordingly.

14. Upon a Discontinuance in a personal or real Action, the Demandant or Plaintiff shall not be amerced, for this is the Act of the Court. 8 Co. 61. a.

15. So if the Court is ousted of Jurisdiction. 8 Co. 61. b.

16. If in a Writ of Entry in *le quibus* in *Wales*, the Defendant pleads *non disseisivit*, and pending this Plea, a general Pardon is made by Parliament, by which all Fines, Amercements, &c. are pardoned, and after Judgment is given for the Demandant, yet the Tenant shall not be amerced for the Delay after; for the not rendring the first Day according to the Command of the King's Writ is the Cause of the Amercement, and that is pardoned. *Mich.* 39 and 40 *Eliz.* between (c) *Hall* and *Vaughan*. 5 Co. 49. adjudged.

(c) Moor 394. pl. 511. S. C. adjudged Co. Lit. 126. b. S. C. Jenk. Cent. 258.

17. If in Debt against Executors, the Defendants do not appear the first Day, but after come and plead *plene administravit*, and thereupon the Plaintiff prays Judgment, *quando Assets acciderint*, he shall have such Judgment, and the Defendants shall be amerced. *Mich.* 22 *Car.* 2. between (d) *Noel* and *Nelson*. 2 *San.* 226. adjudged upon a Writ of Error, and the first Judgment affirmed accordingly, and though by the Record it did not appear, but that the Defendants pleaded the Day of the Declaration, yet *per Vaughan Ch. Justice*, it shall not be so intended, unless entered *venerunt primo die*. But by this Reporter Semble this Case is no Law, for tho' they delayed the Plaintiff, yet by their subsequent Plea they excused themselves of the Tort, as if in a (e) *Quare Impedit*, a Bishop imparles, and after pleads he claims nothing but as Ordinary, he shall not be amerced, because he hath excused himself of the Wrong.

(d) 1 Vent. 96. S. C. adjudged 1. Sid. 449. S. C. adjournatur. 1 Lev. 286. S. C. adjudged and said it was after Imparlance.

(e) But Q. of this Opinion, for I take the Law to be otherwise. Vide Hob. 200. Cro. Jac. 93.

(I) For what Cause.

Upon Abatement of Writs.

1. If a Writ abates by the Act of God, the Plaintiff or Demandant shall not be amerced. Co. Lit. 127.

(a) 8 Co. 61. a. S. P.

2. So if a Writ abates without any Default of the Plaintiff, he shall not be amerced. Co. Lit. 127.

3. (a) In an Action brought by two, if the Writ abates by the Death of one of them, the other shall not be amerced; because it is by the Act of God without the Default of the Party. (b) 43 Ass. 18. adjudged (c) 48 Ed. 3. 23. Co. Lit. 127.

(b) This is misprinted in the Original, and perhaps should be 47 Ass. pl. 3.

(c) Br. Amercement 12. S. C. Fitz. 13. S. C.

4. (d) If two join in a personal Action, and one is Nonsuit, which in Law is the Nonsuit of the other, yet the other shall not be amerced, because this is not his Fault. (e) 47 Ass. 3. adjudged.

(d) 8 Co. 61. a. S. P.

5. In Trespass for taking his Corn, if upon the Pleading the right of the Tithes comes in question by which the Writ abates, yet the Plaintiff shall not be amerced, because there is not any Default in him. 38 Ed. 3. 6. b.

(e) Br. Amercement. 63. S. C.

6. (f) If a Writ abates by the Act of the Plaintiff or Demandant, or for Matter of Form, the Plaintiff or Demandant shall be amerced. Co. Lit. 127.

(f) 8 Co. 61.

7. If a Writ which is grounded upon a Record abates, the Plaintiff shall not be amerced. Fitzh. Amercement 8.

8. As if a quid juris clamat abates, the Plaintiff shall not be amerced, because this is grounded upon a Record.

9. So if a Scire facias abates, the Plaintiff shall not be amerced. 44 Ed. 3. Amercement 8. 41 Ed. 3. there accordingly.

10. If a Scire facias to execute a Fine, abates by the Plea of one executed in his Ancestor, the Plaintiff shall be amerced. 30 Ed 3. 27. b. adjudged, but Quære.

11. If one Demandant or Plaintiff is nonsuit in such Action wherein Summons and Severance lies, and the other proceeds therein, he that is nonsuit shall not be amerced. 8 Co. 61. a.

(K) Upon a Nonsuit.

(a) In all judicial Process if the Plaintiff is bar'd

1. In a Writ (a) founded upon a Record if the Plaintiff be Nonsuit, yet he shall not be amerced. 11 H. 4. 7.

nonsuit, or the Writ abates, the Plaintiff shall not be amerced, because the Process is founded upon a Judgment and Record, and therefore the Plaintiff in such Action shall not find Pledges. 8 Co. 61. a.

(b) Fitz. Amercement 7. S. C. Br. 16. S. C.

2. As in a quid juris clamat, if the Plaintiff be nonsuit, yet he shall not be amerced. (b) 11 H. 4. 7. per Skrene.

(c) Br. Amercement 16. S. C.

3. So if the Plaintiff in a Scire Facias to execute a Fine, be nonsuit, the Plaintiff shall not be amerced. (c) 11 H. 4. 7. per Hank. 30 Ed. 3. 27. b.

(L) What Persons shall be amerced.

(a) 8 Co. 61. b. S. P. 3 Bulst. 276. S. P. arguendo Palm. 518. S.

1. (a) An Infant being Plaintiff or Demandant shall not be amerced, and this is the reason (b) he shall not find Pledges. Co. Lit. 127.

P. per Curiam. Vide 1 Rol. Abr. 288. pl. 2. (b) Cro. Car. 161. S. P. adjudged.

(c) But he shall be pardoned of Course. Vide Infra 8.

2. In a Quare Impedit against an Infant, if the Plaintiff hath a Writ to the Bishop, the Infant shall be amerced. (c) 44 Ed. 3. amercement 10.

(d) 1 Rol. Abr. 211. pl.

3. (d) An Infant Defendant shall be amerced if he pleads with the Demandant, and the Matter is found against him. 9 H. 6. 7. Dubitatur. 2 Ed. 3. 32.

1. S. P. Cro. Car. 410. S. P. in a Writ of Dowers appears cont.

(f) Br. Amercement. 43. S. C.

4. If an Infant in Reversion be received and plead in Bar, and this upon Demurrer is adjudged against him by the Court, he shall not be amerced. Dubitatur. 38 Ed. 3. 33. per Curiam.

5. So if an Infant be attainted of a Disseisin, he shall be amerced. (f) 43 Ass. 45. adjudged.

(g) Cro. Car. 410. S. P. in a Writ of Dower appears contra.

6. (g) If an Infant brings an Action, and the Matter is found against him, he shall be amerced. 17 Ed. 3. 75. b. contra D. 17 Eliz. 338, 41.

(h) Br. Amercement. 61. S. C.

7. If an Infant brings an Action, and this is abated for his Infancy, he shall be amerced. (h) 41 Ass. 14.

8. But when an Infant is amerced he ſhall be (i) pardoned of Courſe. 17 Ed. 3. 75. b. adjudged. (k) 30 Aſſ. 18. (l) 41 Aſſ. 14. (m) 43. Aſſ. 45. adjudged. 44 Ed. 3. Amercement 10.

(i) The Entry in ſuch Caſe is ideo in miſericordia, ſed pardonatur quia infans. 8 Co. 61. b. Palm. 518.—Nihil in miſericordia quia infans, per Cro. Car. 416.

(k) Fitz. Impriſonment 10. S. C. (l) Br. Amercement 61. S. C. (m) Br. Amercement 43. S. C.

9. If an Infant brings an Action by Prochein amy, and pending the Action comes of full Age, and makes an Attorney, and after is nonſuit, he ſhall be amerced. D. 17 Eliz. 338. 41. Curia.

10. If an Infant brings an Action of Treſpaſs by Guardian againſt two, and the Defendants plead not Guilty, and at the Niſi prius the Plaintiff appears in Perſon, and a Verdict is found for the Plaintiff for Part, and not Guilty for the reſt, and one of the Defendants not guilty, and Judgment is given for the Plaintiff, for that for which the Verdict is given him, & quod nil capiat per billam for the reſt, and him that is found not Guilty, ſed nihil de miſericordia pro falſo clamore, &c. quia quærens tempore (*) tranſgreſſionis prædictæ factæ infra ætatem exiſtebat, yet this is good and no Error. Trin. 11 Car. in Camera Scaccarii between Methwold and Anguiſh, adjudged in a Writ of Error, and the firſt Judgment given in the King's Bench affirmed, notwithſtanding I urged this to be an Error, and they took a Diverſity between this and a nonſuit.

(*) Fol. 215.

11. (o) The King being Plaintiff or Demandant ſhall not be amerced. Co. Lit. 127.

(o) 8 Co. 61. b. S. P. F. N. Br. 31. F. 3 Bulſt. 276. S. P. arguendo.

12. (p) The Queen, the Wife of the King ſhall not be amerced. Paſch. 13 E. 1. B. Rot. 52. where the Judgment is againſt the Queen, & in miſericordia nihil eo quod conſors regis.

(p) So where Demandant or Plaintiff, and therefore ſhall not find Pledges. Co.

13. (q) If a Precipe is brought againſt an Infant, and pending the Plea he comes of full Age, he ſhall be amerced for the Delay after he comes of full Age. (r) Mich. 15, 16 Eliz. B. adjudged, quod vide. Co. 5. in Vaughan's Caſe. 49.

Lit. 127. 8 Co. 61. b. F. N. Br. 101. a. 3 Bulſt. 276. S. P. argued. (q) Co. Lit. 126. b. 127. at the Top S. P. (r) Moor 394. pl. 511. S. C. cited 1 Rol. Rep. 294. S. C. cited 3 Bulſt. 151. S. C. cited per Coke.

(M) Who ſhall be amerced.

1. If Baron and Feme are vouched as in the right of the Feme, and Judgment is given againſt them, and the Feme is to be amerced, they ſhall be amerced tho' the Feme be within Age, the Husband being of full Age. 16 Ed. 3. Amercement (a) 16. adjudged.

(a) This is miſprinted in the Original, and ſhould be 14.

2. And this Amercement ſhall not be pardoned of Courſe. 16 Ed. 3. Amercement (b) 16. adjudged.

(b) This ſhould be 14.

3. In an Action upon the Caſe againſt Baron and Feme for ſcandalous Words ſpoke by the Feme, and Judgment is given againſt them both, as well the Husband as the Wife ſhall be amerced. Hobart's Reports 170. between (c) Scaif and Nelſon, per Curiam admit.

(c) Hob. Fol. 127. S. C. and S. P. admit per Curiam. Moor 869. pl. 1206. S. C.

4. (d) If a Judgment given in an inferior Court be reverſed upon a Writ of falſe Judgment, the Suitors ſhall be amerced. (e) 22 Ed. 3. 2.

5. If he in Reverſion prays to be received upon the Default of the Leſſee, and loſes by Plea, he ſhall be amerced. 38 Ed. 3. 33. admit.

and S. P. admit per Curiam. 1 Brownl. 16. S. C. and S. P. admit per Curiam. Cro. Jac. 633. S. C. cited. 1 Rol. Abr. 206. pl. 9. S. C. (d) 2 Inſt. 196. S. P. 558. S. P. Dier 263. a. S. P. appears. 1 Mod. 249. S. P. adjudged. (e) Fitz. Amercement 19. S. C. 8 Co. 40. b. S. C. cited.

6. In

7. If a Writ which is grounded upon a Record abates, the Plaintiff shall not be amerced. Fitzh. Amercement 8.

8. As if a quid juris clamat abates, the Plaintiff shall not be amerced, because this is grounded upon a Record.

9. So if a Scire facias abates, the Plaintiff shall not be amerced. 44 Ed. 3. Amercement 8. 41 Ed. 3. there accordingly.

10. If a Scire facias to execute a Fine, abates by the Plea of once executed in his Anceſtor, the Plaintiff shall be amerced. 30 Ed 3. 27. b. adjudged, but Quære.

11. If one Demandant or Plaintiff is nonsuit in such Action wherein Summons and Severance lies, and the other proceeds therein, he that is nonsuit shall not be amerced. 8 Co. 61. a.

(K) Upon a Nonsuit.

(a) In all judicial Proceſs if the Plaintiff is bar'd

1. In a Writ (a) founded upon a Record if the Plaintiff be Nonsuit, yet he shall not be amerced. 11 H. 4. 7.

nonsuit, or the Writ abates, the Plaintiff shall not be amerced, because the Proceſs is founded upon a Judgment and Record, and therefore the Plaintiff in such Action shall not find Pledges. 8 Co. 61. a.

(b) Fitz. Amercement 7. S. C. Br. 16. S. C.

2. As in a quid juris clamat, if the Plaintiff be nonsuit, yet he shall not be amerced. (b) 11 H. 4. 7. per Skrene.

(c) Br. Amercement 16. S. C.

3. So if the Plaintiff in a Scire Facias to execute a Fine, be nonsuit, the Plaintiff shall not be amerced. (c) 11 H. 4. 7. per Hank. 30 Ed. 3. 27. b.

(L) What Perſons shall be amerced.

(a) 8 Co. 61. b. S. P. 3 Bulſt. 276. S.P.arguendo Palm. 518. S. P.

1. (a) An Infant being Plaintiff or Demandant shall not be amerced, and this is the reaſon (b) he shall not find Pledges. Co. Lit. 127.

per Curiam. Vide 1 Rol. Abr. 288. pl. 2. (b) Cro. Car. 161. S. P. adjudged.

(c) But he shall be pardoned of Courſe. Vide Infra 8.

2. In a Quare Impedit against an Infant, if the Plaintiff hath a Writ to the Biſhop, the Infant shall be amerced. (c) 44 Ed. 3. amercement 10.

(d) 1 Rol. Abr. 211. pl.

3. (d) An Infant Defendant shall be amerced if he pleads with the Demandant, and the Matter is found against him. 9 H. 6. 7. Dubitatur. 2 Ed. 3. 32.

1. S. P. Cro. Car. 410. S. P. in a Writ of Dowers appears cont.

(f) Br. Amercement. 43. S. C. (g) Cro. Car. 410. S. P. in a Writ of Dower appears contra. (h) Br. Amercement. 61. S. C.

4. If an Infant in Reverſion be received and plead in Bar, and this upon Demurrer is adjudged against him by the Court, he shall not be amerced. Dubitatur. 38 Ed. 3. 33. per Curiam.

5. So if an Infant be attainted of a Diſſeiſin, he shall be amerced. (f) 43 Aſſ. 45. adjudged.

6. (g) If an Infant brings an Action, and the Matter is found against him, he shall be amerced. 17 Ed. 3. 75. b. contra D. 17 Eliz. 338, 41.

7. If an Infant brings an Action, and this is abated for his Infancy, he shall be amerced. (h) 41 Aſſ. 14.

8. But when an Infant is amerced he ſhall be (i) pardoned of Courſe. 17 Ed. 3. 75. b. adjudged. (k) 30 Aſſ. 18. (l) 41 Aſſ. 14. (m) 43. Aſſ. 45. adjudged. 44 Ed. 3. Amercement 10.

(i) The Entry in ſuch Caſe is ideo in miſericordia, ſed pardonatur quia infans. 8 Co. 61. b. Palm. 518.—Nihil in miſericordia quia infans, per Cro. Car. 410. (k) Fitz. Impriſonment 10. S. C. (l) Br. Amercement 61. S. C. (m) Br. Amercement 43. S. C.

9. If an Infant brings an Action by Prochein amy, and pending the Action comes of full Age, and makes an Attorney, and after is nonſuit, he ſhall be amerced. D. 17 Eliz. 338. 41. Curia.

10. If an Infant brings an Action of Treſpaſs by Guardian againſt two, and the Defendants plead not Guilty, and at the Niſi prius the Plaintiff appears in Perſon, and a Verdict is found for the Plaintiff for Part, and not Guilty for the reſt, and one of the Defendants not guilty, and Judgment is given for the Plaintiff, for that for which the Verdict is given for him, & quod nil capiat per billam for the reſt, and him that is found not Guilty, ſed nihil de miſericordia pro falſo clamore, &c. quia quærens tempore (*) tranſgreſſionis prædictæ factæ infra ætatem exiſtebat, yet this is good and no Error. Trin. 11 Car. in Camera Scaccarii between Methwold and Anguiſh, adjudged in a Writ of Error, and the firſt Judgment given in the King's Bench affirmed, notwithſtanding I urged this to be an Error, and they took a Diverſity between this and a nonſuit.

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11. (o) The King being Plaintiff or Demandant ſhall not be amerced. Co. Lit. 127.

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(p) So where Demandant or Plaintiff, and therefore ſhall not find Pledges. Co.

13. (q) If a Precipe is brought againſt an Infant, and pending the Plea he comes of full Age, he ſhall be amerced for the Delay after he comes of full Age. (r) Mich. 15, 16 Eliz. B. adjudged, quod vide. Co. 5. in Vaughan's Caſe. 49.

Lit. 127. 8 Co. 61. b. F. N. Br. 101. a. 3 Bulſt. 276. S. P. argued. (q) Co. Lit. 126. b. 127. at the Top S. P. (r) Moor 394. pl. 511. S. C. cited 1 Rol. Rep. 294. S. C. cited 3 Bulſt. 151. S. C. cited per Coke.

(M) Who ſhall be amerced.

1. If Baron and Feme are vouched as in the Right of the Feme, and Judgment is given againſt them, and the Feme is to be amerced, they ſhall be amerced tho' the Feme be within Age, the Husband being of full Age. 16 Ed. 3. Amercement (a) 16. adjudged.

2. And this Amercement ſhall not be pardoned of Courſe. 16 Ed. 3. Amercement (b) 16. adjudged.

3. In an Action upon the Caſe againſt Baron and Feme for ſcandalous Words ſpoke by the Feme, and Judgment is given againſt them both, as well the Husband as the Wife ſhall be amerced. Hobart's Reports 170. between (c) Scaif and Nelſon, per Curiam admit.

(a) This is miſprinted in the Original, and ſhould be 14. (b) This ſhould be 14.

4. (d) If a Judgment given in an inferior Court be reverſed upon a Writ of falſe Judgment, the Suitors ſhall be amerced. (e) 22 Ed. 3. 2.

5. If he in Reverſion prays to be received upon the Default of the Leſſee, and loſes by Plea, he ſhall be amerced. 38 Ed. 3. 33. admit.

(c) Hob. Fol. 127. S. C. and S. P. admit per Curiam. Moor 869. pl. 1206. S. C. and S. P. admit per Curiam. 1 Brownl. 16. S. C. and S. P. admit per Curiam. Cro. Jac. 633. S. C. cited. 1 Rol. Abr. 206. pl. 9. S. C. (d) 2 Inſt. 196. S. P. 558. S. P. Dier 263. a. S. P. appears. 1 Mod. 249. S. P. adjudged. (e) Fitz. Amercement 19. S. C. 8 Co. 40. b. S. C. cited.

6. In

6 In an Attaint, if Leſſee for Life hath Aid of him in Reverſion, and they join and loſe, he in Reverſion ſhall be amerced as well as the Leſſee. 40 Aſſ. 20. adjudged.

7. If an Action be brought againſt four Executors, and one only appears, by which he is put to anſwer by the (f) Statute, who pleads Plene Adminiſtravit, upon which Iſſue being joined, all appear at Niſi prius, and there it is found for the Plaintiff; though in this Caſe Judgment may be againſt all four Executors to recover de bonis teſtatoris, yet he only who pleaded ſhall be amerced, and not the other three, for their Appearance at the Aſſizes is not any Appearance, they not having pleaded before to Iſſue. Mich. 9 Car. B. R. between Cruſe and Berrie, adjudged in a Writ of Error. Intratur Trin. 9. Rot. 1163.

(f) 9 Ed. 3. cap. 3.

8. In an Action of Trover and Converſion againſt Baron and Feme for the Converſion of the Feme during the Coverture, if the Feme be found guilty by Verdict, and the Baron not guilty, yet both ſhall be in Miſericordia, for the Amercement is not for the Converſion, but for the Delay of the Suit, and the non rendring the firſt Day, of which the Baron is as well guilty as the Feme. Mich. 15 Jac. B. R. between (g) Wood and his Wife againſt Sutcliffe, per Curiam the Judgment reverſed, Hill. 13. Jac. B. R. accordingly per Curiam.

(g) Cro. Jac. 439, 440. S.C. reverſed accordingly.

1 Rol. Rep. 293, 294. S. C. reverſed accordingly. 3 Bulſt. 151. S. C. reverſed accordingly per totam Curiam. 1 Rol. Abr. 221. pl. 8. 9. S. C.

9. In a Writ of Dower, if the Tenant vouches the Baron and Feme as in the Right of the Feme, as Heir to the Husband of the Demandant, and the Vouchees demand the Lien, upon which the Lien is ſhewn, and they enter into (*) Warranty as thoſe who have nothing by Deſcent, and the Tenant ſays, that they have by Deſcent; upon which Judgment is given againſt the Tenant, &c. the Feme only ſhall be amerced without the Baron, but both 16 E. 3. Amercement 14. adjudged.

(*) Fol. 216.

(N) (a) In what Caſes where the Defendant is found guilty of Part.

(a) If Part is found for the Demandant or Plaintiff, and Part againſt him, he ſhall be amerced. 8 Co. 61. a.

1. In a Writ of Forcible Entry againſt ſeveral for entring with Force and holding out with Force, if ſome are found guilty of the forcible Entry, and not guilty of the holding out with Force, the Plaintiff ſhall be in miſericordia for this. (b) 19 H. 6. 32.

(b) Br. Amercement. 28, S. C.

2. So if ſome are found guilty of the holding with Force, and that they entred peaceably, the Plaintiff ſhall be amerced for this. (c) 19 H. 6. 32.

(c) Br. Amercement. 18. S. C.

3. If a Man brings an Aſſiſe againſt the Tenant and Diſſeiſor of a Rent-Service, and the Tenant is acquitted, and the Diſſeiſor found guilty, the Demandant ſhall be amerced for the Tenant. 17 E. 3. 46. b. adjudged.

4. So in an Aſſiſe of a Rent againſt one Tenant, and two Diſſeiſors, if he recovers againſt the Tenant, and one Diſſeiſor, and the other is acquitted of the Diſſeiſin, the Demandant ſhall be amerced for him. (d) 31 Aſſ. 31. adjudged.

(d) Br. Amercement. 42. S. C.

5. In an Aſſiſe for ſeveral Rents, if the Defendant be found a Diſſeiſor of one Rent, and not of the other, the Plaintiff ſhall be amerced for this Rent, of which no Diſſeiſin is committed. 17 Ed. 3. 75. b. adjudged.

6. In an Account upon a Receipt of Parcel by another's Hand, of which the Defendant Traverſes the Receipt, upon which they are at Iſſue and of the other Parcel upon a Receipt by the Hands of the Plaintiff himſelf,

himſelf, to which the Defendant wages his Law, ſo that the Plaintiff takes nothing by his Writ as to this, but is in Miſericordia. 14 Ed. 3. Amercement 17. adjudged: And in this Caſe though the Inqueſt after paſs againſt the Defendant for the Reſidue, yet he ſhall not be amerced. 14 Ed. 3. Amercement 17. per Shard.

7. If the Plaintiff declares that he was poſſeſſed of an Hoy floating at Anchor in the River *Thames*, loaded with Goods, and that the Defendant *Satisſciens* being Maſter of a Ship ſailing in the River, ſo negligently governed his ſaid Ship, that ſhe *in præd. Naviculam* of the Plaintiff *violenter ruebat & illam fregit & ſubmerſit*, and upon not guilty pleaded, the Jury find that *quoad negligentem gubernationem navis præd. Defend. per quod in naviculam Querentis violenter ruebat & illam fregit & ſubmerſit*, the Defendant is guilty, *& quoad reſiduum præmiſſor'*. that he is not guilty, The Plaintiff ſhall not be amerced, for there is no *reſiduum*, and the firſt Part of the Verdict comprehends all the Injury complained of in the Declaration. *Trin.* 32 *Car.* 2. between *Muſtard* and *Hornden Hardr.* 390. adjudged, and the Judgment in which the Plaintiff was *in miſericordia pro falſo clamore ſuo* as to the *reſiduum* reverſed accordingly, tho' objected the *Reſiduum* might be intended as to the *Satisſciens*.

(O) In what Caſes where the Judgment is given againſt the Defendant for Part.

1. IN an Action of Covenant for ſeveral Covenants broke, if the Plaintiff be barred for one he ſhall be amerced for this, tho' he recovers for the other. 1 Trin. 4 Jac. B. R. between (a) Waſſell and Yelton agreed.

(a) 1 Rol. Rep. 411. S. C. and S.P. per Coke and Croke and ſeveral Clerks.

2. In an Action upon the Caſe upon a Promiſe to do two Things, Scilicet, to pay ſo much for certain Land ſold, and if the Vendee ſells it again for more than he paid, to pay ſo much more; and the Defendant pleads in Bar a Releaſe, which is adjudged no Bar for Part (ſcilicet for the laſt Sum,) and a Bar for the firſt Sum, he ſhall be in Miſericordia for this Sum of which he is bar'd, though it be an entire Promiſe, and he could not have an Action but upon both Parts, for he might have acknowledged himſelf ſatisfied of that which he had releaſed. Trin. 14 Jac. B. R. between (b) Waſſel and Yelton.

(b) 1 Rol. Rep. 411. S. C. adjourned. 3 Bulſt. 230, 231, &c. S. C. adjudged upon a Writ of Error, and the Judgment affirmed accordingly.

3. In Treſpaſs againſt two, if one be found guilty to Damage quoad him, and the other is found guilty to Damage quoad him, in this Caſe each Defendant ſhall be amerced ſeverally, and the Plaintiff ſhall alſo be ſeverally amerced quoad each of them. Co. 5. Specot's Caſe. 58. b.

(P) In what Caſes where the Defendant is (a) found guilty of Part, or is adjudged guilty upon Demurrer.

Fol. 217.

(a) If Part is found for the Demandant or Plaintiff, and Part againſt him, he ſhall be amerced, 8 Co. 61. a.

1. IN Treſpaſs for a Battery and Impriſonment, if the Defendant pleads to Iſſue for Part of the Matter and Time, and for the reſt pleads a ſpecial Juſtification, upon which the Parties demur, and

and this is adjudged against the Defendant, and the Plaintiff comes & fatetur ſe ulterius nolle proſequi as to the Iſſue, yet he ſhall not be amerced for this, becauſe he hath Judgment against the Defendant for Part. Trin. 15 Jac. between (b) Evely and Sloley adjudged at Serjeant's Inn in a Writ of Error, and the Judgment affirmed.

(b) Hob. 180. S. C. Cro. Jac. 439. S. C. 2 Bulſt. 326. S. C. 1 Rol. Rep. 264. S. C. but in none of theſe Books does this Point appear.

2. In an Action upon the Caſe for ſaying, the Plaintiff was a ſtrong Thief, if it be found that the Defendant ſaid all the Words but the Word ſtrong, and that he did not ſay this, the Plaintiff ſhall have Judgment upon the Words found, and ſhall not be amerced for the Word ſtrong. Dubitatur D. 6 E. 6. 75. 22.

3. In an Action of Waſte in domibus & gardino, if upon the Writ of Enquiry of Waſte, the Defendant be found guilty in domibus, and not guilty in gardino, the Plaintiff ſhall be in Miſericordia (c) for the Garden (d) 14 E. 3. Waſte 27.

(c) So if in Caſe the Plaintiff declares he is ſeiſed of 200 Acres, to which he hath Common Appurtenant, and that the Defendant incloſed per quod, &c. and the Jury find that he hath only 90 Acres Parcel, &c. he ſhall be in Miſericordia for the Reſidue, Palm. 270, 271. (d) Cro. Car. 453. S. C. cited and agreed, becauſe he counts for Waſte in Places where no Waſte was done, but where Waſte is aſſigned in cutting down 20 Trees, and the Waſte is found in cutting down 2 Trees only, and ſo the Variance in Quantity, it is otherways. Cro. Car. 453. per Barkly, Croke and Jones dubitante.

4. (e) In (f) Treſpaſs for the Battery of his Servant, and the Taking of his Timber, if the Defendant be found guilty of the Taking of the Timber, and not guilty of the Battery of the Servant, the Plaintiff ſhall be amerced for this. 22 Aſſ. 76. adjudged.

(e) Moor 692. pl. 956. S. P. appears Dier. 89. pl. 111. like Point per Curiam.

(f) So in Debt where Part is found for the Plaintiff, and Part for the Defendant. per 2 Sid. 137. per Glyn Chief Juſtice. Cro. Eliz. 699. adjudged.

5. If in Debt upon the Statute of *H.* 8. for buying of Titles, the Plaintiff demands 50 *l.* for the Value of the Land, and the Jury find the Value but 20 *l.* the Plaintiff ſhall have Judgment, *&c.* but ſhall be amerced *quoad* the Reſidue of the 50 *l. Paſch.* 33 *Eliz.* between *Savery* and *Tey*. *Cro. Eliz.* 257. adjudged, and for want thereof the firſt Judgment reverſed.

6. But in Treſpaſs or other Actions where the Plaintiff declares *ad damnum*, if leſs be found than he declares for, yet the Plaintiff ſhall not be amerced becauſe the Action is founded upon an Uncertainty. *Paſch.* 33 *Eliz.* between *Savery* and *Tey*. *Cro. Eliz.* 257. *per Curiam.*

7. In Replevin, if the Defendant avows the Taking of two ſeveral Diſtreſſes for ſeveral Cauſes, and the Iſſue is joined upon the Taking of one Diſtreſs, and found for the Plaintiff, and a *nolle proſequi* entered as to the other, the Plaintiff ſhall not be amerced. *Hill.* 1658. between *Young* and *Wakeman*. 2 *Sid.* 136. *per Curiam*, but Time was given to ſearch Precedents.

(Q) 1. (a) In what Caſes where one Defendant is found guilty and the other not.

(a) If all or Part is found againſt one Tenant or Defendant, and nothing or but Part againſt the other, the Demandant or Plaintiff ſhall be amerced, unleſs there be no Default in him. 8 Co. 61. a.

1. In an Aſſiſe againſt two, if it be adjudged againſt one upon his Plea, and the Demandant releaſes his Damages, and hath Judgment preſently for the Land againſt him, relinquiſhing his Suit

againſt

against the other, he shall not be amerced for the other. 44 Ass. 33. (b) 44 E. 3. 24. adjudged.

(b) Fitz. Amercement 9. S. C.

2. In Trespass against several, and one is found guilty, and the Plaintiff prays Judgment against him, relinquishing his Suit against the rest, he shall not be amerced for them. 44 Ass. 33. (c) 44 E. 3. 24.

(c) Fitz. Amercement 9. S. C.

3. In Trespass against several for a Battery, if one Defendant be found not guilty and the rest guilty, yet the Plaintiff shall be amerced as to him who is found not guilty. 22 Ass. 76.

4. In Trespass against Baron and Feme, supposing that they both fecerunt the Trespass, if the Feme be found guilty of the Trespass before Coverture, but the Baron not guilty, the Plaintiff shall not be amerced quoad the Baron, for the Baron ought to be named for Conformity. (d) 28 Ass. 87. adjudged, (but (e) Nota, the Baron is supposed a Trespasser.)

(d) Fitz. Amercement 23. S. C. Br. 38. S. C. Fitz. Brief. 761. S. C.

(e) He could have no other Writ in this Case, so no Default in him, per 8 Co. 61. a.

5. In Trover and Conversion of 1000 Loads of Coal against three Persons, if one of the Defendants is found guilty of 100 Load, and not guilty of the rest, and another guilty of 100 Load, and not guilty of the rest, and the third of 100 Load, and not guilty of the rest; in this Case the Plaintiff shall not be amerced against any of them, because each of them is found guilty of Part, tho' severally. Mich. 2 Car. Between (f) Warne and others Plaintiffs, and Player Defendant, adjudged in a Writ of Error in Camera Scaccarii, this being assigned for Error, Mr. Litt. being of Counsel in the Case.

(f) Cro. Car. 54, 55. S. C. by which it appears there was but one

Misericordia pro falso clamore suo. 1 Jon. 244. S. C. but nothing of this Matter appears.

(R) In what Cases where the Recovery is against one and not against the other.

Fol. 218.

1. (a) In an Assise against two, if the Plaintiff recovers against one, and the other is found not guilty, the Plaintiff shall be amerced as to him. 23 Ass. 18. adjudged.

(a) Dier 312. pl. 85. S. P. appears.

(S) At what Time.

1. In an Account, if the Defendant be adjudged to Account, Judgment shall be presently before the final Judgment, quod sit in Misericordia, quia non prius computavit. Mich. 14 Jac. B. R. Parrey's Case, adjudged in a Writ of Error and affirmed by the Clerks to be the Course.

2. And in this Case, if he be after found in Arrearages, Judgment shall be again quod sit in Misericordia. Mich. 14 Jac. B. R. Parrey's Case adjudged.

(T) How

(T) How it ſhall be aſſeſſed.

Where two Amercements.

(a) 8 Co. 61. a. S. P. laid down as a Rule.

(a) The Defendant ſhall not be amerced (b) twice in one Action.

(b) Where one Defendant ſhall be amerced ſeveral Times for ſeveral Defaults in the ſame Action. Vide 2 Leon. 4. 5. 185, 186.

1. IN a Quare impedit, if the Plaintiff recovers the Preſentation againſt the Defendant, and thereupon Judgment is given upon Demurrer for a Writ to the Biſhop, and upon this the Defendant is amerced, and after a Writ is awarded to enquire of the Damages, and the other Points of the Writ, and found accordingly, and Judgment alſo given for this, the Defendant ſhall not be amerced again, Co. 5. (c) Specot. 58. b.

(c) This Caſe is in ſeveral other Books but no Notice taken of theſe Points.

2. In one Action againſt the ſame Defendant or Tenant, if the Defendant or Tenant pleads one Plea to Part, and another Plea to the reſt, or confeſſes Part, and pleads to Iſſue for the other, and ſeveral Iſſues are found againſt him, yet the Defendant or Tenant ſhall not be twice amerced. Co. 5. 58. b.

3. In Treſpaſs againſt two, if one be found guilty to Damage quoad him, and the other found guilty to Damage quoad him, in this Caſe (d) each Defendant ſhall be ſeverally amerced, and the Plaintiff alſo ſhall be ſeverally amerced againſt each of them. Co. 5. 58. b.

(d) Cro. Car. 55. S. P. con.

4. If in an *ejectione firmæ* againſt four, three are found guilty *quoad* Part, and not guilty for the Reſidue, and the fourth is found not guilty generally, the Plaintiff may be amerced jointly *quoad* all the Defendants, *Scilicet pro falſo clamore quoad* the three, for ſo much of which they were found not guilty, and *pro falſo clamore quoad* the fourth *quod ſit in Miſericordia*. *Hill.* 5 *Car.* 1. between *Deckerow & al' & Jenkins Cro. Car.* 178. adjudged. And the *Prothonotaries* ſaid the uſual Courſe was ſo and ſometimes otherways, *Scilicet* that *quoad* the Three for ſo much, *&c.* he be in *Miſericordia*, *&* *quoad* the Fourth, that he be in *Miſericordia* alſo.

(V) (a) Fine.

What Court may impoſe it.

(a) For the various Signification of the Word Fine, vide 8 Co. 59. b. Co. Lit. 126. b.

1. A Court Leet may impoſe a Fine upon an Officer if he will not do his Office upon Command. (b) 7 H. 6. 12. b.

(b) Br. Amercement 25. S. C. 65. S. C. Br. Lat. 14, 29. S. C.

2. The Lord C. was ſeized of the Manor of *Graveſend*, and preſcribed for a Water Court within his Manor, for Reformation of the Diſorders amongſt Watermen, and whether this Court was not in Nature of a Leet, and not a Court Baron, ſo that the Steward without any ſpecial Preſcription might aſſeſs a Fine. *Mich.* 32 and 33 *Eliz.* Between the Lord *Cobham* and *Brown's* 1 *Leon.* 216, 217. *dubitatur & adjornatur.*

(c) Godb. 381. S. P. adjudged.

3. (c) No Court unleſs of Record can Fine or Impriſon. 11 *Co.* 43. b.

4. (d) Some Courts may Fine but not Impriſon, as the (e) Leet. 11 Co. 43. b.

(d) 1 Rol. Rep. 74. S. P. per Coke.

(e) This is the only Court that can Fine and not Impriſon. 1 Rol. Rep. 35. per Coke.

5. (f) Some may Impriſon, but not Fine, as the Conſtables at the Petit Seſſions, 11 Co. 44. a. at the Top.

(f) 1 Rol. Rep. 74. S. P. per Coke.

6. Some Courts cannot Fine or Impriſon but amerce, as the County, Hundred, &c. 11 Co. 43. b.

7. Some (g) Courts can neither Fine, Impriſon nor Amerce, as (h) Eccleſiaſtical Courts held before (i) the Ordinary, Arch-deacon, &c. or their Commiſſaries, and ſuch who proceed according to the Canon or Civil Law. 11 Co. 44. a.

(g) No Engliſh Court can Fine for not appearing to anſwer a Bill there. 1 Rol. Rep. 336. Nor can the Chancellor for Breach of a Decree. 4 Inſt. 84. (h) Their Proceedings are only by Eccleſiaſtical Cenſures. 4 Inſt. 324. vide 16 Car. 1. cap. 11. par. 4. 13 Car. 2. cap. 12. Noy 17. (i) But whether the High Commiſſion Court (while ſtanding) could Fine and Impriſon was vexat. quæſtio. Vide Poph. 60. Cro. Car. 582. 4 Inſt. 324. &c. 332. fully conſidered, and that they could not. 16 Car. 1. cap. 11. par. 2. ſuch Fines and Imprizonment recited to have been uſed to the Oppreſſion of the Subject. Poph. 60.

(W) Fine for a Contempt.

(a) In what Caſes for ſuing in Contempt of the Court.

(a) Where one under Countenance of Law is guilty of a double Vexation, as if he ſues in B. and pending this ſues in London for the ſame Cauſe. 8 Co. 60. a. Goulſ. 30. pl. 5.

1. If one Man arreſts another in London, coming to the Common Pleas to anſwer a Writ at the Suit of the ſame Man, becauſe he ought to have his Privilege, the Plaintiff ſhall be fined for the Contempt to the Court. (b) 9 H. 6. 55. curia.

(b) Co. 60. a. S. C. cited.

2. But if another Man had arreſted him who was not Plaintiff in the Writ in Banco, he ſhould not be fined. 9 H. 6. 55. curia.

3. If the Plaintiff in a Suit in Banco be arreſted at the Suit of the Defendant in London before the Return of the Writ in Banco, this is a Contempt to the Court, and for this he ſhall be Fined and Impriſoned. (c) 11 H. 6. 22.

(c) Fitz. Fine 13. S. C. Br. Fine pur Contempt. 56. S. C.

(X) Who ſhall be Fined.

1. In an Action upon the Statute of Marlebridge, for driving a Diſtreſs out of the County, if the Defendant juſtifies as Bailiff to I. S. by ſpecial Matter, and it is adjudged againſt him, he ſhall be amerced, for though he juſtifies as Bailiff, yet this is not proved (a) 30 Aſſ. 38.

Fol. 219.

(a) Br. Treſpaſs 255. S. C. 1 Rol. Abr. 221. pl. 1.

2. But otherways it had been if I. S. had been a Party to the Writ. (b) 30 Aſſ. 38.

S. C. (b) 1 Rol. Abr. 221. pl. 2. S. C.

(T) How it ſhall be aſſeſſed.

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(d) Cro. Car. 55. S. P. con.

4. If in an *ejectione firmæ* againſt four, three are found guilty *quoad* Part, and not guilty for the Reſidue, and the fourth is found not guilty generally, the Plaintiff may be amerced jointly *quoad* all the Defendants, *Scilicet pro falſo clamore quoad* the three, for ſo much of which they were found not guilty, and *pro falſo clamore quoad* the fourth *quod ſit in Miſericordia.* *Hill.* 5 *Car.* 1. between *Deckerow & al' & Jenkins Cro. Car.* 178. adjudged. And the *Prothonotaries* ſaid the uſual Courſe was ſo and ſometimes otherways, *Scilicet* that *quoad* the Three for ſo much, *&c.* he be in *Miſericordia*, *&* *quoad* the Fourth, that he be in *Miſericordia* alſo.

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1. **A Court Leet may impoſe a Fine upon an Officer if he will not do his Office upon Command.** (b) 7 H. 6. 12. b.

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Fol. 219.

(a) Br. Treſpaſs 255. S. C. 1 Rol. Abr. 221. pl. 1.

2. But otherways it had been if I. S. had been a Party to the Writ. (b) 30 Aſſ. 38.

S. C. (b) 1 Rol. Abr. 221. pl. 2. S. C.

(Y) For what Cauſes a Fine may be impoſed.

1. A Court that hath Power to Fine may command the People to keep Silence upon a Pain. 7 H. 6. 12.

(a) 8 Co. 39. b. S. P. (b) Br. Leet 14. 29. S. C. 1 Rol. Abr. 542. S. C.

2. (a) A Court Leet may command the Bailiff to execute his Office, as to make a Pannel upon a Pain, and if he doth it not, he ſhall forfeit it. (b) 7 H. 6. 12. b.

3. If a Juror at the Bar will not ſwear he may be fined. 7 H. 6. 12. b.

(c) Br. Fine purcontempt. 32. S. C.

4. If any of the Jury give their Verdict to the Court before they are all agreed of their Verdict, they may be fined. (c) 40 Aſſ. 10.

5. In Treſpaſs, if the Defendant pleads the Releaſe of the Plaintiff, he ſhall not be fined to the King, becauſe this is not any Confeſſion of the Treſpaſs. 11 H. 6. 29.

6. If Time out of Mind a Conſtable hath yearly been elected and preſented by the Jury at a Leet, and *I. S.* by them is elected and preſented Conſtable, and being in Court, and by the Steward required to take his Oath accordingly, refuſes and departs in Contempt of the Court, the Steward may impoſe a Fine upon him. *Trin.* 30 *Eliz.* (d) *Grieſly's* Caſe. 8 Co. 38. *a. b.*

(d) Sav. 93. S. C. and S. P. appears.

7. So if a Tithing Man refuſe to make a Preſentment in a Leet, the Steward may impoſe a reaſonable Fine upon him. 8 *Co.* 38. *b.*

8. So if one of the Jury in a Leet departs without giving his Verdict, he ſhall be fined by the Steward. 8 *Co.* 38. *b.*

(e) So if two are fighting, and others looking on who do not endeavour to part them, if one is killed, the lookers on may be indicted and fined to the King. Noy 50.

9. (e) If one is preſent when a Murder is done, and does not his beſt Endeavour to apprehend the Murderer, he ſhall be fined and impriſoned. 3 *Inſt.* 53.

10. If at a Juſtice Seat held within a Foreſt, a Man makes a falſe Claim of Privilege, he ſhall be fined. 4 *Inſt.* 297.

(Z) (a) In what Actions a Man ſhall be fined by Judgment.

(a) No Judgment after Verdict, Confeſſion by cognovit actionem or relicta veri-ficatione ſhall be reverſed for want of a miſericordia, or a capiatur, or becauſe the one is put for the other, per 16 and 17 Car. 2. cap. 8.

1. A Man ſhall not be fined in an Audita Querela. (b) 12 H. 4. 15. b.

(b) Br. Fine pur contempt. 15. S. C.

(c) 52 H. 3. cap. 4. explained. 2 Inſt. 106, 107.

2. In an Action upon the (c) Statute of Marlebridge for driving a Diſtreſs into another County, the Defendant ſhall be ranſomed (which admits that he ſhall be fined.) (d) 30 Aſſ. 38.

(d) Br. Treſpaſs 255. S. C. 1 Rol. Abr. 222. pl. 12. S. C.

3. In an Aſſiſe of a Rent, if the Tenant be found guilty of a Diſſeiſin with force, becauſe of a Reſcue done by him without vi & armis, he ſhall be fined, though this be not within the Statute. (e) 33 H. 6. 206. (e) Br. Fine pur contempt 46. S. C.

4. 10 *E.* 1. *Rol. Finium. Memb.* 9. Fine taken for not proſecuting an Appeal, &c.

5. (f) In a Writ of Recaption in the Common Pleas, if Judgment be given againſt the Defendant, he ſhall be Fined and Impriſoned. 8 *Co.* 41. *a.* (f) 8 Co. 60. b. S. P. 120. a. S. P. 11 Co. 43. b. S. P. F. N. B. 73. D. S. P.

6. (g) But in a Writ of Recaption in the County Court, if the Defendant be convicted he ſhall only be amerced. 8 *Co.* 41. *a.*

(g) 8 Co. 60. b. S. P. 120. a. S. P. 11 Co. 43. b. S. P. F. N. B. 73. D. S. P.

7. (h) In all Actions quare vi & armis, as Reſcous, Treſpaſs, &c. the Defendant ſhall be fined. 8 *Co.* 59. *b.* (h) 1 Rol. Abr. 222. pl. 9. S. P.

(A) For what Cauſes a Man ſhall be Fined.

1. (a) IN an Action if a Man denies his own Deed, and this is found againſt him by Verdict, he ſhall be fined for his Falſity, and the Trouble to the Jury. Co. 8. Beecher. 60. (b) 33 H. 6. 54. b. curia. (c) 9 E. 4. 24 D. 3 E. 6. 67. 19. admit 7. 8. El. 245. 65. (d) 34 H. 6. 20. adjudged. (a) 2 Bulſt. 230. S. P. adjudged 1 Rol. Abr. 224. pl. 1. S. P. (b) Fitz. Fines 16. S. C. Br. Fine pur contemp. 3. S. C. Br. Amercement 5. S. C. (c) Fitz. Fine 25. S. C. (d) Br. Fine pur contempt. 3. S. C. Fitz. Pledges 3. S. C.

2. (e) So in an Action of Debt, if the Defendant pleads the Acquittance of the Plaintiff, and the Plaintiff denies it, and this is found for him by Verdict, the Defendant ſhall be fined for his Falſity, as well as if he had denied his own Deed. (f) 33 H. 6. 54. b. curia. Co. 8. Beecher 60. (e) 2 And. 160. like Point by one Judge argu-end'. Cro. Eliz. 844. S. P. adjudged Con. per totam curiam upon a Writ of Error in Cam. Scac. Cro. Jac. 255. S. P. adjudged, where an Executor pleaded a Releaſe made to himſelf, &c. (f) Fitz. Fines 16. S. C. Br. Fine pur contempt. 3. S. C. Br. Amercement 5. S. C.

3. If a Writ abates through the Default of the Plaintiff himſelf, he ſhall be fined. (g) 34 Aſſ. 9. (g) Br. Fine pur contempt 30. S. C. being an Attaint.

4. As if a Writ abates, for that the Plaintiff or Defendant is miſnamed the Plaintiff ſhall be fined, for this is his own Fault. (h) 34 Aſſ. 9. adjudged. (h) Br. Fine pur contempt. 30. S. C.

5. If the Plaintiff be nonſuit he ſhall be fined, (i) 34 Aſſ. 9. admit (k) 41 Aſſ. 8. (i) Br. Fine pur contempt. 30. S. C. (k) Br. Appeal 74. S. C. Fitz. Corone 219. S. C.

6. If a Writ abates for Want of Form, the Plaintiff ſhall not be fined, (l) 34 Aſſ. 9. for this is not the Fault of the Plaintiff. Fol. 220.

(l) Br. Fine pur contempt. 30. S. C.

7. So if a Writ abates for Want of Matter in Law. (m) 34 Aſſ. 9. (m) Br. Fine pur contempt. 30. S. C.

8. In an Appeal of Mayhem againſt ſeveral, if any of them are found guilty, and the plaintiff prays Judgment againſt them, and relinquiſhes his Suit againſt the reſt, he ſhall be fined for his not proceeding againſt the reſt. (n) 22 Aſſ. 82. adjudged. (n) Br. Appeal 60. S. C. Fitz. Corone 182.

9. If

9. If in Replevin the Defendant claims Property falſly, and this in a *proprietate probanda* is found againſt him, he ſhall be Fined and Impriſoned. 8 *Co.* 60. *a.*

(o) So in Replevin it was adjudged for the Avowant, a returno habend' awarded, and there the Sheriff returned an elongata, and a Withernam was awarded, and though the Plaintiff brought the Money into Court and prayed the Proceſs might be ſtaid, yet the Court would not grant it till they had aſſeſſed a Fine upon the Plaintiff. 2 Leon. 174.

10. A Man ſhall be fined and impriſoned for all Contempts (o) done to any Court of Record againſt the Commandment of the King's Writ under his great Seal, as in a *Quare non admiſit*, *Quare incumbravit*, Attachment upon a Prohibition, &c. 8 *Co.* 60. *a.*

11. But when the Demandant or Plaintiff, Tenant or Defendant *ſe retraxit* or *receſſit in contemptum Curiæ*, yet this is no Contempt againſt the Commandment of the King by Writ, and therefore he ſhall not be fined in ſuch Caſe, but amerced only. (p) *Beecher's* Caſe. 8 *Co.* 58, &c. admit 60. *a.* & *b.* at the Top.

(p) Cro. Jac. 211. S. C. and S. P. admit.

12. If one denies a Recovery or other Record to which he himſelf is Party, he ſhall not be fined, for it is not his Act, but the Act of the Court, and he does not deny the Record abſolutely, but *non habetur tale recordum.* 8 *Co.* 60. *a.*

(B) To whom and how the Fine may be impoſed.

1. If a Man be indicted for Extortion in his Office as Bailiff to a Sheriff, and found guilty, yet he cannot be fined to the Party grieved in any Sum. Hill. 11 Car. B. R. Brunſden's Caſe in a Writ of Error upon a Judgment at the Seſſions at Sarum, and the Judgment reverſed per Curiam, becauſe the Judgment was to render treble Damages to the Party grieved, this not being upon any Statute that warrants it.

(C) Impriſonment. (a) *Capiatur.*

Againſt what Perſons the Judgment ſhall be *quod capiatur.*

(a) Per 5 and 6 Will. and Mar. in Treſpaſs, Ejectment, Aſſault and falſe Impriſonment, if Judgment is given againſt the Defendant no capias pro fine ſhall go out, or further Proceſs thereupon, but the Fine ſhall be remitted and diſcharged, yet the Plaintiff upon ſigning Judgment ſhall pay 6 s. and 8 d. in Satisfaction thereof, and the Plaintiff ſhall have an Increaſe of ſo much in his Coſts againſt the Defendant. (b) 1 Bulſt. 172. like Point adjudged con. upon a Writ of Error. (c) Fitz. Impriſonment 10. S. C. Br. 64. S. C.

1. (b) If an Infant be Plaintiff in an Attaint, and this is found againſt him by Verdict, he ſhall be impriſoned. (c) 30 Aſſ. 18. adjudged.

(d) Fitz. Impriſonment 10. S. C.

2. And the Impriſonment ſhall not be pardoned of Courſe. (d) 30 Aſſ. 18. adjudged.

(e) Br. Amercement 60. S. C. Fitz. Age 74. S. C.

3. If an Infant brings an Appeal, and this is abated becauſe it does not lie during his Infancy (admit this to be Law) yet he ſhall not be impriſoned. (e) 41 Aſſ. 14.

4. If an Infant be attainted of a Diſſeiſin in an Aſſiſe, the Judgment ſhall be quod capiatur (f) 43 Aſſ. 45. adjudged. But this ſhall be pardoned of Courſe. (g) 43 Aſſ. 45. adjudged.

(f) Br. Imprisonment 75. S. C. 1 Bulſt. 172. S. C. cited and vide the ſeveral Caſes there cited, con. (g) Br. Impriſonment 75. S. C.

5. In an Aſſiſe againſt Baron and Feme, if the Feme be received upon the Default of the Baron, and pleads in Bar, and acknowledges an Ouſter, and the Demandant takes Iſſue upon the Bar, and this is found for the Demandant, the Tenant ſhall not be impriſoned for this Confeſſion of an Ouſter, becauſe ſhe is a Feme covert. (h) 37 Aſſ. 1. adjudged.

(h) Fitz. Imprisonment 2. S. C. Br. 69. S. C.

6. If a Feme covert be found guilty of a Treſpaſs before the Coverture ſhe ſhall be impriſoned. (i) 22 Aſſ. 87.

(i) Br. Imprisonment 53. S. C.

7. (k) If a Biſhop be attainted of a Treſpaſs againſt the Peace, he ſhall not be taken as another Man, becauſe he is a Prelate. 29 E. 3. 42.

(k) Dier 315. pl. 98. S. P. cited pl. 99. S. P. adjudged. Moor 768. S. P. cited.

8. But it ſeems if he be attainted in a Præmunire upon 27 El. 3. the Judgment ſhall be quod capiatur, &c. for this is expreſly given by the Statute againſt all Men. Dubitatur. 39 E. 3. 7. b.

9. In an Attachment upon a Contempt againſt a Prior, for refuſing to admit the Vadelet of the King to a Corody, if he be attainted thereof he ſhall be impriſoned. Dubitatur. (l) 38 Aſſ. 22.

(l) Br. Imprisonment 100. S. C.

10. If a Biſhop be attainted in a Writ of Oyer and Terminer for burning of Houſes, the Judgment ſhall not be quod capiatur. 29 Aſſ. 33. adjudged.

11. If a Prioreſs be attainted in an Aſſiſe of a Diſſeiſin againſt her own Deed, ſhe ſhall be impriſoned. (m) 40 Aſſ. 16.

(m) Br. Imprisonment 93. S. C.

12. If a Baron of Parliament be found a Diſſeiſor with Force in an Aſſiſe, the Judgment againſt him ſhall be quod capiatur. Hill. 32 El. B. R. the (n) Lord Stafford's Caſe adjudged and affirmed in a Writ of Error.

(n) Cro. El. 170. S. C. adjudged. For that it is upon a Diſſeiſin found, upon which a Fine is given by the Statute, in which not being excepted, a Peer is bound. I ſuppoſe Weſt. 1. Cap. 36. is the Statute intended, yet 2 Inſt. 236. it is ſaid quoad the Fine to be only in Affirmance of the Common Law. Vide Weſt. 2 cap. 24. Weſt. 2. cap. 25. Stat. de conjunctim feoffat'. 34 Ed. 1. 4 H. 5. cap. 8. other Statutes by which Diſſeiſors ſhall be fined and impriſoned. Vide Hob. 61. that Barons are not ſubject to Impriſonment, but for great Contempt.

13. So in Debt upon an Obligation againſt a Baron of Parliament, if the Defendant pleads non eſt factum, and the Iſſue is found againſt him, the Judgment againſt him ſhall be quod capiatur. Tr. 39 El. B. R. Between (o) the Earl of Lincoln and Flower adjudged in a Writ of Error.

Fol. 221.

(o) Cro. El. 503. S. C. adjudged, becauſe a Fine due to the Queen upon this falſe Plea, and there is no Privilege againſt her.

(D) Who ſhall be Impriſoned.

1. IN an Action upon the Statute of Marlebridge, for driving a Diſtreſs out of the County, if the Defendant juſtifies as Bailiff to I. S. and pleads a ſpecial Juſtification, and this is adjudged againſt him, he ſhall be impriſoned, for though he juſtifies as Bailiff yet it is not proved. (a) 30 Aſſ. 38. adjudged.

(a) 1 Rol. Abr. 219. pl. 1. S. C.

2. But it had been otherways if I. S. whoſe Baily he was, had been Party. (b) 30 Aſſ. 38.

(b) 1 Rol. Abr. 219. pl. 1. S. C.

(c) 8 Co. 60. a. S. P.

3. (c) If an Attaint be brought against one who was not Party to the first Recovery, he shall not be imprisoned. 8 H. 4. 23. b.

4. If an Attaint be brought against a Feme Tenant in Dower of the Possession of her Husband, upon a Recovery by her Husband, if she maintains the Oath or not, and this is found against her and the Jury attainted, yet she shall not be imprisoned, because she is not the Person that recovered. (d) 41 Ass. 18. adjudged. 40 Ass. 20. adjudged.

(d) Br. Imprisonment 74. S. C. Fitz. Attaint 58. S. C. Br. 80. S. C.

5. But otherways it had been, if it had been found against the Party himself, who recovered in the first Action, if he maintained the Oath in the Attaint. (e) 41 Ass. 18. 8 H. 4. 23. b.

(e) Br. Imprisonment 74. S. C. Br. Attaint 80. S. C.

6. So if he had not maintained it, but had made Default, and the Jury after had been attainted. (f) 41 Ass. 18. admit.

(f) Br. Attaint 80. S. C.

7. In Trespass against Baron and Feme, if the Feme be found guilty, and the Baron not guilty, the Baron shall not be imprisoned. (g) 22 Ass. 87. adjudged.

(g) Br. Imprisonment 53. S. C.

8. In Trespass against Baron and Feme, if the Feme be found guilty and the Baron not guilty, the Baron shall not be imprisoned. (h) 22 Ass. 87. adjudged contra Mich. 15 Jac. B. R. in (i) Wood and Sutcliff's Case by the Clerks. Trin. 4 Jac. B. R. Rot. 376. Between (k) White and Halse adjudged in a Writ of Error upon a Judgment in Banco, where it was in an Action of Battery against Baron and Feme, and the Baron found not guilty, and the Feme guilty, and Judgment quod capiantur as well the Baron as the Feme, because the Baron is party to the Action, and ought to pay the Fine of the Feme. Pasch. 11 Car. B. R. (l) between Mayow and Cockshott per Curiam resolved in a Writ of Error upon a Judgment in Banco in an ejectione firmæ against Baron and Feme, but the Judgment reversed for another Cause. Pasch. 11 Car. Mich. 14 Car. B. R. between Brown and Clugg in a Writ of Error upon a Judgment in the Marshalsea, and the first Judgment affirmed as to this. Intratur Pasch. 14 Car. Rot. 325. contra Mich. 3 Jac. B. R. between Answam and Shaftsbury.

(h) Br. Imprisonment 53. S. C.

(i) Cro. Jac. 439. S. C. and S. P. per omnes Clericos. 1 Rol. Abr. 215. pl. 8. S. C.

(k) Cro. Jac. 203. S. C. adjudged, and a Precedent shewn that it had been so adjudged upon Error in Cam. Scacc'. Cro. Car. 407. S. C. cited.

(l) Cro. Car. 406. S. C. and S. P. adjudged upon a Writ of Error, for that the Imprisonment is only for the King's Fine, which the Baron ought to pay, for the Feme cannot; but this Judgment was reversed for another Cause.—In Trespass against Baron and Feme, for a Battery done by the Feme, the Defendants being found guilty, it was resolved, that a quod capiatur shall be against the Baron only, and per Keeling Clerk of the Crown, and Hodsden Secondary, so are all the Precedents, although the Wrong is only done by the Feme. Cro. Car. 513. Q. and vide Hetl. 53.

(m) Dal. 39. S. P. adjudged. Hetl. 53. S. P. adjudged.

9. (m) In an Action of Debt against Baron and Feme, upon an Obligation of the Feme before Coverture, they plead non est factum, and this is found against them, both shall be imprisoned, scilicet, the Baron as well as the Feme, for the Baron is guilty of a false Denial of the Deed (which is the Cause of the Imprisonment) as well as the Feme. Mich. 15 Jac. B. R. in Wood and Sutcliff's Case per Curiam and the Clerks, and it was said by G. Croke, that it was so adjudged 3 Jac. in Baldock's Case, Hill. 37 El. 31. in Camera Scaccarii between Say and Bardoise adjudged in a Writ of Error for the Reversal of the first Judgment. Intratur Mich. 33, 34 El. Rot. 470. between (n) Bardolf and Percie and his Wife (it seems as if this was the same Case before mentioned in 37 El. where the first Judgment was, that the Baron (*) sit in Misericordia, and that the Feme capiatur, and this was reversed, because it was not that the Baron and Feme capiantur.

(*) Fol. 222.

(n) Cro. El. 381. S. C. adjudged, and the first Judgment reversed accordingly. Moor 704. pl. 982. S. C. adjudged, and the first Judgment reversed accordingly. 1 Rol. Rep. 294. S. C. cited.

(E) In what Actions and Cases the Judgment may be *quod capiatur*.

1. IN an Aſſiſe againſt three, if they are found Diſſeiſors, and that one of them only came with Force, yet all ſhall be impriſoned. (a) 2 Ed. 3. 43. adjudged.

(a) Fitz. Impriſonment 22. S. C.

2. In an Aſſiſe, if the Tenant be attainted of a Diſſeiſin with Force, he ſhall be impriſoned. (b) 17 Aſſ. 14. adjudged. 23 Aſſ. 11. adjudged. 24 Aſſ. (c) 2. adjudged. (d) 2 Aſſ. 8. adjudged. (e) 2 Ed. 3. 43. adjudged.

(b) Br. Impriſonment 88. S. C. Fitz. 9. S. C. Br. Diſſeiſor 39. S. C. (c) This I ſuppoſe is miſprinted in the Original, and ſhould be 3. (d) Br. Impriſonment 30. S. C. 1 Rol. Abr. 224. pl. 9. S. C. (e) Fitz. Impriſonment 22. S. C.

3. In an Aſſiſe, if the Tenant be attainted of a Diſſeiſin he ſhall be taken. (f) 43 Aſſ. 9.

(f) Fitz. Impriſonment 94. S. C.

4. (g) Though it be without Force. (h) 27 Aſſ. 30. adjudged.

(g) 8 Co. 59. b. S. P. con. 2 Inſt. 236. S. P. con. but the Court ex Officio ought to enquire of the Force, but if they do not, it is no Error. (b) Br. Impriſonment 59. S. C.

5. In an Aſſiſe of Nuſance, if the Defendant be found guilty he ſhall be impriſoned. (i) 32 Aſſ. 2. adjudged contra. (k) 19 Aſſ. 6. admit.

(i) Fitz. Impriſonment 68. S. C. Fitz. Aſſiſe 309. S. C. (k) Br. Impriſonment 50. S. C.

6. But if a Man be attainted of a Nuſance upon a Preſentment at the Suit of the King he ſhall not be impriſoned. 19 Aſſ. 6. adjudged.

7. In an Aſſiſe by Tenant by Statute Merchant, if the Tenant be attainted of a Diſſeiſin with Force, he ſhall be impriſoned. 43 Aſſ. 9.

8. In an Aſſiſe, if the Tenant by his Plea does not deny the Ouſter, though he be after found a Diſſeiſor without Force, yet he ſhall be impriſoned. (l) 28 Aſſ. 15. adjudged.

(l) Br. Impriſonment 90. S. C.

9. (m) In all Actions of Treſpaſs general quare vi & armis, if the Defendant be found guilty the Judgment ſhall be quod capiatur Trin. 15 Jac. between Wheatly and Stone adjudged per totam curiam in a Writ of Error at Serjeant's-Inn. Vide the ſame Caſe, Hobart's Reports. (n) 242.

(m) 8 Co. 59. b. S. P.

(n) Hob. Fol. 180. S. C. adjudged.

10. In Treſpaſs, if the Plaintiff declares that he levied a Plaint in London, and upon Proceſs I. S. was arreſted by a Serjeant, and that the Defendant vi & armis reſcued him, per quod he loſt his Debt, and upon not guilty pleaded, it is found for the Plaintiff, the Judgment hereupon ought to be quod defendens capiatur; for though the Nature of the Action is properly an Action upon the Caſe, as touching the Loſs of the Debt of the Plaintiff, yet this being with Force to the Serjeant who was a Miniſter as well to the Plaintiff as Court, the Action may be vi & armis. Hobart's Reports 242. between (o) Wheatly and Stone.

(o) Hob. Fol. 180. S. C. adjudged.

11. (p) In Actions of Treſpaſs upon the Caſe, if the Defendant be found guilty, the Judgment ſhall not be quod capiatur, but quod ſit in miſericordia. Trin. 15 Jac. between (q) Spere and Stone adjudged.

(p) 8 Co. 59. b. S. P. In an Action againſt an Innkeeper for Goods ſtole, the Judgment ſhall not be quod capiatur. Cro. Jac. 224. adjudged. (q) Hob. 180. S. C. cited.

(r) 52 H. 3. cap. 4. explained 2 Inſt. 106, 107.

12. In an Action upon the (r) Statute of Marlebridge for driving a Diſtreſs out of the County, the Defendant being found guilty ſhall be impriſoned, (s) 30 Aſſ. 38. adjudged that he ſhall be ranſomed, which admits as it ſeems that he ſhall be impriſoned.

(s) Br. Treſpaſs 255. S.C. 1 Rol. Abr. 219. pl. 2. S. C.

13. In an Action of Debt upon the Statute of 1, and 2 Ph. and Ma. cap.——of Diſtreſſes, by which the Defendant ſhall forfeit to the Party grieved for the driving a Diſtreſs out of the Hundred, 5 l. and treble Damages, if the Defendant be found guilty, the Judgment ſhall be quod capiatur. D. 2. El. 177. (t) 32. Quære.

(t) This ſhould be 33.

14. In Treſpaſs contra pacem for trampling his Corn, if it be found that the Cattle of the Defendant eſcaped, but not contra pacem, and trampled the Corn, yet the Defendant ſhall be impriſoned, for he ought to keep his Cattle at his Peril. 27 Aſſ. 56. adjudged.

Fol. 223.

15. In an Action upon the Caſe upon an Aſſumpſit, if the Defendant be found guilty, the Judgment ſhall not be quod capiatur, but quod ſit in Miſericordia. H. 10 Jac. B. R. per Curiam.

16. In an Action of Debt upon the Statute of Uſury for treble the Sum lent, for taking more than 8 per Cent. if the Defendant be found guilty, the Judgment ſhall be quod capiatur, becauſe he took it contrary to the Proviſion of the Statute. Paſch. 17 Car. B. R. between Lovell and Bidgood ſo it was.

(u) 1 Sid. 233. S. P. arguendo.

17. (u) In an Action of Debt upon the Statute of 2 E. 6. for not ſetting forth of Tithes, if Judgment be given for the Plaintiff, the Judgment ſhall be quod ſit in Miſericordia, and not quod capiatur, (w) becauſe this is but a Debt given in Recompence of Tithes, this is the uſual Courſe.

(w) In Debt for 5 l. upon the Statute of 1, and 2 Ph. and Ma. for this Action is taking above 4 d. for a Diſtreſs, the Defendant ſhall be in Miſericordia only, becauſe founded upon the Non-payment, and not upon the Statute. Cro. Car. 560. adjudged.

(x) 8 Co. 59. b. S. P. becauſe founded upon the Deceit done to the Court in obtaining Judgment.

18. (x) In a Writ of Deceit againſt the Party who recovered in a real Action and the Sheriff, if it be found that no Summons was made, he that recovered before ſhall be impriſoned. (y) 2 Ed. 3. 48. b. adjudged.

(y) This I ſuppoſe miſprinted.

(z) 8 Co. 60. a. S. P.

19. (z) So if a Man recovers in a Writ of Attaint, by which the firſt Jury is attainted, he that recovered in the firſt Action ſhall be impriſoned. (a) 2 Ed. 3. 50. b. (b) 8 H. 4. 23. b. (c) 50 Aſſ. 4.

(a) This I ſuppoſe miſprinted. (b) Br. Impriſonment 13. S. C. (c) Br. Attaint 84. S. C.

(d) 8 Co. 60. a. S. P.

20. (d) But if a Man recovers in an Attaint againſt the Tertenant, who was not privy to the firſt Recovery, he ſhall not be impriſoned. (e) 8 Hen. 4. 23. b.

(e) Br. Impriſonment 13. S. C. Br. Attaint 14. S. C.

(f) Cro. Jac. 538. like Point adjudged. 12 Co. 134.

21. (f) In all Caſes where a Thing is reſtrained by any Statute, the Offender ſhall be fined and impriſoned. 8 Co. 60. b.

like Point reſolved. Cro. Jac. 631. like Point adjudged. 2 Inſt. 131. 2 Rol. Rep. 400. —In an Action of Scandalum Magnatum, whether the Judgment ought to be quod Defendens capiatur, Dubitatur. Probee and the Marqueſs of Dorcheſter. 1 Sid. 233. adjourned. 1 Keb. 813. adjourned upon a Writ of Error. 1 Lev. 148. dubitatur. but the Court inclined that it was in Miſericordia, it was ſufficient.

22. In an Action for a Robbery founded upon the Statute of *Wincheſter*, if the Defendants are found guilty, the Judgment ſhall be *quod ſunt in Miſericordia*, becauſe this Action is not founded upon any *Male-feſance*, but upon

upon a *Non-feaſance* only. *Trin.* 12. *Jac.* Between *Oldfield* and the Hundred of *Witherly*. *Cro. Jac.* 350. adjudged.

23. In an Action of Treſpaſs for an Aſſault and Battery, if the Battery was done before a general Pardon, by which the Fine is pardoned, yet the Judgment ſhall be entered (g) *quod capiatur*, for the Court need not take Conuſance thereof without Demand of the Party. *Paſch.* 2 *Car.* 1. Between *Swayn* and *Rogers*, *Cro. Car.* 32. adjudged upon a Writ of Error in *Camera Scaccarii*. (h) *Nota*, it did not appear whether the Defendant was a Perſon excepted, or was to take Benefit of the Pardon.

(g) The Entry in this Caſe is ſometimes quod capiatur and ſometimes quod

non capiatur quia pardonatur. Cro. Eliz. 778. per Kemp & alios Clericos. For this vide Lee and Cureton. 1 Leon. 300. Cro. Eliz. 153. Strickland and Thorp. 1 Brownl. 211. Yelv. 126. Hall and Vaughan 5 Co. 49. Moor 394. Jenk. Cent. 258. Bently and Lee. Lane 71. (h) Cro. Eliz. 768. S. P. adjudged for this Reaſon. 778. S. P. adjudged for this Reaſon. Lane 71. S. P. adjudged for this Reaſon.

(F) In what Caſes the Judgment ſhall be *quod Capiatur*.

1. IN an Aſſize for a Rent-ſeck, if the Defendant be found a Diſſeiſor by Denyer only, the Judgment ſhall not be quod capiatur, but only in miſericordia without any finding whether it was vi & armis or not, for this could not be vi & armis, otherways inter. (a) Aſſize in Rent, vide otherways inter. (b) Aſſize in Office 2 capiatur for all where the Diſſeiſin vi & armis for other Things in the ſame Aſſize.

(a) Raſtal. 78. b.

(b) Raſtal. 75. b.

2. In an Aſſize of a Rent-Charge againſt ſeveral Tertenants, if it be found the Plaintiff diſtrained for this, and one of the Defendants without Conſent of the reſt made a Reſcous, though the other are Diſſeiſors by the Denyer. (c) yet they ſhall not be impriſoned, but only he who made the Reſcous. (d) 39 Aſſ. Pl. 4. (e) 40 Ed. 3. 24. (f) 40 Aſſ. 3.

(c) For he that made the Reſcous, is the only

Diſſeiſor with Force. Co. Lit. 161. b. (d) Fitz. Aſſize 335. S. C. Br. Impriſonment 70. S. C. (e) Br. Aſſize 16. S. C. (f) Fitz. Aſſize 339. S. C. Br. 16. S. C.

3. If a Man grants a Rent out of Land, and after againſt his own Deed diſſeiſes the Grantee of the Rent, if he be attainted of this in an Aſſize it ſhall be impriſoned. 29 Aſſ. 6. Quære contra. (g) 30 Aſſ. 33. adjudged, becauſe it is partly the Act of the Tenant.

(g) Br. Impriſonment 66. S. C. Fitz. 5. S. C.

4. The ſame Law where the Diſſeiſin is of Land againſt his own Deed, being thereof attainted in an Aſſize. (h) 40 Aſſ. 16. adjudged.

(h) Br. Impriſonment 93. S. C.

5. If a Man be attainted of a Diſſeiſin againſt his own Feoffment, though the Feoffment was without Deed, yet he ſhall be impriſoned. (i) 28 Aſſ. 8. adjudged 31.

(i) Br. Impriſonment 60. S. C.

6. If a Man makes a Feoffment upon Condition, and re-enters without Performance of the Condition, and after is attainted of this Diſſeiſin, he ſhall be impriſoned contra. (k) 30 Aſſ. 34. adjudged but Quære.

(k) Fitz. Impriſonment 3. S. C.

7. In an Aſſize of a Rent-Service, if it be found that the Tenant claimed the Seigniory, and diſtrained the Tenant of the Land for this, where he had no Seigniory, and ſo diſſeiſed the Plaintiff, the Tenant ſhall be impriſoned, for the Treſpaſs done to the (l) Tenant, was at the ſame Time a Diſſeiſin to the Plaintiff. (m) 43 Aſſ. 9. adjudged.

(l) To make the Senſe more clear, this ſhould be Tenant of the Land. (m) Br. Impriſonment 94. S. C.

(*) Fol. 224.

8. In an Aſſize againſt Baron and Feme, if they plead a Bar, and confeſs an (*) Ouſter, upon which Bar the Plaintiff takes Iſſue, and after the Baron makes Default, and the Feme is received and pleads the ſame Plea in Bar, and the Plaintiff takes Iſſue thereupon, and this is found againſt the Tenant, the Baron ſhall not be impriſoned for the Ouſter which he confeſſes in his Bar, becauſe the Aſſize was not taken upon this, but this was waived by the Plea of the Feme. (n) 37 Aſſ. 1. adjudged.

(n) Fitz. Impriſonment 2. S. C. Br. 69. S. C.

9. In an Aſſize againſt ſeveral who are found Diſſeiſors, if it be found that one came with Force all ſhall be impriſoned. (o) 2 Aſſ. 8. adjudged.

(o) Br. Impriſonment 30 S. C. 1 Rol. Abr. 222. Pl. 1. S. C.

(G) Impriſonment by the Court.

Upon what Pleas.

For denying his Deed.

(a) 1 Rol. Abr. 219. Pl. 1 vide and the Notes Margine.

1. (a) If a Man denies his own Deed, and this is found againſt him by the Country, he ſhall be impriſoned. (b) 45 Ed. 3. 11. (c) 23 Ed. 3. 21. b. adjudged. D. 3. Ed. 6. 67. 19. (d) 26 Aſſ. 5. (e) 34 H. 6. 24. per Forteſcue.

(b) Br. Impriſonment 7. S. C. (c) Fitz. Judgment 189. S. C. (d) Impriſonment 56. S. C. (e) Br. Fine pur Contempt. 5. S. C.

(f) 1 Rol. Abr. 219. Pl. 2. S. P. Vide and the Notes in the Margin.

2. (f) So if the Defendant pleads the Deed of the Plaintiff in Bar, and the Plaintiff denies it, and this is found not his Deed, the Judgment ſhall be againſt the Defendant quod capiatur for the Falſity. (g) 33 H. 6. 54. b. Curia. D. 3. E. 6. 67. 19. adjudged. 33 Aſſ. 11. adjudged. (h) 26 Aſſ. 5. (i) 6 Aſſ. 4. adjudged.

(g) Br. Fine pur Contempt. 3 S. C. (h) Br. Impriſonment 56. S. C. (i) Br. Impriſonment 31. S. C.

3. But if a Man pleads a Releaſe in Bar of an Obligation, and after makes Default by which Judgment is given againſt him, yet he ſhall not be impriſoned. 45 E. 3. 4.

(k) Dier 67. Pl. 19. S. P. con. but in N. Dier ſeveral Caſes Margin agree

4. (k) So if a Man brings Debt upon an Obligation, and the Defendant pleads his Acquittance, and the Plaintiff confeſſes it, he ſhall not be impriſoned for the Suit for he never denied his Deed. Quære (l) 45 E. 3. 11.

; but for this vide Infra. Pl. 1. 2 Sand. 192. S. P. cited to be adjudged. (l) Br. Impriſonment 7. S. C.

(m) Cro. Jac. 255. like Point ſeems to be admitted.

5. (m) If a Man pleads a Deed of the Plaintiff or his Anceſtor, made to the Anceſtor of the Defendant, and this is found againſt him, he ſhall not be impriſoned for his Falſity, becauſe he could not know whether this was his Deed or not, being made to his Anceſtor. 28 Aſſ. 10. curia contra. 28 Aſſ. 9. adjudged contra. (n) 26 Aſſ. 5.

(n) Br. Impriſonment. 56. S. C.

6. If a Man recovers in an Aſſize by Default againſt A. Who after ſues a Certificate upon the Releaſe of the Anceſtor of the Plaintiff with Warranty, and the Inqueſt being taken by Default find this to be a good Deed, yet the Defendant in this Certificate ſhall not be impriſoned. (o) 26 Aſſ. 5.

(o) Br. Impriſonment 56. S. C.

(p) 8 Co. 60. a. S. P. 1 And. 160. S. P. and like Point by one Judge arguend'.

7. (p) So if a Man denies the Deed of his Anceſtor, and this is found againſt him, yet he ſhall not be impriſoned. (q) 26 Aſſ. 5. (r) 34 H. 6. 24. per Forteſcue, but he ſhall be amerced.

(q) Br. Impriſonment 56. S. C. (r) Br. Fine pur Contempt. 5. S. C.

(H) In what Caſes it may be ſaved by Matter ſubſequent.

1. (a) IF a Man, where his own Deed is pleaded againſt him, pleads non eſt factum, and after at the Niſi prius, or before Verdict relicta verificatione cognovit this to be his Deed, he ſhall not be impriſoned, (b) but only amerced. Paſch. 3. Jac. B. R. between (c) Davage and Clerk per Curiam which Intratur Hill. 43. El. Rot. 526 and there it was ſaid, ſo is the common Courſe of the King's Bench and Common Pleas. Contra 2 H. 6. B. R. 134. cited D. 3. El. 6. (d) 67. 19. adjudged contra Co. (e) 8 Beecher 60. Trin. 16. Jac. B. R. between & Waring, ſuch a Judgment affirmed in a Writ of Error, Hill 10. Jac. B. R. between Trian and Beecher adjudged, and ſaid to be the common Courſe which Intratur Mich. 10. Jac. Rot. 556.

(a) Powel and Row S. P. Raym. 202. adjourned. 2 Keb. 678. 694. adjourned. Portlack and Charlton S. P. 2 Sand. 191. per Reporter but ended by Compoſition.

1 Mod. 73. adjourned. Raym. 195. adjourned. 2 Keb. 688. 704. Kelw. 42. per Curiam. 2 Rol. Rep. 45. S. P. adjudged. Cro. Jac. 420. S. P. adjudged. (b) For the Judgment is not given upon the falſe Plea, but upon the Confeſſion. per 2 Sand. 193. Raym. 202. (c) Noy 4. S. C. adjudged. Cro. Jac. 64. S. C. adjudged by two Judges againſt one. 2 Sand. 190. S. C. cited and allowed per Reporter. (d) N. Dier 67. Margin, ſeveral Caſes con. (e) The ſeveral Authorities upon which this Opinion of Coke is founded, examined, and found not to warrant it. 2 Sand. 189, 190. per Reporter.

(I) For what Cauſes.

Fol. 225.

1. IF the Proceſs in an Attaint be diſcontinued by which the Writ abates, the Plaintiff ſhall not be impriſoned. 32 Aſſ. 13. adjudged,

2. (a) But otherways it had been if he had been Nonſuit after Appearance. 32 Aſſ. 13. admit. (b) 19 Aſſ. 13. adjudged. (c) 6 Aſſ. 5. adjudged. 20 E. 3. Attaint 43.

(a) 8 Co. 60. a. S. P. (b) Br. Jmpriſonment 87. S. C. (c) Br. Impriſonment 32. S. C. Fitz. Judgment 215. S. C.

3 In an Aſſize if the Tenant pleads a Bar, and confeſſes an Ouſter of the Plaintiff, and the Demandant takes Iſſue upon the Bar, and this is found againſt the Tenant, he ſhall be impriſoned for the Ouſter which he confeſſed. 37 Aſſ. 1.

4. (d) If a Man be bar'd of an Appeal of Mayhem, becauſe he was Nonſuit after Appearance of the Defendant in another Appeal, the Plaintiff ſhall be impriſoned. (e) 40 Aſſ. 1. adjudged.

(d) 8 Co. 60. a. S. P. and ſo if in any other Appeal. (e) Br. Impriſonment 71. S. C. Br. Appeal 71. S. C.

5. In an Appeal againſt two, if the Appeal againſt one be found falſe, the Plaintiff ſhall be impriſoned. (f) 1 Aſſ. 9. adjudged.

6. In Treſpaſs if the Iſſue be found againſt the Plaintiff, he ſhall be (g) impriſoned. Mich. 42. and 43. El. B. R. between Bartholomew and Deighton adjudged, and though the Fine due to the King is pardoned by the general Pardon by Parliament, yet the Judgment ſhall be quod capiatur, and not quod ſit in Miſericordia. Mich. 42, 43. El. B. R. between Deighton and Bartholomew adjudged in a Writ of Error.

(f) Br. Appeal 49. S. C. Br. Impriſonment 29. S. C. (g) In the Original it is Miſpriſon, and ſo appears to be miſprinted.

7. In

7. In an Indiament of Barretry, if the Defendant be found guilty, and upon this Judgment is given that the Defendant ſhall be committed to Gaol ibidem remanſurus per two Months without Fail or Mainprize, & quod ſolvat Domino Regi pro fine ſummam 100 Marcarum, & quod ſit in Miſericordia, this Judgment is erroneous, becauſe when the Defendant is fined the Judgment ought to be quod capiatur, (h) for he ought to be impriſoned till he hath paid the Fine; and the Impriſonment in this Caſe per two Months is another Puniſhment inflicted upon him for his Offence, which is for a certain Time, and therefore cannot amount to a Capiatur for the Fine. Hill. 9. Car. B. R. (i) Chapman's Caſe in a Writ of Error upon ſuch a Judgment given by the Juſtices of Aſſize in Comitatu Devoniæ. This was a Doubt per Curiam, and Precedents commanded to be ſearched, and after the Fine was eſtreated into the Exchequer, and levied, and then the Defendant did not proſecute his Writ of Error.

(h) To every Fine Impriſonment is incident, and when the Judgment is quod Defendens capiatur, that is as much as to ſay capiatur quouſque finem fecerit. 8 Co. 59. b. Co. Lit. 126. b. (i) Cro. Car. 340. S. C. adjourned.

(K) Amercement.

Of a County, Hundred, (a) Town, Village, &c.

(a) Per 3 Ed. 1 cap. 6. No City, Borough or Town ſhall be amerced without reaſonable Cauſe and according to the Quantity of the Offence.

1. (b) IF in the (c) Day-time a (d) Murder is committed in a (e) Town not walled, and the Murderer eſcapes, the (f) Townſhip ſhall be amerced. 3 *Inſt.* 53.

(b) 4 Inſt. 183. S. P. and of this the Coroner may inquire upon the View of the Body, and the Juſtice of Peace may inquire of ſuch Eſcapes, and certify them into the King's Bench, and vid. 3. H. 7. cap. 1. (c) Where the Stroke was given in the Day-time, but the Party died not till Night, 1 Leon. 107. dubitatur 3 Leon: 207. dubitatur: the Town is not bound to ſtop the Offender before the Death of the Party, but per 3 Hen. 7, cap. 1. it is declared to be the Law of the Land, that if any Man be wounded in Peril of Death, the Party that ſo wounded ſhould be arreſted and put in Surety till known whether the Party hurt ſhall live or die. (d) So when one kills another in his own Defence, which by the common Law was Felony. 2 Inſt. 315. (e) Tho' in the Fields of the Town or in a Lane, &c. Dier 210. b. (f) An Information againſt the Mayor and Commonalty of London, for that I. S. was killed in a Tumult there, and none of the Offenders taken, nor any Perſon known or indicted for the Felony, upon which they appeared and confeſſed the Offence, and were fined 1500 Marks. Cro. Car. 252.

2. But if Walled, whether the Murder be in the Night or Day, the Town ſhall be amerced. 3 *Inſt.* 53.

3. If by the Foreſt Law Hue and Cry is made for a Treſpaſs in Veniſon, any Townſhip or Village within the Foreſt, which does not follow the Hue and Cry, ſhall be amerced at the Juſtice Seat. 4 *Inſt.* 294.

Fines and Amercements.

Where impoſed jointly or ſeverally.

1. IF at a Court-Leet, 12 of the Inhabitants Time out of Mind, by the Steward have been ſworn chief Pledges, who at every Leet have uſed to preſent that they the ſaid chief Pledges ſhould pay to the Lord of the Leet (a) 10 *s. pro certo Letæ,* and accordingly have paid it at the ſaid Leet.

(a) By the Report of the Caſe. 1 Rol. Rep. 32. every chief Pledge was to pay 10 s.

if at a Court Leet 12 chief Pledges being Sworn to enquire of the Articles of the Leet, refuſe to preſent, that they ought to pay 10 *s. pro certo Letæ*, the Steward cannot impoſe one joint Fine upon them all, but muſt Fine them ſeverally, for the Refuſal of one is not the Refuſal of the other. *Mich.* 12 *Jac.* (b) *Godfrey*'s Caſe. 11 *Co.* 42. adjudged, and the Opinion of *Priſot*, 35 *H.* 6. *tit.* Examination 17. denied.

(b) 1 Rol. Rep. 32, 73. adjudged.

2. If in an Aſſiſe againſt two, the Diſſeiſin is found with Force, tho' the Diſſeiſin was (c) joint, yet the Fine ſhall be ſeveral. 11 *Co.* 43. *a.*

(c) So when ſeveral are jointly convicted upon an Information, the Fine ſhall be ſeveral. 1 Lev. 125.

3. If in a Plaint 2 are *Nonſuit*, the Amercement ſhall be ſeveral. 11 *Co.* 43. *a.*

4. And though the Judgment be againſt two, *& ideo in Miſericordia*, yet when it is affeered by the Coroners in pais, the Amercement ſhall be laid upon them ſeverally. 11 *Co.* 43. *a.*

5. So if there are ſeveral Defendants, and by Law they are to be Fined in the Entry of the Judgment, it is *ideo capiantur*, yet it ſhall be taken *reddendo ſingula ſingulis*, and there ſhall iſſue ſeveral *capias's pro fine.* 11 *Co.* 43. *b.*

6. (d) Yet in ſome Caſes a Fine or Amercement ſhall be impoſed upon ſeveral jointly, as upon a County, Hundred, and ſo upon a Village, *&c.* as for the Eſcape of a Murderer, *&c.* becauſe of the Uncertainty of the Perſons, and the Infinity of their Number. 11 *Co.* 43. *b.*

(d) 1 Rol. Rep. 74. S P. per Coke.

(a) Pleader.

(a) For the Forms of Entry of an Amercement. vid. 8 Co. 61, 62.

In an Avowry or Action for or Juſtification by reaſon of an Amercement.

1. (b) IN an (c) Avowry as Bailiff of *I. S.* for the (d) Penalty for Breach of a By-law in a Court-Baron, it is not enough to ſay that the Plaintiff was preſented at the Court for Breach thereof, but the Defendant muſt alledge in Fact that he did, *&c. Mich.* 7 *Eliz.* between (e) *Scarning* and *Criet*, 3 *Leon.* 7. 8. adjudged.

(b) Cro. El. 885, 886 S. P. adjudged.

(c) So in Debt for an Amercement. Cro. Jac. 582. per Houghton.

(d) So in an Avowry for an Amercement, 2 Rol. Rep. 40. per Curiam. 1 Leon. 242. Cro. El. 885. adjudged. Raym. 337.

(e) Moor 75. pl. 205. S. C. adjudged. N. Bend. 159. pl. 219. S. C. adjudged, and the Entry thereof.

2. (f) So if in Treſpaſs the Defendant juſtifies, for that the Plaintiff was a common Baker, and that it was preſented in the Leet that he ſold Bread in *locis vicinis* againſt the Aſſiſe (admitting the Preſentment ſufficient without ſhewing the Offence to be done within the Juriſdiction) yet this Plea is not good without an Allegation in Fact, that the Offence was committed within the Jurisdiction. *Paſch.* 14 *Jac.* between (g) *Wilton* and *Hardingham*. *Hob.* 129.

(f) But yet in Treſpaſs the Defendant as Bailiff, &c. juſtified for that preſentatum fuit, that the Plaintiff ſurcharged, &c. and did not alledge in fact that he ſurcharged, &c. yet this was held well enough, per Cro. El. 748. per Curiam, becauſe the Bailiff need only take Conuſance of the Preſentment, and non refert quoad him whether it be true or falſe,—and 2 Rol. Rep. 177. per Mountague it was held a ſufficient Plea to juſtify the Impriſonment for a Fine aſſeſſed for feeding his Sheep within the Bounds of the Foreſt, to ſay preſentatum fuit, without averring in Fact that they were fed there. (g) 1 Brownl. 120. ſeems to be S. C. and S. P. appears adjourned.

3. If in Treſpaſs for taking a Tankard, the Defendant as Bailiff of the Dean and Chapter of *Weſtminſter*, juſtifies for an Amercement at the Leet of the Dean, *&c.* and ſays, that he by a (h) Mandate from the Dean and Chapter diſtrained the Tankard, *&c.* this is no good Plea; for in ſuch a Juſtification by way of Excuſe he ought to ſhew a Warrant to him directed from the Steward of the Court, and then to ſet forth the Warrant it ſelf, and the Taking by Vertue thereof. *Mich.* 3 *Jac.* 2. 3 *Mod.* 137, 138. *adjudged per totam Curiam.*

(h) But per 1 Edw. 4. cap. 2. the Preſentments in the Sheriffs Turn ſhall be delivered at the next Quarter Seſſions, and there enrolled, and thereupon they ſhall aſſeſs the Fines and Amercements, and make out Proceſs to levy them to the Uſe of the Sheriff. Vide 1 Jon. 301. Cro. Car. 176.

4. But it was ſaid that if it had been in *Replevin* where the Defendant made Conuſance in the Right of his Lord, it might have been well enough as pleaded. 3 *Mod.* 137.

Of the Affeerment.

1. In (a) Treſpaſs if the Defendant as Bailiff, *&c.* juſtifies for that the Plaintiff was preſented, *&c.* and ſets forth that the Amercement was (b) affeered by two Affeerors, he ought to ſhew their (c) Names. 20 *H.* 7. *Kelw.* 66. *a. per Curiam.*

(a) So in Debt for an Amercement 3 Keb. 362, 363.

(b) But a Juſtification for an Amercement in a Court Baron, without ſhewing it was affeered is naught. 3 Lev. 19. (c) So if alledged that at a Court Baron coram Sectatoribus ejuſdem Curiæ it was preſented, &c. the Names of the Suitors ought to be ſhewn. Scarning & Crien. 3 Leon. 7, 8. Moor 75. pl. 205. adjudged. N. Bend. 159. pl. 219. adjudged.

Fol. 226.

ANNUITY.

(A) What Things will make it, what not.

1. If a perſon grant to me 10 l. every Year, that I ſhall be Reſident within his Pariſh, payable, &c. an Annuity lies for this, for this is Annual at my Will. 7 H. 6. 19. b.

(a) This Caſe is very much miſprinted in the Original, which vide.

2. (a) So if a Man grants 20 s. to me every Eaſter Day, that I ſtay with him in his Houſe, if I come at any Day I ſhall have Annuity for this, yet at the Grant it was uncertain whether I would ever come there. 8 H. 6. 7.

3. If a Man grants to me a Rent of 20 l. payable at the End of every 20 Years, although this be not Annual, yet an Annuity lies for it. 8 H. 6. 6. b.

(B) By what Words it may be granted.

1. If a Man grants an Annuity to another and his Heirs, and does not ſay for him and his Heirs, this is determinable by the Death of the Grantor. (a) 2 H. 4. 13. Curia.

(a) Fitz. Annuity 16. S.C.

2. (b) So if a Man grants a Rent in Fee, without saying for him and his Heirs, his Heirs cannot be charged in an (c) Annuity. D. 18. El.

(b) Co. Lit. 144. b. S. P.
(c) But if it be taken as a Rent Charge, the Land out of which, &c. ſhall be charged with it in Perpetuity. Poph. 87.

3. The ſame Law, though he adds further to the Grant, that he obliges himſelf and his Heirs to warrant the Annuity to the Grantee and his Heirs, for this does not inlarge the Grant. (d) 2 H. 4 13. Curia.

(d) Fitz. Annuity 16. S. C.

4. If *A.* by Deed grants to *B.* that if *B.* is not yearly paid 20 *s.* at the Feaſt of *Chriſtmas*, that *B.* may diſtrain for the ſame in the Lands of *A.* (e) this is a Rent with which the Lands of *A.* ſhall be charged, but the Perſon of *A.* ſhall not be charged in an Annuity, becauſe *A.* did not grant an Annuity, but only that *B.* might diſtrain for ſuch Annuity, *&c. Litl. Sect.* 221. *Co. Litt.* 146. *b.*

(e) 1 Rol. Abr. 227. pl. 7.

(C) Upon what (a) Grant or Conveyance it lies.

(a) Where a Rent may be granted without Deed, a Writ of Annuity does not lie, tho' it be granted by Deed. Co. Lit. 145. a. at the Top.

1. Upon a Rent created by way of Reſervation, no Annuity lies. 1 H. 4. 4.

2. (b) If a Man makes a Feoffment in Fee, reſerving a Rent, no Annuity lies for this, becauſe the Reſervation are the Words of the Feoffor, and no Grant of the Feoffee. Co. Lit. 144.

(b) Co. Lit. 144. a. S. P. becauſe the Words reddendo, &c. are the Words of the Feoffor, and not of the Feoffee.

3. If a Man before Quia emptores had made a Feoffment, reſerving a Rent Service, no Annuity lay for this Rent Service. (c) 33 H. 6. 34. b. admit. (d) 36 H. 6. 13. b. 14. admit. 33 E. 3. Annuity 52.

(c) Fitz. Annuity 8. S. C. Br. 31. S. C.
(d) Fitz. Annuity 10. S. C. Br. Rent. 26. S. C.

4. If a Man before Quia emptores terrarum had enfeoffed another, rendring 20 Marks Rent, and the Feoffee by another Deed had obliged himſelf in 20 Marks, to pay yearly to the Feoffor (as it ſeems to be intended) for certain Lands which he had of his Feoffment, upon this Deed the Feoffor might have had an Annuity, for this had no Reference to the Rent reſerved upon the Feoffment, but was a good Grant, though no Feoffment was made. 33 E. 3. Annuity 52. adjudged.

5. If an Annuity be granted by an Abbot, Prior or Parſon, by the Ordinance of the Ordinary, (e) upon a certain Accord, a Writ of Annuity lies for this. (f) 25 E. 3. 39.

(e) There being quid pro quo, elſe not.
Co. Lit. 344. a. at the Top. F. N. B. 152. G. J. (f) Fitz. Aid. 7. S. C.

6. (g) So if it be granted by the Ordinary, with the Aſſent of the Parſon and Patron. 8 R. 2. Annuity 53.

(g) F. N. B. 152. G. S. P.

7. If a Man holds of me by a certain Rent Service, and he grants by a Deed to me, reciting that the ſame Land is held of me by the ſame Rent, and for the greater Surety he binds other Lands to my Diſtreſs, that I may diſtrain in other Lands. I cannot have a Writ of Annuity upon this, becauſe the Condition of the Rent is not changed by this Deed. 33 E. 3. Annuity 52. but Quære.

Fol. 227.

8. If

8. If a Rent be granted for (h) Equality of Partition, no Writ of Annuity lies, because it is of the Nature of the Land descended. Co. Lit. 144. b.

(h) Where a Rent is granted for Equality of Partition, or for Allowance of Dower, or Recompence of Title, an Annuity lies not, because it is in Satisfaction of a Thing real, and therefore shall not become Personal, but remain as the Thing for which it was given. Poph. 87. agreed by all the Justices at Serjeant's Inn.

(D) Upon what Title it lies.

1. (a) A Writ of Annuity does not lie by Prescription against an Heir, because it cannot be known whether he hath any Land by Descent from the same Ancestor who first granted this. Co. Lit. (b) 202.

(a) Fitz. Annuity 13. S.P. 1 Mod. 200. S. P. argued'. F. N. B. 152. F.

(b) This is misprinted in the Original, and should be 102. a. F. N. B. 152. f. S. P.

2. But a Writ of Annuity does lie by Prescription against a Rector of a Church, and it is no Plea for him to say that the Church is *submersa, obruta*, &c. for the Parson is not bound in respect of the Building of the Church or consecrated Ground, but of the Profits of the Tithe and Glebe. *Hill.* 27, and 28 *Car.* 2. 1 *Mod.* 200, 201. adjudged.

(E) In what Cases a Grant of a Rent is void as a Rent, and yet shall be good as an Annuity.

1. If the Queen grants a Rent of 20 l. to be received of a certain Sum assigned to her in Part of her Dower, de Magna Custuma London, by the Hands of the Collectors of the same Custom, and the Queen hath 1000 l. of the Custom assigned to her for Part of her Dower, yet because this cannot enure as a Rent, because one Rent cannot issue out of another, she may be charged in an Annuity because the Grant was generally of 20 l. de novo, not limited to the Custom, but only the Receit limited to that which cannot alter the Grant. (a) 9 H. 6. 12. adjudged.

(a) Fitz. Annuity 5. S.C. Br. 3. S. C. Br. Grants 4. S. C.

2. (b) So in this Case, if the Queen had had none of the Customs in Dower. 9. H. 6. 12.

(b) The Original is si not sic, and so appears plainly to be misprinted.

3. So if a Man hath a Rent of 100 l. and grants an Annuity of 10 l. to be received of him who is to pay the Rent to him, he is chargeable in an Annuity. (c) 9 H. 6. 53.

(c) Br. Annuity 3. S. C.

4. If a Man grants an Annuity of 10 l. out of his Land in D. and he hath but 10 l. Rent there, yet he is chargeable in an Annuity. (d) 9 H. 6. 53.

(d) Fitz. Annuity 4. S. C.

5. If a Man grants a Rent of 20 l. to be received of 40 l. Rent in D. if he hath no Rent there, yet this is a good Annuity. 9 H. 6. 12. b. because this is a new Rent.

6. So if a Man grants a Rent of 20 l. to be received of his Tenants in D. and he hath no Tenants there, this is a good Annuity. (e) 9 H. 6. 12. b. 53. b.

(e) Br. Annuity 3. S. C. Fitz. Annuity 4. S. C.

7. So if a Man grants a Rent out of his Manor, and he hath no Manor, yet is this a good Annuity. (f) 9 H. 6. 13. (g) 53.

8. (h) So if a Rent be granted to be received out of one Acre of Land in A. and he hath not any Acre there, yet this is a good Annuity. 9 H. 6. 12.

per Curiam. Goulf. 30. like Point per Curiam.

(f) Br. Grant 4. S. C.
(g) Br. Grants 4. S. C.
(h) Ow. 3. like Point

9. If a Man grants an Annuity to be received out of a Bag of Money, this is a good Annuity. 9 H. 6. 12. b.

10. So if he grants an Annuity to be received of I. S. a Stranger, these Words, to be received of I. S. are void, and yet it is a good Annuity; for the first Words create the Annuity. 9 H. 6. 53.

11. So if a Man grants an Annuity to be received out of his Coffers, the last Words are void and the Annuity good. 9 H. 6. 53.

12. If a Man hath 20 s. Rent-Service of several Tenants, and he reciting this Rent grants an Annuity of 10 s. to receive of the Tenants, this is (*) void as a Rent, because none of the Tenants hold by 10 s. but every one by 12 d. and so it is not known who shall pay it, nor who shall attorn, and therefore it is a good Annuity. (i) 9 H. 6. 12. b.

(*) Fol. 228. Vid. Hob. 172.
(i) Br. Grants 4. S. C.

13. If a Man recites that he hath 10 l. Rent of one A. and grants an Annuity of 10 s. percipere of the said Rent, if he hath no Rent, yet it is a good Annuity. 9 H. 6. 13.

14. If a Man recites that whereas he hath 20 s. Rent issuing out of the Manor of D. and grants 10 s. Parcel of the said 20 s. if he hath no Rent issuing out of the said Manor, he is not chargeable in an Annuity, but the Grant is utterly void, for he intended to pass the Rent he had there. Kell. 3 H. 8. (k) 1.

15. So if the Grantor had had such Rent issuing out of the said Manor, the Person of the Grantor could never have been charged upon such Grant. Kell. 3. H. 8. (l) 1.

16. But if a Man recites that he hath 20 s. Rent issuing out of the Manor of D. and grants 10 s. issuing out of the said 20 s. the Grantee may upon his Grant charge the Person of the Grantor by Writ of Annuity. Kell. 3. H. 8. (m) 1.

(k) This is Pl. 1. but 'tis Fol. 161. b.
(l) So this Pl. 1. but Fol. 161. b.
(m) Pl. 1 Fol. 161. b.

17. So if a Man recites that whereas he hath 10 l. issuing out of the Manor of D. and grants 40 s. to another percipere of the said 10 l. when in Truth it hath not any such Rent, yet the Grant is good to charge the Person of the Grantor for the Words (percipere of the said 10 l.) are more than was necessary, because the Grant was sufficient before. Kell. 3. H. 8. (n) 1.

(n) Pl 1. but Fol. 161. b.

18. If a Man grants an Annuity to another Solvend' extra clara lucra of Allom Mines, in a Writ of Annuity, it is no Plea for the Defendant to say, that there were not any clear Gains, for the Grant charges the Person, and the rest is idle. Hobart's Reports Case 317. Between (o) Smith and Boucher adjudged. Trin. 17. Jac. B.

(o) Hob. Fol. 248. S. C. adjudged.

19. If a Man hath 100 l. de Magna Customa London, and he grants 20 l. of the 100 l. it is void, and if it be not void, yet because the Intent appears to pass only Part of the 100 l. and not to make a new Grant of 20 l. his Person is not chargeable. 19 H. 6. 12. A. B. agrees.

20. If a Man hath a Rent of 20 s. of one Tenant, and he reciting this Grants 10 s. of his Rent, if the Tenant attorns this is a good Grant of the Rent, but if he doth not attorn it is void, but if he attorns or not, yet the Person of the Grantor is not chargeable in an Annuity. (p) 9 H. 6. 13. 53. 9 H. 6. 53. if the Tenant attorn.

(p) Fitz. Annuity 5. S. C. Br. Grants 4. S. C.

21. If a Man recites how he hath 20 l. Rent, and grants 10 l. of the same Rent, if he hath no Rent his Person shall not be charged, because he intended to pass what he had as a Rent, and not to make a new Rent. (q) 9 H. 6. 12. (r) 53.

(q) Br. Annuity 3. S. C. Br. Grant 4. S. C.
(r) Br. Grant 4. S. C. Fitz. Annuity 4. S. C.

(s) Q. if ſome Part of this Caſe is not miſprinted, and what Part, for the Reaſon ſeems againſt

22. (s) If a Rent-Charge is granted to A. for Years, and after Arrearages incur, and A. dies during the Years, the Executors of A. cannot have a Writ of Annuity for the (t) Arrearages incurred in the Life of the Teſtator, becauſe the Annuity doth yet continue. Mich 22. Jac. B. R. Between (n) Carew and Burgen upon a Demurrer per Curiam.

the Caſe, perhaps it ſhould not be a Writ of Annuity but a Writ of Debt. (t) No Writ of Annuity lies for Arrearages only. Co. Lit. 285. a. 2 Leon. 51, 52. (u) 1 Rol. Abr. 350. Pl. 8. S. C. but not S. P.

23. If the Land out of which the Rent-Charge is granted, be recovered by an elder Title, and thereby the Rent avoided, yet the Grantee ſhall have a Writ of Anuuity againſt an Opinion *obiter*. 9 *H.* 6. 42. *a.* *Co. Lit.* 148. *a.* and ſaid to have been ſo held in (x) *Ward*'s Caſe.

(x) Poph. 86. 2 And. 1. 2.

(F) At what Time it lies.

(a) If he purchaſe an Aſſize and appear thereto, &c. elſe not,

1. If the Grantee of a Rent (a) brings an Aſſize for this, he ſhall never after have a Writ of Annuity, becauſe by the bringing of an Aſſize he hath (b) eleced this to be a Rent. (c) 18 E. 3. 7. b.

for a Stranger may purchaſe, &c. Co. Lit. 145. a. F. N. B. 152. a. (b) The Grantee hath an Election to bring an Annuity and make it perſonal, or an Aſſize, Diſtrain, &c. and make it real. Co. Lit. 144. b. F. N. B. 152. a. (c) Fitz. Annuity 25. S. C.

2. But though the Grantee diſtrain for the Rent, yet he may after bring a Writ of Annuity and diſcharge the Land, for the Election of the Grantee muſt be determined by ſome Action or Suit, in ſome Court of Record. *Co. Lit.* 145. *a.*

3. But if the Grantee avow the taking of ſuch Diſtreſs in a Court of Record, this is in Nature of an Action, and a Determination of his Election before any Judgment given. *Co. Lit.* 145. b.

4. But if a Man grants a Rent-Charge to a Man and his Heirs, who dieth, and his Wife brings a Writ of Dower againſt the Heir, and the Heir in Bar of her Dower claims the ſame to be an Annuity, yet the Wife ſhall recover her Dower, for he cannot determine his Election by Claim, but by ſuing a Writ of Annuity, nor after ſuch Endowment can the Heir have an Annuity for the two Parts, for that would not be according to the Grant, for either the whole muſt be a Rent-Charge, or the whole an Annuity. *Co. Lit.* 144. *b.*

(d) Co. Lit. 148. a. S. P.

5. (d) If Tenant *pur auter vie* grants a Rent for 15 Years, and two Years after, and before any Election made, *ceſtui qui vie dies*, yet the Grantee may bring a Writ of Annuity for the Arrears which grew due after his Death, for he ſhall not loſe his Election but through his own Default, and this was the Act of God. *Hil.* 37. *Eliz.* between (e) *Fulwood* and *Ward*. *Poph.* 86. adjudged by all the Judges at Serjeants Inn except three.

(e) Moor 361. Pl. 450. S. C. adjudged by the

greater Part of the Judges at Serjeants Inn. 2 And. 1. S. C. adjudged, being argued at Serjeants Inn. 2 Co. 36. b. S. C. cited.

(f) 2 And. 4. S. C. and S. P. agreed. Co. Lit. 148. a. S. P.

6. But if the Grantee purchaſe Part of the Land out of which, *&c.* his Election is determined by his own Folly, and he ſhall never after have a Writ of Annuity. *Hill.* 37. *Eliz.* between (f) *Fulwood* and *Ward*. *Poph.* 86. agreed by all the Judges at Serjeants Inn.

7. If

7. If a Rent-Charge be granted to *A.* and B. and their Heirs, *A.* diſtrains and avows for himſelf, and makes Conuſance for *B. A.* dies, and *B.* ſurvives, *B.* ſhall not have a Writ of Annuity, for the Election of *A.* binds *B.* though this Avowry was made without his Aſſent. *Co. Lit.* 146. *a.*

8. When the Rent Charge is appointed by Act of Law, the Writ of Annuity fails, for that muſt be founded upon the Deed and brought for the whole. *Co. Lit.* 150. *a.*

(G) Judgment.

Fol. 226.

1. IF a Man brings an Annuity and demands Arrearages, if the Defendant pleads an Acquittance of the Arrearages, the Plaintiff may have Judgment preſently to recover the Annuity. 30 Ed. 3. 22.

2. In an Annuity, if the Defendant traverſes the Title, if the Title be found for the Plaintiff, but that no Arrearages are behind, but at one Day pending the Writ, yet the Plaintiff ſhall have Judgment to recover the Annuity and Arrearages. 39 Ed. 3. 38.

3. In a Writ of Annuity if the Plaintiff demands a certain Sum for a Year and half ended at Michaelmas before the Action brought, where there is another Quarter paſt, between Michaelmas and the Writ purchaſed, ſcilicet the Feaſt of Chriſtmas, the Annuity being payable Quarterly, and upon non eſt factum pleaded; this is found for the Plaintiff; in this Caſe the Judgment ought not to be for the ſaid Quarter due at Chriſtmas next before the original Purchaſe, though he ought to recover the Arrears incurr'd pending the Action, for it ſhall be intended that this Quarter being paſt, and not demanded by the Plaintiff, was paid before the Action brought. Hill. 11. Car. B. R. between (a) Frank and Stukely per curiam in a Writ of Error, and they gave a peremptory Rule to reverſe the Judgment given in Bank accordingly for Chriſtmas Quarter. But this was after ſtaid for an Exception to the Writ of Error. Intratur Hill. 10. Car. Rot. 990.

(a) Cloth-worthy and Clothworthy Cro. Car. 436, 437. S. P. adjudged, and ſeems to be S. C.

(H) How to be excuted.

1. IF a Man recovers in an Annuity, (a) he ſhall never after have a new Writ of Annuity for the Arrearages recovered. 21 Ed. 3. 22.

2. But within the Year he ſhall have an elegit or fieri facias to execute them. 21 Ed. 3. 22. 24 Ed. 3. 23. 1 Ed. 3. (b) 3.

3. And after the Year a ſcire facias. 21 Ed. 3. 22. 24 Ed. 3. 23. 1 Ed. 3. 3.

4. But if a Man recovers an Annuity againſt a Parſon by nient dedire, without the Aid of Patron and Ordinary, and the Parſon dies within the Year, Execution ſhall be ſued againſt the Succeſſor within the Year by ſcire facias and not by a fieri facias. (c) 24 Ed. 3. 23.

5. (d) If a Man recovers in an Annuity he ſhall never have a new Writ of Annuity for the Arrearages incurr'd after the Recovery, but a (e) ſcire facias becauſe the Judgment is always executory. 21 Ed. 3. 22. 24 Ed. 3. 23. 30 Ed. 3. 22.

Annuity is determined, perhaps no ſcire facias lies. Dier 377. Pl. 28.

6. So it ſeems that for the Arrearages incurred after the Recovery he ought to have a ſcire facias within the Year, and not a fieri facias, becauſe the Defendant may plead any Diſcharge thereof. Contra 30 Ed. 3. 22. contra 1 Ed. 3. (f) 3.

(a) Vid. Kelw. 168, &c. 170. a.
(b) New Print.
(c) Fitz. Execution 89. S. C.
(d) 2 Co. 37. a. like Point. Co. Lit. 145. a. like Point.
(e) But if the but Debt.
(f) New Print.

Pleader.

Declaration.

THe Plaintiff claiming an Annuity for Life, may lay in his Declaration, that he was ſeized thereof (a) in *dominico ſuo, ut de libero tenemento. Hill.* 5. *Car.* 1. *Bodwell* and *Bodwell. Cro. Car.* 171. adjudged.

(a) Vide Dier 65. Pl. 1.221. Pl. 19. Co. Ent. 48, 49, 50.

Plea.

1. IN a Writ of Annuity founded upon a Preſcription againſt a Rector of a Church, it is no Plea for the Defendant to ſay that the Church is *ſubmerſa, obruta, &c.* for the Parſon is not bound in reſpect of the Building of the Church or of the conſecrated Ground, but of the Profits and Glebe; and though the Church be down, yet a Parſon may be preſented to the Rectory. *Hill.* 27 and 28 *Car.* 2. 1 *Mod.* 200, 201. adjudged.

(a) APPEAL.

(b) Who ſhall have an Appeal.

(c) Of Murder or Manſlaughter.

The Wife.

(a) Quid eſt and the Derivation of the Word vide Co Lit. 123. b. 287. b. Stamf. 58. b.

(b) By the old Law none could have an Appeal of Death, if he ſaw not the Defendant kill him of whoſe Death he appealed, for it was hard that he ſhould fight for the Truth, who could not bear Teſtimony thereof, and had it only from the Relation of others. Stamf. 79. a. (c) At common Law an Appeal for High Treaſon lay. 3 Inſt. 132. Stamf. 78. a.—but per Hal. Pl. Coron. 180. it is ſaid to be ouſted per 1 H. 4. cap. 14. by which it is enacted that no Appeal ſhall lie in Parliament, and Appeals of Treaſon were commonly brought there, Stamf. 78. b. but vid. Br. Appeal 46.——and in ancient Times there were Appeals de plagis & impriſonamento, but they are out of Uſe now and turned into Actions of Treſpaſs. Co. Lit. 12ſt. b. 4 Inſ. 182.

(d) Co. Lit. 25. b. at the top S. P. 2 Mod. 40. S. P. arguendo.

1. (d) AT common Law a Woman as well as a Man might have had an Appeal of the (e) Death of any of her Anceſtors. 2 *Inſt.* 68. But *per Magnam Chartam cap.* 34. *nullus capiatur aut impriſonetur propter appellum* (f) *fœminæ de morte* (g) *alterius quam* (h) *viri* (i) *ſui.*

(e) And at this Day ſhe may have an Appeal of Robbery. 2 Inſt. 68. Stamf. 60. b. (f) But the Heir though he derives his Blood through Females may have an Appeal. 2 Inſt. 68. Co. Lit. 25. b. Hal. Pl. Coron. 182. Stamf. 58. b. Br. Appeal 104. Fitz. Corone 9. (g) Quia vir & uxor una caro, according to Glanvil, but yet the Huſband ſhall not have an Appeal for the Death of his Wife, but the Heir only. Stamf. 59. a. (h) And the old Books ſay Fœmina de morte viri inter brachia ſua interfecti, & non aliter poterit appellare, ſo that ſhe muſt be a Wife de jure and not de facto only, for ne unque accouple, &c. is a good Plea, 2 Inſt. 68. Stamf. 59.——But though ſhe eloped in his Life-time ſhe may have an Appeal. Co. Lit. 33. b. (i) She muſt continue Fœmina viri ſui; for if ſhe marries before or pending the Appeal 'tis gone for ever, though the ſecond Huſband die within the Year. 2 Inſt. 68, 69. Dier 88. Pl. 108. Stamf. 59. a. Br. Appeal 109. S. P. 112. and if ſhe marries after Judgment ſhe can have no Execution. 2 Inſt. 69. Stamf. 59. Br. Appeal 112. 148. for the want of her Huſband is the Cauſe of the Appeal, but when ſhe is married again that Cauſe ceaſeth.

2. (i) If the Husband is attainted of Treaſon, &c. and after killed, his Wife may have an Appeal. *Co. Lit.* 33. *b.*

(i) 7 Co. 13. b. Calvin's Caſe S. P. Fitz. Coron. 21. S. P. 203. Hal. pl. Coron. 181. S. P. 3 Inſt. 215. S. P. Fitz. Corone 20. Br. Appeal 5. Stamf. 59. a. S. P. 2 Inſt. 69. S. P. for notwithſtanding the Attainder he was vir ſuus—but the Heir cannot, for the Blood is corrupted. 2 Inſt. 69.

(B) (a) The Heir.

(a) Nullus capiatur, &c. propter appellum fœminæ de morte alteriusquam viri ſui. Vide Ante. But an Hermaphrodite, if the Male Sex is predominant may have an Appeal as Heir, Secus if the Female. 2 Inſt. 69. (b) Br. Appeal 68. S. P. Raſt. Entr. 50. a.

1. NOne but the Heir by the Courſe of the Common Law ſhall have an Appeal of the Death of his Anceſtor, for though an Heir Female can have no Appeal her ſelf, (b) yet ſhe ſhall prevent the Heir male from having any, as if a Man has Iſſue a Daughter only, and is killed, his Brother ſhall have no Appeal. *Stamf.* 59. *b.*

2. (c) If a Man is killed, and after his Wife dies within the Year, his Heir ſhall have no Appeal, for the Action being once attached out of the Blood, none of the Blood ſhall after have it. *Kelw.* 120. *a.* adjudged.

(c) Stamf. 59. b. S. P. Hal. pl. Coron. 181. S. P.

3. (d) But if the Wife kills the Husband (e) the Heir ſhall have an Appeal. *Hill.* 14 *Car. B. R.* between (f) *Piggot* and *Piggot.* 1 *Jon.* 425. adjudged.

(d) 1 Leon. 326. S. P. con. arguendo. Di. 50. pl. 4. S. P. adjudged con. Hal. pl. Coron. 181, 182. S. P. Br. Appeal 106. S. P. Raſt. Ent. 50. b. (e) So where the Appeal is againſt the Heir, the next Heir ſhall have it, as if the other was dead without Iſſue. Hal. pl. Coron. 182. Stamf. 60. a. (f) Cro. Car. 531, 532. S. C. and S. P. appears.

4. (g) If after the Death of the Anceſtor, the Heir (h) dies (i) before or after an Appeal commenced, (k) another Heir ſhall not have one. *Hal. pl. Coron.* 182.

(g) Di. 69. pl. 31. S. P. dubitatur. Stamf. 59. b. S. P. dubitatur. (h) Or any way diſables himſelf by Attainder, &c. Stamf. 60. a. (i) Secus where he dies before per Br. Appeal 156. ſed Q. (k) The old Law ſeems to have been otherways vide Stamf. 80. Br. Appeal. 30. 75. and Quære when the Father is killed, and the elder Brother brings an Appeal and dies within the Year, whether the ſecond Brother may not have an Appeal without mentioning his elder Brother. Though it may be otherways where the Grandfather is killed, and the Father brings an Appeal and dies, and vid. Br. Appeal 88. 144.

5. But (l) it ſeems if the Heir after Judgment die, his Heir may have Execution. *Hal. pl. Coron.* 182.

(l) Stamf. 59. b. S. P, dubitatur for he that demands Vengeance of the Death of his Anceſtor, ought to make himſelf immediate Heir to the ſame Anceſtor, who is killed, or otherways his Suit ſhall not be received, and vid. Br. Appeal 141, 144.

6. A (m) Man of 70, or (n) an Infant may have an Appeal, and yet (o) Battail ſhall not be waged, and of late it hath been adjudged the Parol ſhall not demur. *Sed* (p) *Quære Hal. pl. Coron.* 183.

(m) Stamf. 60. a. S. P. (n) Moor 461. pl. 646. S. P. adjudged. Lat. 173. S. P. appears. Raym. 483. ſaid that before 21 Edw. 3. 23. no Precedent is to be found of any Appeal brought by an Infant, but now it is frequent, which vide. Fitz. Coron. 114. Stamf. 60. a. Br. Appeal 2. but an Ideot, Monk or Mute ſhall not have an Appeal. Hal. pl. Coron. 183. Stamf. 60. a. (o) But he may have a lawful Trial, viz. by Inqueſt. Kelw. 120. a.—and the Failure of Battail can be no Reaſon why the Appeal ſhould ſtay, for if the Plaintiff in an Appeal is Mayhemed, &c. the Defendant ſhall be ouſted of Battail and yet the Appeal ſhall proceed. 3 Inſt. 320. (p) And vide Kelw. 120. a. 2 Inſt. 320. Br. Appeal 116, 119.

(C) Of Robbery, Burglary or Larceny.

(a) Who ſhall have it.

(a) Where Church-wardens may, &c. Br. Appeal 31. 45, 90.

1. IN ſome Caſes (b) a Man may have an Appeal, though the Robbery was not done to him but to another, as if one joint Merchant is robbed and killed, the Survivor may have an Appeal. *Stamf.* 61. *a.*

(b) Hal. pl. Coron. 184. S. P. where both robbed.

2. (c) But if the Teſtator is robbed, his Executors ſhall not have an Appeal. *Stamf.* 60. *b.*

Fitz. Coron. 392.

3. (d) If *A.* robs *B.* of Goods, and after *C.* robs *A.* of the ſame Goods, *B.* may have an Appeal (e) againſt *C.* becauſe by the firſt Taking neither the Poſſeſſion nor Property was out of *B.* for a Felon claims no Property in the Goods ſtole. *Stamf.* 61. *a.*

(c) Hal. pl. Coron. 184. S. P.

(d) Br. Appeal 100. S. P. Fitz. Coron. 39. S. P. (e) Againſt A. or C. Kelw. 160. b. at the Top.

(f) Br. Appeal 100. S.P. Fitz. Coron. 39. S. P.

4. (f) Otherways when Goods are taken by a Treſpaſſer. *Stamf.* 61. a.

(g) So a Bailiff of Goods or Taylor may, Kelw. 70. b.

5. If *A.* commands *B.* to bring Goods to him, and in ſo doing *B.* is robbed of them, (g) *B.* may have an Appeal, becauſe he is chargeable over. *Stamf.* 60. *b.*

The Bailiff hath a Poſſeſſion, but my Butler that in my Houſe takes Charge of my Plate, hath no Poſſeſſion, and therefore if ſtole ſhall have no Appeal. 3 Inſt. 108.

(h) Lat. 127. S. P. per Dod. 1. and he that begins firſt ſhall recover and prevent the other of his Action.

6. (h) If the Servant is robbed of the Maſter's Goods, the Maſter or (i) Servant may have an Appeal. *Hal. pl. Coron.* 184.

(i) Stamf. 60. b. S. P. Br. Appeal 92.

(D) Of Rape.

Who ſhall have it.

(a) 2 Inſt. 180. Hal. pl. Coron. 186. A Feme covert may, &c.

1. THE (a) Party raviſhed ſhall have the Appeal. *Stamf.* 61. *a.*

2. But if ſhe aſſents thereto, (b) either before or after, ſhe ſhall have no Appeal. 2 *Inſt.* 433.

without her Husband. Br. Rape 1. (b) For by the Statute of Weſtm. 2. cap. 34. where ſhe conſents not before or after, the Offender ſhall have Judgment of Life and Member, and where ſhe conſents after, he ſhall be attainted at the Suit of the King, and have the ſame Judgment, &c. and 2 Inſt. 433. it is ſaid there is no Law but this that gives a Woman an Appeal of Rape, yet vide 2 Inſt. 180. by which it appears an Appeal of Rape lay before this Act.

(c) Fitz. Coron. 1. Br. Rape 4. Stamf. 61.

3. But per (c) 6 *Rich.* 2. *cap.* 6. if ſhe aſſents after, her (d) Husband may have an Appeal, if no Husband, her (e) Father, if no Father, the (f) next of Blood.

(d) This intended of her rightful Husband, for ne uny accouple, &c. is a good Plea. Stamf. 61. b. Br. Appeal 32. doubted—Quære, if he marries again. Stamf. 61. b. (e) So that by the expreſs Words of this Statute, an Appeal of Rape is given to the Father, and yet he can have no Appeal of the Death of his Son or Daughter. Stamf. 61. b. (f) But if raviſhed by her next of Kin, and ſhe conſents to him, and hath neither Husband nor Father, the next of Kin next to him ſhall have the Appeal, for he hath diſabled himſelf by the Rape, by which he became a Felon. 2 Inſt. 434.

(E) Against whom it lies.

1. BY the ancient Law an Appeal lay not between Lord and Tenant, that held by Homage, (a) nor between the Lord and his Villein. But this Law (b) hath loſt its Force. *Stamf.* 62. *a.*

(a) Stamf. 60. a. Litl. Sect. 189, 190.

(b) The Villein may have an Appeal of Death againſt his Lord, but not of Robbery or Mayhem. Co. Lit. 123. b. 126. b. Hal. pl. Coron. 184.

2. An Appeal of (c) Felony lies againſt an Infant. *Stamf.* 62. *a.*

3. It lies againſt a Monk without naming his Sovereign. *Stamf.* 62. *a.*

4. So it lies againſt a Feme Covert without naming her Husband. *Stamf.* 62. *a.*

(c) So of any other Appeal: Hal. pl. Coron. 185.

(F) At what Time it lies.

1. AT Common Law a Man could not have maintained an Appeal of Death unleſs he had made (a) freſh Suit. 2 *Inſt.* 319.

(a) Which is a ſpeedy and continual purſuit of the Felon for his Apprehenſion and Conviction. 2 Inſt. 319.—Which ſhall be adjudged by the Juſtices before whom, &c. Stamf. 62. b.

2. *Per 6 Edw.* 1. *cap.* 9. it is enacted, That (b) no Appeal ſhall abate if the Plaintiff declares the Deed, the Year, *&c.* with what Weapon ſlain, *&c.* nor for want of freſh Suit if the Party ſues (c) within the (d) Year and Day after the (e) Deed done.

(b) This Clauſe if taken literally, extends to all Appeals, but by Reaſon of the preceding Clauſes, which concern the Death of a Man only, and of the Words with what Weapon, &c. it appears to be intended of an Appeal of Death only. 2 Inſt. 317. Stamf. 62. a.—And it hath been ſince held, that if a Man is robbed and makes freſh Suit, he may have an Appeal at any Time. Stamf. 62. b. Where the old Authorities to the contrary are denied. 4 Leon. 16 Hal. pl. Coron. 185. Br. Appeal 23. Fitz. Coron. 79. (c) Per 4 Inſt. 185. at Common Law Appeals were to be brought within a Year and Day after the Offence committed, but Q. (d) If he dies at any Time the 1 Jan. the Year ſhall end the laſt of Dec. for the Law makes no Fraction of a Day, and the Day was added that there might be a whole Year at leaſt. 3 Inſt. 53. vide Hob. 139, 140. (e) To be accounted from the Death, not the Stroke. 2 Inſt. 420. 3 Inſt. 53. 4 Co. 43. b. per Wray, ſaid to be the common Experience of the King's Bench, againſt the Opinion of Stamf. 63. a.—But if half a Year after the Murder, one becomes Acceſſory, he may be appealed within a Year and Day after he became ſo. 3 Inſt. 53. Stamf. 63. a. 2 Inſt. 320. Br. Appeal 65.

3. (f) Though *per Weſt.* 1. *cap.* 13. (by which a Rape was made a Treſpaſs) an Appeal of Rape ought to have been brought within 40 Days, yet being made Felony, again *per Weſt.* 2. *cap.* 34. and no Time limited for it, it may be brought in any reaſonable Time. *Hal. pl. Coron.* 186.

(f) Stamf. 63. a. S. P.

(G) Where it ſhall be brought.

In what County.

1. (a) IT ought always to be brought where the Felony is done. *Stamf.* 63. *a.*

(a) 3 Leon. 141. S. P. arguendo.

2. (b) But

(b) 3 Inſt. 49. S. P. 7 Co. 2. a. S. P. Dier 46. pl. 8. S. P. Br. Appeal 3. 83, 85. Fitz. Corone 60.

2. (b) But at Common Law if a Man had been wounded in one County and died in another, the Appeal might have been commenced in either County, and (c) tried by a Jury of both. *Stamf.* 63.

But at Common Law where both Counties could not join, the Appeal failed. 3 Inſt. 49. Di. 40. pl. 71.—But yet where one was ſtruck in Middleſex, and died in London, and the Iſſue was tried by a Jury of Middleſex only, vide Di. 46. pl. 8. and yet vide the Preamble of the Statute of 2 and 3 Ed. 6. cap. 24. (c) So if after the Appeal commenced, the Plaintiff did not purſue it, but the Defendant was arraigned thereupon at the Suit of the King. Br. Appeal 149.

(d) Intended a Proſecution to the End of the Suit, and that it may be tried by a Jury of that County alone. 3 Mod. 121, 122. adjourned.

3. *Per 2 and 3 Edw. 6. cap.* 24. An Appeal in ſuch Caſe may be commenced and (d) ſued in the County where the Party dies, *&c.*

(e) Br. Appeal 83. S. P.

4. (e) So an Appeal of Rape muſt be brought in the County where the Rape is committed, as if a Man takes a Woman in one County, and againſt her Will carries her into another, and there raviſhes her, the Appeal ſhall be brought in that County only. *Stamf.* 63. *b.*

5. So if *A.* takes *B.* in one County, and carries him into another, and there robs him. *Stamf.* 63. *b.*

6. But if *A.* threatens *B.* in one County, unleſs he brings Money to *A.* in another, upon which *B.* brings it accordingly. *Stamf.* 63. *b. Quære* where the Appeal ſhall be brought.

(f) So an Indictment for the Robbery lies in any of the Counties, per Kelw. 160. b. Br. Appeal 84. for the Felony. (g) Of Felony, becauſe 'tis ſo in every County where the Goods are carried, but not of Robbery, which is in reſpect of the taking from the Perſon. 7 Co. 2. a. Hal. pl. Coron. 184. Di. 39. pl. 56, 40. pl. 66. Br. Appeal 23, 35. Br. Appeal 84. Fitz. Corone 79.

7. If *A.* robs *B.* in one County, and carries the Goods into ſeveral others, *B.* may have an (f) Appeal (g) in which of the Counties he will. *Stamf.* 63. b.

(H) Appeals.

Before whom.

(a) 2 Inſt. 420. S. P. Hal. pl. Coron. 179. S. P. Br. Appeal 56, 62.

1. (a) APpeals by Bill may be commenced at the (b) County Court before the Sheriff and (c) Coroners. *Stamf.* 64. *b.*

(b) Weſtm. 1. cap. 14. 2 Inſt. 184. (c) Notwithſtanding Magn. Char. cap. 17. quod nullus vicecomes, conſtabularius, coronator, vel alii ballivi teneant placita Coronæ, for this Power is ſaved them, per Weſt. 1. cap. 10. by which Act they ſhall attach and preſent Pleas of the Crown, but the Sheriffs ſhall have counter-rolls with them as well of Appeals as of Inqueſt, &c. 2 Inſt. 32. Br. Appeal 44, 56.—but they can only take and enter the Appeal, and count and proceed no further. 2 Inſt. 32. yet vide Stamf. 64. Br. Appeal 56, 62. Fitz. Coron. 184.

(d) Hal. pl. Coron. 179. S. P.

2. (d) And by *Certiorari* (e) directed to the Sheriff and Coroners, removed in *B. R. Stamf.* 64. *b.*

(e) It may be ſo directed, becauſe by Weſt. 1. cap. 10. the Sheriff hath a Counter-roll. 2 Inſt. 176.—But if directed to the Sheriff alone, it will not remove the Record, becauſe he is not Judge, but only hath a Counter-roll. 2 Inſt. 176. Stamf. 64. b. 70. a. Br. Appeal 44.

(f) Hal. pl. Coron. 179. S. P. 2 Inſt. 420. S. P.

3. (f) So an Appeal (g) by Bill may be received in *B. R.* againſt one that is (h) in *Cuſtodia Mariſchalli* for the Judges of this Court are the Sovereign Coroners of *England. Stamf.* 64. *b.*

(g) Of Murder may be there commenced by the expreſs Words of 3 H. 7. cap. 1. (h) So if bailed, but not if mainprized. Stamf. 64. b. 65. a. Hal. pl. Coron. 179. 1 Bulſt. 74.—But for the Difference between Bail and Mainprize, vid. 4 Inſt. 179, 180. Godb. 339.

4. (i) So

4. (i) So an Appeal by Bill may be commenced before (k) Justices of (l) Gaol-Delivery, where the Appellees or any of them (m) are in the Gaol of which they are to make Deliverance. *Stamf.* 64. *b.*

(i) Hal. Pl. Coron. 179. S. P. 2 Inst. 470. S. P. Br. Appeal 51. 123. (k) Who by their Commission in an Appeal of Robbery have Power. Di. 99. Pl. 62.—So in an Appeal of Rape. Di. 201. Pl. 67.——And in an Appeal of Murder by the express Words of 3 Hen. 7. cap. 1. (l) So before Justices of Oyer and Terminer as appears by Westm. 2. cap. 29. which vid. 2 Inst. 420. and there said also it lies before Justices of Nisi prius, Br. Appeal 113. Kelw. 152. b. before Justices in Eyre. (m) Br. Appeal 19.

5. (n) But where the Appeal is commenced before Justices of Gaol-Delivery against several, of which some are not in Prison before them, the Appeal ought to be removed in *B. R.* and Process there made out against those that are at large. *Stamf.* 64. *b.*

(n) Hal. Pl. Coron. 179. S. P. Co. 47. b. Br. Appeal 28. S. P.

6. *Per Fitz. Herbert* in his Abridgment of the Case of (o) 44 *Edw.* 3. Justices of Peace having Power by (p) 34 *Edw.* 3. (which he calls *le novel Statute*) might receive an Appeal by Bill, because they had Power to hear and determine Felonies, but that Statute gives Power only at the Suit of the King, and the Book at (q) large speaks only of Justices of Gaol-Delivery. 2 *Inst.* 420.

(o) Fitz Coron. 44. Hal. Pl. Coron. 179. Stamf. 65. a. Br. Appeal 18.

(p) 34 Ed. 3. cap. 1.

(q) 44 Edw. 3. 44. and so is Br. Appeal. 11.

7. *Per* 1 *Hen.* 4. *cap.* 14. it is enacted that (r) Appeals of Things (s) done out of the Realm shall be tried and (t) determined before the Constable and Marshal of *England.*

(r) Co. Lit. 139. b. Stamf. 65. a. Hal. Pl. Coron. 184.

(s) But if one is mortally wounded in France, and dies in England, it is said an Appeal lies upon this Act, because not punishable by the common Law, and the Wound was given out of the Realm. Co. Lit. 74. b.——But without question the Offence shall be heard and determined before the Constable and Marshal, per 13 Rich. 2. cap. 2. 3 Inst. 48. 2 Inst. 51. but if upon an Appeal Q. (t) Not by Jury but upon Testimony of Witnesses or Combat. Co. Lit. 74. a.——but 74. b. where the Queen noluit constituere Constabularium dormivit appellum vide Cas. Parl. 61.

8. *Per* 1 *H.* 4. *cap.* 14. No Appeal shall be made or pursued in Parliament.

Appeals.

Where there shall be but one, and Where several.

1. BY the (a) old Law a Man (b) might have had several Appeals one against the principal and another against the Accessary. *Stamf.* 65. *b.*

(a) This seems to have been altered by some Statute, per 28 Edw. 3. 90. a. Fitz. Coron. 138. (b) Kelw. 65. a. S. P.

2. (c) But now all Principals and Accessories before and after must be joined in one (d) Appeal. *Hil.* 45. *Eliz.* in *Waite*'s Case, 4 *Co.* 47. *b. per Curiam*, and there it was resolved that a Woman having brought seven Appeals of the Death of her Husband against several Persons, all but the first should abate.

(c) Stamf. 65. a. S. P. Hal. Pl. Coron. 188. S. P. and by both these Books if the Defendant is attaint, or acquit, or Plaintiff nonsuit, no other Appeal lies. (d) Quære if not a Diversity between an Appeal of Robbery, Rape, Mayhem, &c. and of Murder, for a Man may be robbed of the same Goods several Times in the same Day, but a Man can die but once. Stamf. 65. 2 Br. Appeal. 28. 32.—But if robbed of two Things at once, one Appeal lies not for one Thing, and another Appeal for the other. Stamf. 65. b.

3. (e) But if *A.* in one County procures *B.* to rob or kill *C.* in another, several Appeals lie in the (f) several Counties. *Stamf.* 65. *b.*

(e) Hal. Pl. Coron. 188. S. P.

(f) Vide Dier 40. Pl. 71. 7 Co. 2. b.

(g) 4 Co. 48. a. S. P. and there ſaid 28 Edw. 3. 90. a. muſt be ſo intended, which vide. Fitz. Coron. 138.

4. So if after the Year and Day and Appeal commenced, one receives the Felon, (g) another Appeal lies againſt this Acceſſory. *Stamf.* 65. *b.*

(b) Br. Appeal 21. vid. 93. Fitz. Coron. 26. 81.

5. If one Man robs ſeveral, every one of them may have an Appeal, and though attainted at the Suit of one, (h) yet he ſhall be tried at the Suit of the reſt, if their Appeals were commenced before the Attainder, and if found guilty, and that they made freſh Suit they ſhall be reſtored to their Goods. *Stamf.* 66. *a.*

6. But if before Attainder the Defendant ſhall anſwer to ſeveral Appeals of Murder or Rape. *Quære*, for it ſeems not within the ſame Reaſon. *Stamf.* 66. *a.* at the Bottom.

Pleading (a) in Appeals.

Of the (b) Writ or Plaint.

(a) Appeals are either by Writ or Bill, Stamf. 64. a. Hal. Pl. Coron. 179. 2 Inſt. 183. 1 Bulſ. 70, 71. (b) For the Exceptions thereto vide 1 Bulſ. 69, 70, 71, &c.

(c) 3 Inſt. 118. S. P. vid. 4 Co. 43. (d) So in the Count, Br. Appeal 143. Fitz. Coron. 63. (e) Br. Appeal 107. S.P. (f) Secus in an Appeal by Bill, Stamf. 148. a. (g) Br. Appeal 7. (h) Stamf. 70. a. pet vid. Br. Appeal 79.

1. (c) BY the ancient Law of *England*, if one Mayhemed another ſo that he loſt any Part of his Body, the Offender ſhould loſe the like, and tho' this Law is changed, yet in the (d) Writ it is ſtill ſaid *Felonicè Mahemavit*, for at common Law where the Defendant loſt Life or Member, the Writ run *Felonicè, &c. Co. Lit.* 127. *a.*

2. (e) In an Appeal by Original (f) both Principals and Acceſſories are generally charged alike without Diſtinction, who are Principals and who Acceſſories until the Plaintiff counts, and if the Defendants make Default the Appellant (g) before the Exigent ought to declare, that it may be known who are Principals and who Acceſſories, that the Exigent may go againſt the Principals only, and the Plea as to the Acceſſories be continued till the Principals be attainted, (h) for if the Plaintiff prays an Exigent againſt all, he is concluded to charge any of them after as Acceſſories. 2 *Inſt.* 183.

Appeal.

(a) Arraignment thereof.

(a) For the Manner how it ſhall be arraigned, vide 1 Sid. 314. 2 Jon. 210. (b) Where it abates, the Declaration depending thereupon is determined alſo, Br. Appeal 44.——and the Court hath no Authority to do it. Br. Appeal. 53.

1. IF the Writ is (b) abated the Defendant cannot be arraigned upon the Count, becauſe the Count is founded on the Writ. Between *Moor* and *Savage*. *Mich.* 22 *Car. Stil.* 7. *per Curiam.*

(a) Where

(a) Where upon the (b) Appeal the Defendant may be arraigned at the Suit of the King.

(a) Where upon a Trial before Judges of Nisi prius, the Plaintiff is nonsuit, they shall not arraign the Defendant upon the Declaration, otherways when an Appeal is begun before them. Br. Appeal 115. (b) The Appeal carries the greater Presumption against the Defendant, and therefore if there be an Indictment and Appeal for the same Offence, and the Plaintiff after Declaration is nonsuit, the Defendant shall be arraigned at the Suit of the King upon the Declaration, and not upon the Indictment. Stamf. 147. b. 148. a. Br. Appeal 92.

1. (c) IF the Appeal is good and well taken, and founded upon substantial Matter, and after the Plaintiff has (d) declared, fails by Act of God, (e Party or Law, the Defendant shall not go at large, (f) but be arraigned at the Suit of the King upon the same Declaration. *Stamf.* 147. *b.* 148. *b.*

(c) And therefore if the Plaintiff release, yet as to the King the Defendant is not excused without his Pardon, for he may be arraigned for the King upon the Declaration. Br. Appeal 27. (d) If nonsuit before, there is nothing upon which he can be arraigned. Br. Appeal. 67. (e) In an Appeal against several, several Issues being joined, the Plaintiff upon a Trial against one was nonsuit, (which was held a nonsuit as to all) and therefore as to the Suit of the Party they were discharged, yet it was held that those which were not tried should upon this Declaration be arraigned at the Suit of the Queen. Cro. El. 460. per Curiam, vid. Dier 120. b. (f) Rast. Entr. 48. a.

2. But if the Appeal was never good, true or well taken, and therefore abated, he shall not be arraigned at the Suit of the King, as if it abates for Misnomer, *&c. Stamf.* 148. *b.*

3. So if the Defendant (g) pleads any Matter in Bar by which it appears that the Plaintiff was not entitled to the Appeal. *Stamf.* 149. *a.*

(g) But in such Case though the King can take no Advantage of the Appeal, yet the Defendant must answer to an Indictment, for though he is discharged of the Appeal, yet he is not discharged of the Felony. Stamf. 149. a.

4. (h) So if he pleads the Plaintiff is excommunicated, by which the Appeal is delayed, (i) yet he shall not be arraigned at the Suit of the King, because the Plaintiff may be assoiled, and then may proceed in his Appeal. *Stamf.* 149. *a.*

5. But if an Approver confesses his Appeal false, the Defendant shall not be arraigned at the Suit of the King, for 'tis as much as if the Defendant had vanquished him, and he shall be put to Death. *Stamf.* 148. *b.*

(h) Br. Appeal 50. S.P. (i) So in an Appeal by an Infant (admitting the Parol should demur) Br. Appeal 53.

Of the (a) Count.

(a) For a Form thereof and how it varies from what was used in Bracton's Time, vid. Stamf. 79. a. b. 80. a.

1. (b) PER 6 *Edw.* 1. *cap* 9. it is enacted that (c) no Appeal shall be abated so soon as heretofore, but if he appeal or declare the (d) Deed, the Year, (e) the Day, (f) the (g) Hour, the (h) Time of the King, and (i) Town where the Deed was done, and (k) with (l) what Weapon, the Appeal shall stand.

(b) 1 Bulst. 80. 82. (c) This Clause if taken literally extends to all Appeals, but by reason of the preceding Clauses which concern the Death of Man only, and of the Words with what Weapon, it appears to be intended of an Appeal of Death only. 2 Inst. 317. Stamf. 62. a. (d) The Manner thereof with the Circumstances to ascertain it as much as the Nature thereof will admit, as if by wounding, in what Part of the Body, of what Depth and Length, that it may appear mortal; so if without wounding, whether by Weapon, as Blow, &c. or without as Poysoning, &c. 2 Inst. 318. Stamf. 79. a. (e) If in the Night it must be laid in nocte dicti in which done. 2 Inst. 318. (f) But because it may be difficult to allege the Hour exactly, it may be laid circa horam decimam ante meridiem, &c. or inter horam decimam & undecimam, &c. but the Day or Year cannot be alledged with a circa, &c. and yet the Plaintiff is not bound to prove the precise Day or Hour laid in his Count. 2 Inst. 318. Stamf. 80. b. 1 Bulst. 77, 80, 81, 82. and vid. 83. several like Precedents cited. (g) At common Law the Plaintiff in his Count need not have set forth the Hour. Quære then if it is not good without at this Day, notwithstanding this Statute. Stamf. 80. b. 1 Bulst. 82, 83. (h) That is the Year of his Reign which is added again that not only the Year may be alledged

ledged wherein the Blow, &c. was given, but alſo the Year when the Death enſued, that it may appear he died of the Blow within the Year and Day, and when the Year of the King ought to be alledged it draws with it Time and Place, viz. the Day and Time when and where the Death enſued. 2 Inſt. 319. (i) If done in a Town—if not, but in a Place known, it may be alledged in that Place in Com. &c. 2 Inſt. 319.—if in a City it may be alledged in ſuch a Pariſh, &c. which is in lieu of a Town. 2 Inſt. 319.——vid. Fitz. Coron. 80.—but where a Pariſh contains ſeveral Towns it cannot be alledged in a Pariſh, for the Statute requires the Fact to be alledged in a Town, 2 Inſt. 319. (k) Where any uſed, 2 Inſt. 319.——but if none, yet an Appeal lies. (l) Yet if done with any other the Defendant muſt be found guilty. 2 Inſt. 319.——but not if poyſoned or drowned where no Weapon is uſed. 2 Inſt. 319.

(m) Hal. Pl. Coron. 187. S P.

2. (m) The Plaintiff may declare the Fact according to the Conſtruction the Law makes of it, as if *A. B.* and *C.* are preſent, and *C.* only ſtrikes, *&c.* he may count that they all ſtruck, *&c. Stamf.* 80. *b.*

(n) Hal. Pl. Coron. 187. S. P.

3. (n) So in an Appeal of Rape, where *A.* and *B.* were preſent, abetting *C.* to raviſh, *&c. Stamf.* 80. *b.*

(o) Hal. Pl Coron. 187. S. P. Br. Appeal 12.

4. (o) In an Appeal of Death by one as Couſin and Heir, he ought to (p) be ſhewn how. *Stamf.* 81.

and vide 1 Bulſ. 71. 75. Fitz. Coron. 28. 114. 201. (p) An Indictment may be pro morte ignoti, ſecus of an Appeal. Br. Appeal 61.

5. If in an Appeal of Rape by the Husband upon *6 Rich.* 2. *cap.* 6. he declares and ſhews that the Defendant raviſhed his Wife *contra formam Statuti*, but does not ſhew that ſhe did conſent to the Raviſher, yet this is a good Count, for it is implied in the Words *contra formam Statuti per Stamf.* 81. *a.*

(q) Where it was rapuit & carnaliter cognovit, but felonice was omitted, vide Dier 202. a. Stamf. 82. by which Book it is implied in the Word rapuit. (r) But the Word rapuit is vox artis, and muſt be uſed. Stamf. 82. a. 4 Co. 39. b. Co. Lit. 124. a. 2 Rol. Rep. 464.

6. So if he declares *quod* (q) *felonicè rapuit, &c.* but does not ſay *quod carnaliter cognovit*, for that is implied in the Words *felonicè* (r) *rapuit. Stamf.* 81. *a.*

(s) Cro. Eliz. 196. S. C. adjudged, and per Curiam, if it had been & ſic murdravit modo & forma it had been well enough.——but whether die & loco had been ſufficient. Vide Cro. Eliz. 739. Dier 50. Pl. 9.

7. (s) If in an Appeal of Murder, the Plaintiff in his Count ſhews that the Wound was given at *A.* of which he after died at *B.* he muſt not conclude and ſo he murdered him at *A.* but at *B. Mich.* 32. *&* 33. *Eliz.* between *Hume* and *Ogle*, 4 *Co.* 42. adjudged.

(t) 2 Inſt. 318. S. P. (u) But the ſureſt Concluſion is, and ſo he murdered him in Manner and Form aforeſaid. 2 Inſt. 318.

8. (t) So if the Wound is laid to be given the 23d of *Sept.* and that he died the 24th, he muſt not conclude, and ſo he murdered him the 23d, but (u) he may conclude, and ſo he murdered him the 24th. *Mich.* 33 and 34 *Eliz.* between *Wrote* and *Wiggs*, *per* 4 *Co.* 47. *a.* reſolved *per totam Curiam.*

(x) Hal. Pl. Coron. 188. S. P. Stamf. 81. a. b. S. P. Br. Appeal 28. S. P.

9. (x) If an Appeal is brought againſt ſeveral, and all but one make Default, yet the Plaintiff ought to count all. *Hill.* 45. *Eliz. Wait*'s Caſe, 4 *Co.* 47. *b.* reſolved *per Curiam.*

(y) 5 Co. 110. a. S. P. (z) But with what Certainty as to Number, Colour, Goods, &c. vide Stamf. 81. a.

10. (y) In an Appeal of Robbery the Plaintiff in his Count muſt (z) declare of all Things of which he was robbed, or elſe they ſhall be forfeited to the King, for the Favour which the Law preſumes the Plaintiff bears the Felon, and he can have Reſtitution for no more than is in his Appeal. 3 *Inſt.* 227.

Imparlance.

1. IN an Appeal the Court can grant no Imparlance, but it (a) may be adjourned *per dies dat'* till ſuch a Day. *Paſch.* 19 *Car.* 2. between (b) *Sampſon* and *Tothil.* 1 *Sid.* 325. *per Curiam.*

(a) And yet in Lat. 173. where an Infant brought an Appeal by Guardian, and at a Day it was prayed the Guardian might not be called becauſe he was ſick, but that a Day or two might be given, and the Court ſaid it could not be done in an Appeal, whereupon he was called and came not, per quod, &c. (b) 2 Keb. 183. S. C. and S. P. per Curiam.

Plea.

In Bar.

1. (a) ANY Thing may be pleaded in Bar, by which it appears the (b) Plaintiff is not intitled to his Appeal. *Stamf.* 98. *a.*

(a) Hal. pl. Coron. 190. S. P.

(b) So where the Plaintiff is nonſuit, and the Defendant arraigned upon the Declaration at the Suit of the King, becauſe the King ſhall not be in better Condition than the Plaintiff, upon whoſe Declaration the Defendant is arraigned. Fitz. Coron. 3.

2. (c) Therefore a *nonſuit* or *retraxit* (d) after a Declaration in a former Appeal may be pleaded in Bar. *Stamf.* 198. *b.*

(c) Hal. pl. Coron. 190. S. P.

(d) After Appearance. Co. Lit. 139. a.—but 1 Sid. 32. doubted, becauſe the Appearance of the Appellor is not entered upon Record, for he ought to be always ready in proper Perſon.

3. (e) So it is a good Plea that the Plaintiff brought an Appeal againſt another, who thereupon was acquit or attainted. *Stamf.* 98. *b.*

(e) Hal. pl. Coron. 190. S. P. Br. Appeal 14.

4. (f) So the Defendant may plead a Releaſe by the Plaintiff made to him. *Stamf.* 98. *b.*

(f) Hal. pl. Coron. 190. S. P.

5. (g) But one Defendant cannot plead a Releaſe to another, tho' Party to the Appeal. *Stamf.* 98. *b.*

(g) Hal. pl. Coron. 190. S. P. Br. Appeal 111. for each ſhall die, and it is not like a Releaſe in other perſonal Actions where an Execution againſt one ſerves for the reſt.

6. (h) So if *quoad* one Defendant, the Plaintiff enters a *retraxit*, this will not bar him *quoad* the others. *Stamf.* 98. *b.*

(h) Hal. pl. Coron. 190. S. P.

7. (i) Where the Defendant (k) pleads in Bar (l) in *favorem vitæ*, he may alſo plead over to the Felony, and his Plea ſhall not be accounted double. *Stamf.* 98. *b.*

(i) Hal. pl. Coron. 190. S. P.

(k) Diverſity where a Man pleads in Diſability, and where in Bar. 1 Bulſt. 143. per Yelv. arguendo. (l) But if in an Appeal of Mayhem, the Defendant pleads in Abatement and quoad the Felony and Mayhem not guilty, by this his Plea in Abatement is waved, for a Man ſhall not be allowed to plead in Abatement, and alſo not guilty, if not where Life is in danger. Kirton and Williams, Cro. Eliz. 495. adjudged. Poph. 115. adjudged. Ow. 59, 60. adjudged. Moor 457. pl. 628. adjudged, and a Venire awarded to try the Iſſue, not guilty. Noy 36. adjudged.

8. (m) But where he pleads a Releaſe he ſhall not be admitted to plead over not guilty to the Felony, for that would be repugnant to his Plea before confeſſing the Felony by Implication. *Stamf.* 98. *b.*

(m) Hal. pl. Coron. 190. S. P. vide 1 Bulſt. 143.

9. (n) So if in an Appeal of Robbery, the Defendant pleads, the Plaintiff is a Villain, he ſhall not conclude over to the Felony, for the Plaintiff would thereby be enfranchiſed. *Stamf.* 98. *b.*

(n) Hal. pl. Coron. 191. S. P.

10. (o) But if the Villanage is found againſt the Defendant, he may after plead not guilty to the Felony. *Stamf.* 98. *b.*

(o) Hal. pl. Coron. 191. S. P.

(p) Hal. pl. Coron. 191. S. P. Br. Appeal 115. S. P.

11. (p) But otherways in Caſe of a Releaſe by the Pleading, whereof the Felony by Implication is confeſſed. *Stamf.* 98. *b.*

(q) Hal. pl. Coron. 191. S. P. Br. Appeal 115. S. P.

12. (q) But if the Defendant pleads in Bar, without concluding to the Felony, (r) where he might alſo have pleaded to the Felony, yet if his Bar is found againſt him, he may after plead not guilty to the Felony. *Stamf.* 98. *b.*

(r) So if the Defendant pleads ne unq; accouple in loyal Matrimony, and it is certified they were accouple, &c. yet he may after plead not guilty. Fitz. Coron. 140. Br. Appeal 17. 101.

(s) 1 Bulſt. 141. Br. Appeal 122.

13. (s) In an Appeal of Death, the Defendant cannot (t) juſtify *ſe defendendo*, but muſt plead not guilty, and the Jury find the ſpecial Matter, &c. 2 *Inſt.* 316.

(t) But a Sheriff, &c. that executes a condemned Man, may juſtify and need not plead not guilty, Br. Appeal 5.—but a Judge that condemns a Man, &c. cannot juſtify but muſt plead not guilty, and ſhew his Matter in Evidence. Br. Appeal 5.

14. But in an Appeal of Mayhem, the Defendant muſt juſtify *ſe defendendo*, and cannot give it in Evidence. 2 *Inſt.* 316.

(u) Yelv. 204, 205. S. C. adjudged, becauſe murdravit is as proper to expreſs Manſlaughter as Murder, and however the Word murdrum is but idle, and feloniam the Principal, which makes the Plea and refers to ſuch manner of Felony, as the Plaintiff hath ſuppoſed, and it was not ex neceſſitate that he pleaded to the Country where he had pleaded a good Plea before, for the Defendant might have hazarded his Life upon the firſt Plea if he would. 1 Bulſt. 142, 143, &c. adjudged.

15. If in an Appeal of Manſlaughter, the Defendant *defendit feloniam & murdrum*, and then pleads a Conviction upon an Indictment and Clergy allowed, and in the Concluſion of his Plea *quoad* the Felony and Murder, pleads not guilty, this is a good Plea, for it refers to the Declaration, and anſwers the Homicide there charged. *Trin.* 9 *Jac.* between (u) *Bradly* and *Banks. Cro. Jac.* 283. adjudged.

Plea.

Where the Defendant may have his Plea.

1. IF in an Appeal of Murder the Defendant pleads not guilty, and thereupon Iſſue is joined, he may after wave his Plea, and demur to the Declaration, for if that is not good, it is in vain to go to Trial. *Mich.* 32, & 33 *El.* Between *Hume* and *Ogle. Cro. El.* 196. *per Curiam*, and the Defendant accordingly did ſo, and it was agreed, that if it had been adjudged againſt him, it had not been peremptory, but only a *reſpondeas* Ouſter.

(a) Where if the Defendant pleads, the Plaintiff ought to reply ſedente curia, vid. 1 Bulſt. 141.

(a) Replication.

1. IF in an Appeal of Murder by a Woman, the Defendant pleads *ne unque accouple* in loyal Matrimony, &c. and (b) *quoad* the Felony not guilty, the Plaintiff may reply that ſhe was accoupled in loyal Matrimony, without anſwering to the Felony. *Paſch.* 33 *Eliz.* Between (c) *Withington* and *Dalaber*, *Cro. Eliz.* 225. adjudged.

(b) He ſhould not conclude to the Felony, becauſe that is to demand two Trials. Br. Appeal 17, 48.—and yet he ſhall not be bound by the Certificate of the Biſhop, for he may after plead not guilty. Br. Appeal 17, 101. Fitz. Coron. 140.

(c) 3 Leon. 268. S. C. adjudged.

(d) For he may plead as many Matters as he will, ſo that they are all triable per pais Br. Appeal 44.

2. But where the Defendant pleads a Plea triable by common Law (d) and concludes over to the Felony, the Plaintiff (e) ought to reply and

(e) For the ſame Jury ſhall be charged with both Iſſues, but when the Verdict is to be taken they ſhall be firſt asked as to that in Abatement, and if found for the Appellee, they ſhall be asked no further but diſcharged. 1 Sid. 325.

conclude to the Felony. *Paſch.* 33 *Eliz.* Between (f) *Withington* and *Dalaber*. *Cro. Eliz.* 223. *per Curiam.*

(f) 3 Leon. 268. S. C. and S. P. per Curiam.

(a) Proceſs.

(a) If at the Day of the Return of a Writ of Appeal viz. non miſit breve, yet if the Defendant appears in Court, and prays, the Plaintiff may proceed againſt him, he muſt declare, though his Writ is not yet executed or returned. 1 Bulſt. 71, 73, 74, 77. 3 Bulſt. 243. Raſt. Ent. 46. b. (b) Which vide explained. 2 Inſt. 182, 183.

1. PER (b) *Weſt.* 1. *cap.* 14. the Acceſſory ſhall not be outlawed till the Principal that is appealed of the Deed be attainted, *&c.* but the Exigent ſhall ſtay till he be attainted by Outlawry or otherways.

2. If an Appeal is commenced before the Coroner in the County, and thereupon a *Capias* iſſues, and a *non eſt inventus* is returned, an Exigent ſhall be immediately awarded. *Stamf.* 67.

3. But *per* 8 *H.* 6. *cap.* 10. in an Appeal againſt one commorant in a foreign County, after the firſt *Capias* returned, another ſhall iſſue to the (c) Sheriff of the County where the Defendant (d) by the Appeal is ſuppoſed converſant returnable before, *&c.* at a Day three Months after, where the Counties are held from Month to Month, and four Months after were held from ſix Weeks to ſix Weeks, *&c.* and if he can't be found, the Sheriff ſhall make Proclamation in two Counties before the Return of the Writ, that the Defendant appear at the Day, *&c.* after which ſecond Writ ſerved and returned, if the Apellee come not he ſhall be outlawed.

(c) How to be directed when the Defendant dwells in a County Palatine. Stamf. 69 a.

(d) This extends only to ſuch Caſes where by the Appeal the Defendant is ſuppoſed commorant in a foreign County. Stamf. 68.

4. And *per* 10 *H.* 6. *cap.* 6. if ſuch Appeal by *Certiorari* is removed in *B. R.* like Proceſs ſhall be made and returned there.

5. If an Appeal is brought againſt ſeveral, and one comes and pleads, Proceſs ſhall be continued againſt the reſt. *Stamf.* 70. *a.*

6. But if he that appears pleads in Abatement of the Appeal, or Matter in Bar to prove the Appeal lies not, the Exigent ſhall be ſtaid againſt the reſt, till it be adjudged whether the Appeal lies or not. *Stamf.* 70.

7. (e) After the Appeal is removed in *B. R.* the Parties are without Day before the Coroner, and if the Plaintiff does not proceed, yet he ſhall not be *nonſuit* till a *Scire facias* ſued againſt him, *&c. Stamf.* 70. *a. b.*

(e) Br. Appeal 15. 140.

8. (f) In an Appeal when one Proceſs is returned, another ought inſtantly to iſſue without any (g) mean Day between, ſo that there be no Ceſſation of the Proſecution. *Mich.* 8 *Jac.* Between *Bradly* and *Banks*. *Cro. Jac.* 284. reſolved *per Curiam.*

(f) Yelv. 204, 205. S. C. and S. P.

(g) But it ought to bear Teſte the ſame Day the former was returned. Yelv. 205. 1 Bulſt. 142, 143.

9. Therefore where the Writ of Appeal was returnable *quind' Mich.* which was the 16 *Oct.* and the *Capias* was teſted the 23 *Oct.* returnable *Octab. Hill.* it was held a Diſcontinuance notwithſtanding all was in one Term, which in Law is but one Day. *Mich.* 8 *Jac.* Between (h) *Bradly* and *Banks*. *Cro. Jac.* 283. adjudged.

(h) Yelv. 204. 205. S. C. and S. P. adjudged, as alſo becauſe the Capias was returnable. Octab. Hill. viz. 23. Jan. and the Exigent iſſued out the 24, and becauſe the Exigent was returned 20 Jun. and the allocat. Com. boze Teſte 21 Jun. 1 Bulſt. 141, 142. adjudged.

When

When the Abettors shall be enquired of.

(a) Which vide explained. 2 Inst. 383, 384. (b) If after an Indictment it shall be presumed not to be per malitiam unless the Indictment is insufficient, and then it is taken as none. 2 Inst. 384. Co. Lit. 139. a. Br. Appeal 1. 4. 6. 43. 58. Secus where indicted as Principal and the Appeal is against him as Accessory. Br. Appeal 73. (c) It must be where the Original and Process were good, so that his Life was in danger. 2 Inst. 385. Yelv. 204. 1 Bulst. 141. at bottom. (d) Not so if the Writ abates. 4 Co. 47. b.—or if by Plea there is a nearer Heir, &c. he is discharged of the Action, and not acquitted of the Felony. 2 Inst. 385. Br. Appeal 68. (e) Intended upon the Appeal, 2 Inst. 385. (f) Though an Inquiry may be made before Justices of Nisi prius, yet they cannot give Judgment for the Damages. 2 Inst. 386. 4 Co. 93. b. Dier 120. b. unless the Appeal was commenced before them. Br. Appeal 113. (g) And if not able, his Body may be taken. 12 Co. 126. (h) Where several Apellees, the Damages must be assessed severally. 12 Co. 126. Dier 120. b. Br. Appeal 77. (i) Unless Monk or Feme Covert, who by Law are disabled. 2 Inst. 385. Hob. 98. 1 Rol. Rep. 170. (k) And therefore if the Court thinks the Jury give too little, they may increase them. Cro. Eliz. 223.—or if against the Abettors the Plaintiff may have an Original Writ of Abatement, and count to greater. 2 Inst. 387. (l) But if able to answer Part only, part of the Damages shall not be given against him, and other Part against the Abettors, but the Whole shall be recovered against the Abettors. 2 Inst. 386. 12 Co. 126. 2 Inst. 386. Br. Appeal 96. yet vide Br. Appeal 74. Fitz. Coron. 219. (m) The Heir or next of Kin may abet the Wife Appellant. 2 Inst 384. (n) By these Words a Distress infinite is given, and the Abettors coming in, upon this Process may traverse the Abetment, because Strangers to the Verdict. 2 Inst. 386. Rast. Ent. 44. or may plead not guilty, or other Plea. 12 Co. 126. Rast. Entr. 44.

1. PER (a) *Westm.* 2. *cap.* 12. In a false Appeal (b) by Malice, if the Appellee (c) (d) acquits himself either at the Suit of the Appellant or (e) King, the Justices (f) before whom it is heard and determined, shall punish the Appellant by a Year's Imprisonment, and he shall (g) recompence (h) Damages to the (i) Appellee (k) at the Discretion of the Justices, and be fined to the King, and if not (l) sufficient, it shall be enquired by whose Abatement it was commenced, and if any Abettor (m) through Malice is found at the Suit of the Appellee, he shall be (n) distrained by judicial Writ to come before the Justices, and if convicted, shall be punished as before.

Judgment.

(a) 3 Inst. 212. S. P. Co. Lit. 390. b. S. P.

1. (a) IF the Appellee wage Battle and is slain in the Field, the Judgment must be, that he was vanquished in the Field, *ideo consideratum est quod suspendatur per collum*, &c. for until this Judgment he is not attainted, and without it the Lord can have no Escheat. 2 *Inst.* 183.

Fol. 230.

(a) APPENDANT.

(a) The Difference between Appendant and Appurtenant, & the Word Pertinent used indifferently for both. Co. Lit. 121. b. (b) Fitz. Quare impedit 151. S. C. (c) Long and Hemming S. P. 1 Leon. 207, 208. per Curiam. Cro. El. 209. per Curiam. 4 Co. 87. b. like Point.

(A) What Thing may be Appendant.

1. AN Advowson of a Priory may be appendant to a Castle. (b) 18 Ed. 3. 15. b.

2. (c) An Advowson which is said to be appendant to a Manor is in rei veritate appendant to the Demesnes of the Manor, which is of perpetual Subsistance and Continuance, and not to the Rents or Services which are subject to Extinguishment or Destruction. Co. Lit. 122.

3. If an Advowſon be appendant to the Manor of D. of which Manor the Manor of S. is held, and after the Manor of S. is made Parcel of the Manor of D. by Way of Eſcheat, the Advowſon is only appendant to the Manor of D. Co. Lit. 122.

(B) What Things ſhall be ſaid Appendant, and to what Things, and what not.

1. (a) 33 H. 6. 4 b. per 2 Serjeants, When Advowſons or other Things which may be appurtenant, have, (b) Time out of Mind, &c. paſt with the Manor by this Word cum pertinentiis, this makes the Appendancy.

(a) Br. Incidents 2 S. C.
(b) Things Appendant are ever by Preſcription, but Appurtenants may in ſome Caſes be created at this Day, as if one grants to another common of Eſtovers to be burnt within his Manor, theſe are appurtenant to the Manor. Co. Lit. 121. b. 1 Ven. 407.

2. One Thing incorporeal cannot be appendant to another Thing incorporeal. Com. 170. Bracton lib. 2. fol. 53. Co. 4. Tit. 36. b. (c) Lit. 121. b

3. One corporeal Thing cannot be appendant to another corporeal Thing. Com. 170. Co. 4. Tit. 36. (d) b. Co. Lit. 121. b.

4. But a Thing incorporeal may be appendant to a Thing corporeal. Com. 170. Bracton lib. 2 fol. 53. Co. Lit. 121. b.

5. A Leet may be appendant to a (e) Manor. (f) 33 H. 6. 46. per Lit. 13. H. 4. 9. b.

6. A Hundred may be appendant to a Manor (or Appurtenant) (g) 33 H. 6. 4. b. per Lit. contra. 13 H. 4. 9. b.

(c) This ſhould be Co. Lit.
(d) The Original is 6. ſo plainly miſprinted.
(e) To a Hundred. March. 75. per Jones Juſtice.
(f) Br. Incidents 2. S. C.
(g) Br. Incidents 2. S. C. Fitz. Releaſe 9. S. C. Br. Joint-tenants 2. S. C.

7. A Rent Charge may be Appendant to a Manor. 1 H. 4. 3.

8. (h) Land may be appurtenant to an (i) Office; as to the Office of Fosterſhip and Warden of the Fleet, &c. becauſe thoſe which have had the Office have had the Land. 1 H. 7. 16. Com. 169. D. 6. E. 6. 71. 33.

(h) Godb. 352. S. P. per Dod. Co. Lit. 122. a. S. P.
(i) But this muſt be an Office in Fee and not for Life only. Dier. 71. Pl. 43. Dav. 34——ſuch Offices are of perpetual Subſiſtance, either being in eſſe, or in that they are grantable over, per Co. Lit. 122.

9. One Office may be appurtenant to another, as the Cuſtos brevium gives one of the Prothonotaries de Banco, Com. 169. and ſo of the chief Juſtice de Banco.

10. (k) But Land cannot be appendant to Land, becauſe both are Things corporeal. Com. 169, 170. per Curiam.

(k) Godb. 352. S.P. per Dod' arguendo.

11. An Advowſon in one County may be appendant to a Manor in another County. 33 H. 6. 4. b. per Lit.

12. (l) A Vicarage may be appendant to a Parſonage. Dubitatur 17 Ed. 3. 76.

Fol. 231.

13. If a Parſon appropriate creates a Vicarage, &c. lawfully, the Vicarage of common Right ſhall be appendant to the Parſonage. Contra 17 Ed. 3. 51.

(l) N. Bend. Pl. 270. S. P. appears.

14. (m) A Vicarage may be appendant to a Manor, though of common Right it belongs to the Parſonage, for it might be granted over by the Parſon Time out of Mind, and ſo become appendant to the Manor, or it might be by Compoſition, My Reports Mich. 13. (n) the King and Sacker, Mich. 14 Jac. B. adjudged. The Dean and Chapter of Exeter and Corniſh's Caſe.

(m) Moor 894. Pl. 1258. S. P. per Curiam, becauſe it may be intended the Rectory was appendant to the Manor before the Appropriation, and that thereupon the Advowſon of the Vicarage was reſerved to the Patron. (n) 1 Rol. Rep. 235, 237. S. C. and S. P. adjudged. Cro. Jac. 385, 386. S. C. adjudged. 3 Bulſ. 88. S. C. and S. P. appears. Hob. 75. S. C. but S. P. does not appear.

15. One Advowſon cannot be appendant to another Advowſon. Contra 24. Ed. 3. Quare impedit 13. per Curiam.

16. Land may be appurtenant or Parcel of a Hundred, for a Man may convey his Manor except a ſmall Parcel of Land, which in Continuance may be reputed Parcel of the Hundred. Mich. 17. Jac. B. ſaid by Hobart to be reſolved in Camera Scaccarii.

17. An Advowſon may be appendant to a Tenement. 32 Ed. 1. 89. admit.

18. An Advowſon may be appendant to one Acre. 18 Ed. 3. 52. 39 Ed. 3. 36. b. 19 Ed. 3. Quare impedit 155 D. 28. H. 8. 24. 153. to 6 Acres.

19. (o) If an Advowſon be appendant to a Manor, and one Acre is granted with the Advowſon, it is clear that after the Grantee hath preſented, the Advowſon is appendant to this Acre. 44 Ed. 3. 16. admit. (p) 17 Ed. 3. 3. b. 5. adjudged. 18 b. 21. b.

(o) Cro. Pl. 39. S. P. per Windham Juſtice arguendo.

20. So it ſeems it is appendant before any Preſentation. Dubitatur 43. Ed. 3. 25. b. (q) 17 Ed. 3. 3. 5. 18. 24. b. they did not rely upon the Preſentation.

(p) Fitz. Darrein Preſentment 9. S. C.

21. But this Feoffment of the Acre with the Advowſon, ought to be by Deed to make the Advowſon appendant. 17 Ed. 3. 4. b. 18. b.

22. If a Baron is ſeized in the Right of his Feme of a Manor to which the Advowſon is appendant, and grants one Acre with the Advowſon, the Advowſon ſhall be appendant to this Acre. (r) 17 Ed. 3. 5. 18. b. adjudged 21. b. though the Husband had not the abſolute Right, but (s) 23 Aſſ. 8. this is reverſed in a Writ of Error.

(q) Fitz. Darrein Preſentment. 9. S. C.

(r) Fitz. Darrein Preſentment 9. S. C.

(s) Br. Error 121. S. C.

23. So if the Husband hath aliened all the Manor by Acres to ſeveral Perſons, ſaving one Acre, the Advowſon ſhall be appendant to this. 17 Ed. 3. 22. b.

24. If Leſſee for Life of a Manor to which an Advowſon is appendant, aliens one Acre with the Advowſon appendant, the Advowſon is appendant to the Acre for this. 18 Ed. 3. 44. Curia.

25. (t) If Coparceners of a Manor, to which an Advowſon is appendant, make Partition of the Manor, and not of the Advowſon the Advowſon continues appendant. 17 Ed. 3. 39. Curia.

(t) Co. Lit. 122. a. S. P. and that in every of their Turns it is appendant to that Part which they have. 8 Co. 79. b. S. P.

26. If the Baron ſeized in the Right of the Feme of a Manor to which an Advowſon is appendant, aliens one Acre with the Advowſon appendant, and after aliens the Reſidue of the Manor to another, and dies, if the Wife recovers in a cui in vita, the Acre with the Appurtenances, ſhe ſhall recover the Advowſon as appendant. (u) 17 Ed. 3. 22. b. 19. b.

(u) Fitz. Darrein Preſentment 9. S. C.

27. If a Feme be endowed of the third Part of a Manor with the Appurtenances, the third Part of the Advowſon ſhall be appendant to it alſo. 6 Ed. 3. 44. Quare impedit 40.

Fol. 232.

28. If a Feme be endowed of the third Part of a Manor with the Advowſon appendant, and after another Baron and Feme purchaſe all the Manor, and preſent twice, and after alien one Acre with the Advowſon appendant, the third Part of the Advowſon does not paſs as appendant to the Acre, becauſe the Baron had but a Reverſion in this third Part at the Time of the Grant. (x) 23 Aſſ. 8. adjudged.

(x) Br. Error 121 S. C. Br. Preſentation al. Egliſe 38. S. C.

29. If a Man ſeized of a Manor to which an Advowſon is appendant, grants the third Part of the Manor with the Appurtenances, without making mention of the Advowſon, nothing of the Advowſon paſſes. 6 Ed. 3. 44. per Parm and Stoner, Title, Quare impedit 40.

30. (y) Common of *Turbary* or *Eſtovers* cannot be appendant or appurtenant to Land, but to a Houſe to be ſpent there, for there muſt be an Agreement in Nature and Quality. *Co. Lit.* 121. *b.*

(y) 4 Co. 37. a. S. P. 1 Rol. Abr. 397. Pl. 4. S. P.

31. (z) So a Leet that is (a) temporal, cannot be appendant or appurtenant to a Church that is eccleſiaſtical. *Co. Lit.* 121. *b.*

(z) 4 Co. 37. a. S. P.

(a) So Tythes cannot be appurtenant to a Grange, becauſe of ſeveral Natures, unleſs the Grange is the Glebe. Winch. 72, 73.

32. So a Seat in a Church cannot be claimed by Preſcription, as appendant or belonging to Land, but to a Houſe, for that ſuch Seat belongs to the Houſe in reſpect of the Inhabitancy thereof. *Co. Lit.* 121. b. 122. *a.*

(C) Deſtruction of the Appendancy.

1. If there are two Parochial Churches, of which one is appendant to the Manor of D. and the other in groſs, and the Patrons and Ordinaries are willing to annex and conſolidate them into one Church, and upon the ſame Union it is agreed, that the Patrons ſhall preſent to the ſaid Churches by Turns, in this Caſe all the Advowſon ſhall be in groſs for one Turn, and appendant for the other Turn to the Manor of D. as it was before the Union. D. 9. Eliz. 259. 20.

2. A Man is ſeiſed of a Manor to which an Advowſon is appendant, and a Stranger brings an Aſſize of darrein Preſentment, or Writ of Covenant againſt him of the Advowſon, upon which the Stranger levies a Fine ſur conuſans de droit tantum to the Defendant, and he regrants that the Conuſor ſhall have the next Preſentment, and he himſelf the ſecond, and ſo by Turns for ever, in this Caſe the Advowſon remains appendant as before every other Turn, becauſe by this Fine it is made diſappendant but every other Turn, which doth not belong to the Grantor. (a) 43 Ed. 3. 35.

(a) Fitz. Quare impedit 134. S. C. Dier 259. Pl. 20. S. C. cited.

3. (b) A Fold courſe ſcilicet Common of Paſture for 300 Sheep in a certain Field, may be appurtenant to a Manor, ſcilicet that the Lord and all thoſe whoſe Eſtates he hath, &c. have had Time out, &c common there for 300 Sheep as appurtenant to the ſaid Manor, without ſaying levant and couchant upon the ſaid Manor. Mich. 10. Car. B. R. in a Writ of Error between (c) Day and Spooner per Curiam agreed.

(b) Sacheverel and Porter like Point. Cro. Car. 428. adjudged. 1 Jon. 397. adjudged.

(c) Cro. Car. 432. S. C. adjudged and S. P. appears. 1 Jon. 375. S. C. adjudged and S. P. appears. 1 Rol. Abr. 401. Pl. 4. S. C.

4. In the ſaid Caſe when ſuch Fold courſe is appurtenant to a Manor, if the Lord grants or leaſes to another Parcel of the Manor, as ſeveral Acres Parcel of the ſaid Manor with the ſaid Fold-courſe, this will paſs as appurtenant to the ſaid Acres, and ſhall be appurtenant to them. Mich. 11, Car. B. R. between (d) Day and Spooner aforeſaid for it is not neceſſary for them to be levant and couchant upon the Manor, and it is not any Prejudice to the Owner of the Land where the Common is to be taken.

(d) Cro. Car. 432. S. C. adjudged. 1 Jon. 375. S. C. adjudged. 1 Rol. Abr. 402. Pl. 3. S. C.

5. If a Man grants the Manor of D. and in the ſame Deed grants the Advowſon of D. naming it as in groſs, yet being appendant before it will paſs as appendant. (e) 48 Ed. 3, 4. b.

(e) Br. Eſtoppel 47. S. C.

6. If a Patron preſents to an Advowſon appendant as in groſs, this will make it diſappendant. 21 Ed. 4. 2.

7. If a Man hath an Advowſon appendant to a Manor, and grants every ſecond Preſentation to another in Fee, yet the Advowſon continues to himſelf appendant for the other Preſentation. (f) 43 Ed. 3. 35.

(f) Fitz. Quare impedit 134. S. C.

Fol. 233.

8. If a Man ſeiſed of a Manor to which an Advowſon is appendant accepts a Fine of a Stranger, by which the Stranger acknowledges all his Right in the Advowſon to him, this does not make the Advowſon in groſs. (g) 43 E. 3. 35.

(g) Fitz. Quare impedit 134. S. C.

9. (h) But

(h) This in the Original is 10. ſo appears miſprinted.

9. (h) But if he had acknowledged his Right in the Advowſon to have been to a Stranger, this had made the Advowſon in groſs, and this could not be made appendant after by any grant. (i) 43 E. 3. 35.

(i) Fitz. Quare impedit 134. S. C.

(k) This in the Original is 9. ſo appears miſprinted.

10. (k) If a Man be ſeiſed of a Manor to which an Advowſon is appendant, and leaſes the Manor without Deed for Life reſerving the Advowſon, this makes the Advowſon in groſs though it be without Deed. 29 E. 3. 36. b. Co. 5. 11 b. it is in groſs during the Eſtate for Life.

(l) Secus if made generally of the Manor, without taking Notice of the Advowſon.

11. If a Partition is made between Coparceners, (l) with an expreſs Exception of the Advowſon, the Advowſon remains in Coparcenery and in groſs. *Co. Lit.* 122. *a.*

1 Rol. Abr. 231. Pl. 25.

12. But if upon a Partition the Advowſon appendant is allotted to one Coparcener, and the Manor to which to the other, and after one dies without Iſſue, by which the Law unites them again, in this Caſe the Advowſon which was once ſevered is now appendant again. *6 Co.* 64. *a.*

Fol. 234.

APPORTIONMENT.

(A) Of what Things there ſhall be an Apportionment.

1. NO Appoztionment ſhall be of a Rent-charge. 32 Aſſ. 10. tempor. E. 1: Avowry 226.

(a) Weſt. 3. cap. 2. made 18 Ed. 1. which vid. explained.

2. No Appoztionment ſhall be of a Rent-ſeek, for this is not within the (a) Statute that gives an Appoztionment of Rent. 32 Aſſ. 10. 2 Inſt. 503.

(b) So where by Preſcription, 8 Co. 78, 79. adjudged. Moor 463. Pl. 654. dubitatur.

(c) Cro. Car. 482. S. C. adjudged.

3. Common appurtenant to Land for Cattle levant and couchant upon the Land (b) by Grant, ſhall be appoztioned, if Part of the Land is granted over to another. Mich. (c) 13 Car. B. R. between Sacheverel and Porter per Curiam adjudged, upon a ſpecial Verdict. Intratur Trin. 11. Car. Rot. 324. Hobart's Reports (d) this Caſe 296. adjudged, but there it does not appear whether it was by Grant or Preſcription.

1 Jon. 396, 397. S. C. adjudged. (d) Hob. Fol. 235. S. C. adjudged. Co. Lit. 122. S. P. 2 Brownl. 297. S. P. per Curiam. Hob. 25. S. P. ſaid con. Noy 30. S. P. per Curiam.

(B) What Act or Thing will make an Apportionment.

Acts of the Parties.

1. IF there be Lord and Tenant of 20 Acres by Fealty and 10 s. Rent, and the Tenant aliens two Acres in Fee, the Alienee ſhall hold the two Acres pro particula by the Statute of W. 3. de quia emptores

emptores terrarum, &c. and the Rent shall be apportioned according to the Value. Co. M. C. 503.

2. If a Man leases for Years Freehold, and also Copyhold Lands by the Licence of the Lord, reserving a Rent, and after grants the Reversion of the Freehold Land to another, and the Lessee attorns, the Rent shall be apportioned, for this Waits upon the Reversion. Mich. 40, 41 El. B. R. between (a) Collins and Harding.

(a) Cro. El. 604, 605, 622, 623. S. C. and S. P. may be inferred thence. 13 Co. 57. S. C. adjudged, and S. P. may be thence inferred. Godb. 139. S. C. and like Point, but S. P. does not appear.

3. So if the King's Tenant leases for Years rendring Rent, and after grants the Reversion of two Parts to another, and dies, and his Heir is in Ward for the third Part of the Reversion which descended, and the King grants the third Part over, the Grantee shall have an Action of Debt for the third Part of the Rent, for it shall be apportioned. Mich. 43, 44 Eliz. B. R. between (b) West and Lassels, adjudged.

(b) Cro. El. 851. S. C. adjudged as to this Point, tho' Judgment was staid for an Imperfection in the Declaration. 1 Rol. Abr. 236. pl. 1. S. C.

4. If Lessee for 20 Years leases for 10 Years, rendring 34 l. 6 s. 8 d. and after devises 20 s of this Rent to three Persons, to hold to each of them one third Part divided, and dies, this Rent shall be apportioned according to the Devise, and each Devisee may have an Action of Debt against the Lessee for his Part, scilicet 6 s. 8 d. tho' hereby the Lessee may be charged in several Actions, for it seems it might be so divided upon a Grant with Attornment, and in the Devise an Attornment is supplied. Mich. 40, 41 El. B. R. between (c) Arge and Watkins adjudged. Hill. 41 El. B. R. the same Case.

(c) Moor 549. pl. 737. S. C. adjudged by 3 Judges against 1. Cro. El. 637, 651. S. C. adjudged by 3 Judges against 1.

5. If Lessee for Years of Land rendring Rent, accepts a new Lease from the Lessor of part of the Land, which is a surrender of this Part, the Rent shall be apportioned, for this comes by the Act of the Parties. H. 43 El. B. R. between Fish and Campion per Curiam.

6. If a Man Leases two Messuages in London, deviseable rendring Rent, and after the Lessor devises the Reversion of one Messuage to a Stranger, the Rent shall be apportioned. Pasch. 1 Jac. B. dubitatur.

7. (d) If a Man leases three Acres for Life or Years rendring Rent, and after grants the Reversion of one Acre, the Rent shall be apportioned. Hill. 10 Jac. B. Co. Lit. 144. and there cited Pasc. 39 El. Rot. 233. Between (e) Collins and Harding adjudged, Co. Mag. Charta 504. where there are Judgments cited. P. 39 El. Rot. 233. B. R. between (f) Collins and Harding. Hill. 42 El. B. between (g) Ewer and Moyle. Trin. 43 El. B. Rot. 243. contra (h) Hill. 6, 7 E. 6. Bendlows.

Fol. 235.

(d) 8 Co. 79. b. S. P. Wiseman and Mallinger S. P. Godb. 95. per Curiam. con. Goulst. 44. per 2 Judges arguendo con. 1 Leon. 252. cited con. 2 Brownl. 298. S. P. per Coke. 1 And. 21. S. P. per Curiam. con. and vide Ow. 10. Dier 4. b. (e) Cro. El. 604, 622. S. C. adjudged, and S. P. may be inferred thence. 13 Co. 57. S. C. adjudged, and S. P. may be thence inferred. (f) Cro. El. 604, 622. S. C. adjudged and S. P. may be inferred thence. 13 Co. 57. S. C. adjudged, and S. P. may be thence inferred. (g) Cro. El. 771. S. C. (h) I do not find this Case reported in the new Edition of Bendl.

8. (i) If Tenant by Knight's Service by his last Will devises the Reversion of two Parts, the Devisee shall have two Parts of the Rent. Co. Lit. 148. cited. Trin. 43 El. Rot. 243. between (k) West and Lassels, and Hill. 42 E. Rot. 108. B. between (l) Ewer and Moyle, Co. Magna Charta 504. contra (m) H. 6, & 7 E. 6. Bendlows.

(i) Cro. El. 652. S. P. cited. Wiseman and Mallinger like Point. Godb. 95. adjudged con. Goulst. 44. adjourned. 1 Leon. 310. S. P. per Anderson, Moor 271. S. P. per Curiam con. (k) 13 Co. 58. S. C. cited. Cro. El. 851. S. C. adjudged. and S. P. may be inferred (l) 13 Co. 58. S. C. cited. Cro. El. 771, 772. S. C. adjudged. (m) I do not find this Case reported in the new Edition of Bendl.

9. If the Grantee of 10 l. Rent, out of his Land grants 5 l. thereof to the Grantor, this does not extinguish the Residue. Trin. 1 Jac. B. between Allen and Payn dubitatur.

(n) Co. Lit. 148. S. P. because the Granteedealeth only with the Rent, and not with the Land. 2 And. 89. S. P. per Curiam arguendo con. Diversity where he releases Parcel of the Rent generally, and where he releases his Rent in one Acre (Parcel of the Land charged.) Goulf. 116. per Drew arguendo.

10. (n) If the Grantee of a Rent out of his Land releases Part of the Rent to the Grantor, yet this does not extinguish the Residue, but it shall be apportioned. Tr. 1 Jac. B. between Allen and Payne.

(o) Rotheram and Green S. P. being Common appurtenant to a House. 2 And. 89. adjudged by 3 Judges against 1. Cro. El. 593, 594. adjudged by 3 Judges against 1. 1 Brownl. 180. S. P. arguendo.

11. (o) But otherways it is of a Common. Trin. 1 Jac. B. said to be adjudged.

(p) Godb. 95. S. P. per Curiam arguendo. con. Moor 114. pl. 255. S. P. and like Point per two Judges. Goulf. 21. S. P. arguendo.

12. (p) If a Man leases for Life or Years, reserving a Rent, and after the Lessee surrenders Part of the Land to the Lessor, the Rent shall be apportioned. Co. Lit. 148. Co. Magna Charta 504.

(q) Moor 114. pl. 255. S. P. per 2 Judges.

13. (q) So if the Lessor recovers Part of the Land in an Action of Waste, the Rent shall be apportioned. Co. Lit. 148. Co. Magna Charta 504.

(r) Godb. 95. S. P. per Curiamarguend.

14. (r) So if the Lessor enters for a Forfeiture in Part of the Land, the Rent shall be apportioned. Co. Lit. 148.

(s) Hob. Fol. 177. S. C. (t) Co. Lit. 148. b. S. P. (u) So though the Lease was made by the King. Co. Lit. 148. b. perhaps there

15. If a Copyholder in Fee leases it for Years by Indenture by Licence of the Lord, and after surrenders the Reversion of one Moiety to I. S. who is admitted accordingly without any Attornment of the Lessee, yet I. S. shall have one Moiety of the Rent, and may distrain and avow for it. Hobart's Reports 239. between (s) Swinnerton and Miller per Curiam.

16. (t) If a (u) Man leases for Years or Life rendring Rent, and after Part of the (x) Land is evicted or recovered by a Stranger by elder Title, the Rent shall be apportioned. D. 35 H. 8. 56. 14.

(x) Secus if only a Right of Common in the Land, &c. is recovered, but in such Case may be some Relief and Apportionment in Equity. 2 Chan. Rep. Fol. 31.

(y) Or several Actions, Ante 7. pl. 2. —but yet if the Lessor pleases he may bring Debt against the Assignee for a Moiety of the Rent. 2 Lev. 231.

17. If there are two Jointenants of a Term, and the one assigns over his Part to the other, it seems that the Rent reserved upon this Term shall not be apportioned, for the Lessees by their own Act cannot divide the Rent by which the Lessor should be put to (y) several Distresses for his Rent. Dubitatur Trin. 14 Jac. B. R. by the (z) Bailiff of Ipswich against Martin and Parker.

(z) 3 Bulst. 211. S. C. adjudged and S. P. per Co. Ch. Just. Cro. Jac. 411. S. C. adjudged, but S. P. does not appear, but may be inferred. 1 Rol. Rep. 404. S. C. adjourned. but S. P. does not appear.

(a) Co. Lit. 122. S. P. Moor 463. S. P. per Curiam. (b) Morse and Web perhaps may be the same Case, but S. P. is not therein adjudged, but held so per Curiam. 1 Brownl. 180. 13 Co. 66. 2 Brownl. 297 and 298. is the S. P. per Coke.

18. (a) If a Man seized of 60 Acres of Land, prescribes to have Common in other Land for all his Cattle levant and couchant thereupon, and he makes a Feoffment in Fee of 5 of these Acres, his Feoffee shall have Common proportionably pro rata, for the Common is joint and several, and no Surcharge or Tort is done thereby to the Tenant. Mich. 7 Jac. between (b) Moreton and Wood adjudged, cited Hill. 7 Jac. B. per Coke.

19. If a Man prescribes to have Common to two Yard Lands for 4 Beasts, 4 Horses, and 60 Sheep, scilicet when the Land is sowed to have Common after Severance of the Corn, and when the Land is not sown to have Common all the Year, and after he leases for Years one of the Yard Lands, the Lessee shall have Common pro rata. (c) Hill. 7. Jac. B. per Curiam.

(c) Morse and Web seems to be S. C. 1 Brownl. 180. adjudged. 13 Co. 66. per Curiam. 2 Brownl. 297, 298. per Curiam. 1 Vent. 385, 386. S. C. cited.

20. (d) If a Man purchases Part of the Land where he hath Common appendant, the Common shall be apportioned, because it is of common Right. *Co. Lit.* 122. a.

(d) 1 Brownl. 180. S. P. said 2 Brownl. 297. S. P. per Curiam. Hob. 25. S. P. said. 4 Co. 37, 38, &c. S. P. and like Point adjudged. 8 Co. 79. a. S. P. per Curiam.

21. (e) But it is otherways of Common appurtenant, or of any other Common of what Nature soever. *Co. Lit.* 122. a.

(e) 1 Brownl. 180. S. P. said 2 Brownl. 297. S. P. per Curiam. Hob. 25. S. P. said. Kimpton and Wood S. P. 1 And. 159. adjudged, but doth not there appear what sort of Common it was. 1 Leon. 43, 44. per Curiam. Goulst. 53. adjudged. 8 Co. 79. a. S. P. per Curiam.

(C) The Act of God.

Fol. 236.

1. If a Man leases Land for Life or Years rendring Rent, and after Part of the Land is surrounded by fresh Water, this will not make any Apportionment of the Rent, because the Soil remains, and the Lessee only shall have the Fish in the Water, and by ordinary Intendment this may be regained again. (a) Contra 35 H. 8. D. 56. (b) 14.

(a) Vide the Case. (b) This should be pl. 15. and yet perhaps not misprinted, but refers to Dier, as it ought to be if amended, for the Placita are misprinted there.

2. But if a Man leases for Life or Years rendring Rent, and Part of the Land is surrounded with the Sea, (c) this will make an Apportionment of the Rent, for tho' the Soil remains to him, yet the Water is Part of the Sea, and so is common for every Man to Fish therein as well as the Lessee, and by ordinary Intendment there is not any Possibility of regaining it. Contra 35 H. 8. Dier 56.

(c) Where the Law creates a Duty or Charge, and the Party is disabled to perform it without any Default in him, and hath no Remedy over, the Law will excuse him as in Case of Waste, &c. but where the Party by his own Contract creates a Duty or Charge upon himself, he is bound to make it good, notwithstanding any Accident by inevitable Necessity. All. 27. this Diversity resolved per Curiam.

3. If Part of the Land in Lease be (d) burnt with Wild-fire, yet this will not make any Apportionment, for the Land remains notwithstanding, and cannot be so consumed but some Benefit may be made thereof. D. 35 H. 8. 56. (e) 14.

(d) So if there be an Invasion by Enemies per quod, he could not take the Profits, &c. Paradine and Jane, All. 26, 27. adjudged. Stil. 47. adjudged. (e) This should be 15.

4. If Land in Fee descends to two Copartners, of which one hath a Rent in Fee issuing out of the same Lands, and after they make Partition, the Rent shall be apportioned, though all descended to her per mie & per tout before the Partition, because this happened by Act of Law. (f) 34 Ass. 15. adjudged.

(f) Br. Apportionment 17. S. C. Br. Extinguishment 31. S. C.

5. (g) If Part of the Land out of which a Rent-charge issues, descends to the Grantee of the Rent, this shall be apportioned, because it is by the Act of God. (h) 34 Ass. 15. adjudged.

(g) Co. Lit. 150. a. S. P. and there said that the Part of the Grantee is so discharged by the Descent, that if she makes a Feoffment of her Part of the Land, yet the Moiety of the Rent remains, issuing out of her Sister's Part. (h) Br. Apportionment 17. S. C. Br. Extinguishment 31. S. C. 1 And. 175. S. C. cited.

6. If

6. If Land held by Rent deſcends to two Coparceners, and after one before Partition grants over her Part to a Stranger, the Rent ſhall be apportioned. 2 E. 2. Avowry 184. adjudged that an Avowry upon both ſhall abate, becauſe there ought to be two Avowries upon them.

(i) Vide Plo. Com. 72. a. b. Cro. Eliz. 756.

7. If the Conuſor of a Cognizance aliens to ſeveral Men, and (i) after Part of the Land deſcends to the Conuſee, all the Land is diſcharged, becauſe he cannot make Contribution, ſo that an Apportionment might be. (k) 34 Aſſ. 15.

(k) Br. Extinguiſhment 31. S. C.

(l) Co. Lit. 149. a. S. P. 6 Co. 2. a. S. P.

8. (l) If Land for which Suit is due, be in ſeveral Mens Hands, and after Part of the Land deſcends to the Lord, all the Suit is extinct, and there can be no Apportionment becauſe it is intire, and the one ſhould do the Suit, and the other ſhould make Contribution. (m) 34 Aſſ. 15.

(m) Br. Extinguiſhment 31. S. C. Br. Apportionment 17. S. C.

9. If *A.* hath Common of Paſture ſans Number, and Part of the Land in which, *&c.* deſcends to *A.* this being entire and uncertain, cannot be apportioned, but ſhall remain, *Co. Lit.* 149 *a.* yet there ſaid this Act in Law ſhall work no prejudice to the Tertenant, for he ſhall have what belongs to him.

10. But if it had been Common certain as for ten Beaſts, it ſhould have been apportioned, the Deſcent being the Act of God and the Law. *Co. Lit.* 149. *a.*

11. If the Father of the Grantee of a Rent-charge, aliens within Age the Land charged, and dies, and the Grantee recovers the Land in a *dum fuit infra ætatem* or enters, tho' the Act of the Party is here mixt with the Act of God and the Law, yet this Rent ſhall be apportioned, for after the Recovery or Entry the Son hath the Land by Deſcent. *Co. Lit.* 150. *a.*

(D) The Act of Law.

1. If the King's Tenant leaſes for Years rendring Rent, and after grants two Parts of the Reverſion to another, and dies, his Heir in Ward to the King, and the King grants the Ward of the Body and Land to another, and after Rent is arrear, the Patentee of the third Part of the Reverſion ſhall have an Action of Debt for the third Part of the Rent, for it ſhall be apportioned. M. 43, 44 El. B. R. between (a) Weſt and Laſſels per Curiam adjudged.

(a) Cro. El. 851. S. C. adjudged as to this Point, though Judgment was ſtaid for an Imperfection in the Declaration. 1 Rol. Abr. 234. pl. 3. S. C.

2. If the Lands of a Monaſtery were granted to A. reſerving 28 l. Rent per Annum, for the 10th of all the Land according to the (b) Statute of H. 8. and after A. grants the greater Part of the Land to B. and after by Agreement between A. and B. B. uſed to pay 20 l. of the Rent per Annum, for that which he held, and after the Grantee is attainted, by which his Part of the Land comes to the King; though all this 10th was originally chargeable and leviable upon all and every Parcel of the Land, yet in as much as Part is (*) come to the King it ſhall be apportioned, and B. ſhall pay but his 20 l. as he paid before. P. 8. Jac. Scaccario, (c) Sir J. Littleton's Caſe adjudged.

(b) 27 H. 8. cap. 27.

(*) Fol. 237.

(c) Lane 56. S. C. adjudged.

3. If a Man being ſeized in Fee of Black Acre, and poſſeſſed for 20 Years of White Acre, Leaſes both for 10 Years, rendring Rent, and dies, by which the Reverſion of one Acre comes to his Heir, and the other Acre to the Executor, the Rent ſhall be apportioned, becauſe it happens by Act of Law. Dubitatur Paſch. 14 Jac. B. R. between (d) Moody and Garnon.

(d) Cro. Jac. 390. S. C. adjourned. Moor 848. pl. 1151. S. C. and S. P. appears, but adjudged upon another. 1 Rol. Rep. 330, 367. S. C. and S. P. appears, but adjudged upon another. 3 Bulſt. 153, 154. S. C. and S. P. agreed, but adjudged upon another.

4. If a Man Leaſes for Years reſerving Rent, and after one Moiety of the Reverſion is extended upon an Elegit, he ſhall have one Moiety of the Rent, and it ſhall be apportioned. Hill. 10. Jac. B. Sir Thomas Cambell's Caſe per Curiam reſolved.

5. If the Husband makes a Leaſe for Years rendring Rent, and after his Death his Wife recovers the third Part of the Reverſion for her Dower, ſhe ſhall have one third Part of the Rent, and ſhall have an Action for it. Hill. 10. Jac. B. per Curiam.

6. So if the Feme be endowed of the third Part of a Rent-ſervice in Fee, he ſhall avow for the third Part of the Rent, as if the Tenant holds by 3ds ſhe ſhall avow for 1ſts. 24 H. 8. Brook Avowry 139

7. (e) If a Man ſeized of Lands in Fee, takes a Wife, and makes a Feoffment in Fee, and the Feoffee grants a Rent-charge of 10 l. out of the Land to the Feoffor and his Wife, and to the Heirs of the Husband, the Husband dieth and the Wife recovers a Moiety for her Dower by the Cuſtom, yet ſhe may diſtrain in the other Moiety for 5 l. of the Rent, for though her Title of Dower in Time precedes the Rent, yet it does ſo but by Fiction of Law, which will not work a Charge to a third Perſon, and though her own Act did concur with the Act of Law, yet the Rent ſhall be apportioned. *Co. Lit.* 150. *a.*

(c) 9 Co. 135. b. S. P.

(E) How it ſhall be made.

1. The Court in an Action of Debt for all (a) the Rent, cannot make an Apportionment upon Demurrer, for it ought to be done by the Jury. Hill. 43 Eliz. B. R. between Fiſh and Campion per Curiam.

2. But it ſeems that a Man may bring an Action of Debt for (b) all the Rent, and if the Jury ſee Cauſe of Apportionment, yet the Plaintiff ſhall recover ſo much as he ought to have upon the Apportionment. Dubitatur Hill. 43. Eliz. B. R. Paſc. (c) 14. Jac. B. R. per Coke.

(a) But Q. if the Plaintiff declares ſpecially, Vide Cro. Jac. 160. 1 Brownl. 186, 187.

(b) So if he demands not all but more quam apportt. 3 Co. 24. a. per Popham. 1 Brownl. 33. 1 Sid. 6. (c) 1 Rol. Rep. 376. S. C. and S. P. per Coke.

3. So upon an (d) Avowry ibidem agreed. Co. M. Charta. 503.

4. So if the Lord diſtrains for Rent, and the Tenant makes reſcous, and the Lord brings an Aſſize, and the Tenant pleads no Tort, &c. though the Lord had diſtrained for 10 s. Rent, yet if there ought to be an Apportionment, and not ſo much due, the Jury ſhall apportion it. Co. M. Ch. 503.

(d) Vide Moor 281.

5. But when a Rent is to be apportioned, he who will demand the Rent by Force of a Condition to avoid the Eſtate, ought to demand the Sum directly to which the Rent ought to be apportioned, or otherways his Demand is not good. Paſc. (e) 14. Jac. B. R. per Coke.

(e) 1 Rol. Rep. 376. S. C. and S. P. per Coke. 3 Bulſ. 155. S. C. and S. P. per Coke Chief Juſtice.

6. (f) But if there be Cauſe of an Apportionment of a Rent-Service, and the Lord avows or makes Title in an Aſſize for leſs Rent than is due to him upon the Apportionment, he ſhall not recover more Rent than he hath made Title to have. Co. M. Ch. 504.

(f) Vide 1 Rol. Rep. 368.

Pleader.

Who ought to ſet forth the Value of the Lands.

(a) 1 Brownl. 186, 187. S. C. adjudged —— vide Cro. El. 771, 772.

1. (a) IF to an Avowry for 20 l. Rent, the Plaintiff pleads an Eviction of Part, he ought to ſhew how much of the Land in Value was evicted, and what remains. *Paſch.* 5. *Jac.* between *Smith* and *Malins.* Cro. *Jac.* 160. *adjornatur.*

(b) 1 Brownl. 187. S. P. per 2 Judges. vide 1 Brownl. 33.

2. (b) But if the Leſſor accepts a Surrender of Part of the Land, the Leſſor in his Declaration or Avowry ought to ſet forth how much of the Land in Value was evicted, for that lies in his Notice as well as the Leſſees. *Cro. Jac.* 150. *per Popham.*

3. In Replevin the Defendant may ſet forth a Leaſe rendring one Penny Rent, and entitle himſelf to one third Part of the Reverſion and Rent, and ſo avow for one third Part of the ſaid Penny. *Mich.* 30. *Car.* 2. between *Edgecomb* and *Bumaford.* 2 *Jon.* 138. adjudged for the Avowant *niſi.*

Fol. 238.

(a) (b) Appropriation

(A) By what Patron.

(a) Where an ancient Appropriation ſhall not be queſtioned, notwithſtanding for any Thing that appears the ſame is defective, vide 12 Co. 4. 5. Cro. Jac. 252. 517. Palm. 427. (b) Upon ſuch Appropriation what Proviſion ſhall be made for the Poor and Vicar. Vide 15 R. 2. cap. 5. 4 H. 4. cap. 12. (c) Br. Appropriation 6. S. C.

1. IF an Abbot be ſeiſed of an Advowſon in Fee held of a common Perſon, an Appropriation may be made thereof to him by the King and the Ordinary, without the Aſſent of the Lord of whom it is held. (c) 21 Ed. 3. 5. b.

(d) For thereby the Patronage is extinct.

2. The (d) Patron of the Advowſon ought to agree to the Appropriation, otherways it is not good. Com. Grendon 497. b. Curia 39 Ed. 3. 10.

Kelw. 48. 2 Leon. 80. 3 Leon. 101. Sav. 20.

3. If there be Leſſee for Years of an Advowſon, the Reverſion in Fee, the Aſſent of the Reverſioner to appropriate the Church is not ſufficient to bar the Leſſee for Years. 29 Ed. 3. 10.

(e) But an Appropriation by the Pope, without the Ordinary was held good, becauſe he was then taken as ſupream Ordinary. Pl. Com. 498. a.

4. An Appropriation cannot be made without the Aſſent of the (e) Ordinary, becauſe of his Intereſt in the Lapſe. Contra 34 Ed. 3. Quare impedit 197.

5. 19 Ed. 1. Rot. pat. membrana 25. in Schedula Annexa, the Archbiſhop of Canterbury, with the Conſent of the Dean and Chapter, appropriated a Church of his Dioceſe, and belonging to his Collation, to a Hoſpital of Lepers in compenſatione ſummæ pecuniæ debitæ by the Archbiſhop, and now the Succeſſor of the Archbiſhop, with the Conſent of the Pope, and of the Dean and Chapter, and of the Maſter of the Hoſpital, revoked the Appropriation.

(f) By the King only where he is Patron.

6. An Appropriation by (f) King William the Conqueror only is not good. 7 Ed. 3. Quare impedit 19. adjudged.

Poph. 145. ſaid. Pl. Com. 498. a.

7. 2 H. 4. Rot. Parl. numero 51. the Commons prayed that no Appropriation of any Church at any Time thereafter should be made, and (g) he that should enjoy such Appropriations for the Time to come, should incur the Pain contained in the Statute of Provisors, except religious, or other Persons whatsoever, who have Possessions amortised might exchange or give such Possessions amortised to a Secular Hand, to have any such Benefice appropriated by the Licence of the King, Patron, Lord and Founder. (h) Answer, the King will advise.

8. (i) An Appropriation cannot be made without the Licence of the King. 8 Co. 11. a.

(g) The Original is ſ ceux qui enjoy ſe tiel appropriation in temps avener, &c.

(h) Theſe Words are miſplaced in the Original, and printed as a diſtinct Head.

(i) Plo. Com. 498. b. 499. a. S. P. Poph. 145. S. P. ſaid:

(B) To (a) whom it may be.

(a) It cannot properly be unleſs to a ſpiritual Perſon, &c. capable of the Cure, but

1. AN Appropriation of a Church may be to a Biſhop and his Succeſſors. Da. (b) 1. 80. b.

what Corruption hath been herein vide Plo. Com. 496, 497. Hob. 148. (b) I ſuppoſe this is miſprinted, and that the Figure 1. ſhould be a v. Dav. 80. b.

2. Conſtitutiones (c) Othoboni capitulo de Appropriationibus Eccleſiarum non faciendis, in Linwood Fol. 51.

(c) The Original is Otboboni and miſprinted.

3. An Appropriation of a Church may be to the Dean of a free Chapel of the King. 33 Ed. 3. Aid del roy 103. admit.

4. A Church may be appropriated to two Priories, for this is not as if a Woman was married to two Husbands, for both may well have the Care of one Church. Mich. 15. Jac. B. R. in Freeſton and Kemp's Caſe, Doddridge ſaid, that upon the Trial of this Caſe in his laſt Circuit, ſuch Appropriation was given in Evidence confirmed by the Pope; and he (*) inclined that this was a good Appropriation, as well as a Parſonage may be the Body of two Prebends, as 21 Ed. 3. is, but the Court ſaid this is a ſtrange and rare Caſe, to have ſuch Appropriation, Quære this Caſe, for he, to whom the Appropriation is made, ought to have the Advowſon of the Church, and therefore it ſeems that it ought to be intended that the Priors were Tenants in common of the Advowſon.

(*) Fol. 239.

5. An Appropriation cannot be but to him who is Patron and Parſon. 14 H. 4. 14.

(C) For what Cauſes it may be.

1. AN Appropriation may be made to an Abby or Priory, cauſa paupertatis Conſtitutiones de Othoboni capitulo de Appropriationibus eccleſiarum non faciendis, in Linwood 51.

2. An Appropriation ought not to be made but cauſa paupertatis or other lawful Cauſe. Conſtitutiones de Othoboni capitulo de Appropriationibus eccleſiarum non faciendis, in Linwood Fol. 51.

(D) At what Time it may be made.

1. (a) NO Appropriation can be made of a Church which is full of an Incumbent, but in a ſpecial Manner to take Effect after the Death of the Incumbent. Co. 11. Priddle and Napper 11. (b) Com. Grendon 499. b. vide (c) 50 Ed. 3. 27. admit. good in præſenti.

(a) Dier 244. Pl. 60. S. C. appear.

(b) Hob. 150. S. C. cited.

(c) Br. Quare impedit 42. S. C. Fitz. Grant 53. S. C. Br. Appropriation 2. S. C.

2. But

(d) Hob. 150. S. C. cited. (e) Br. Quare impedit 42. S. C. Fitz. Grant 53. S. C. Br. Appropriation 2. S. C.

2. But when the Church is full it may be appropriated by proper Words. Co. 11. Priddle and Napper 11. (d) Com. 499. b. 41 Ed. 3. 6. b. (e) 50 E. 3. 26. b. 27.

3. As when a Church is full it may be appropriated by Words in futuro after the Death of the Incumbent. Com. 499. b. Co. 11. Priddle 11.

4. If a Prior was seised of an Advowson in Fee, this being then full of an Incumbent, and the King gave to him Licence to appropriate this Church, and to hold it appropriate without mentioning the Incumbent, and after the Ordinary appropriates it, ita quod after the Death of the Incumbent, the Prior and his Successors possint tenere in proprios usus, in this Case though the Licence of the King be general without mentioning the Incumbent, yet the Appropriation being after well made, this is a good Licence and a good Appropriation. Co. 11. Priddle and Napper 11. resolved. Mich. 16. Car. B. R. between Foe and Hasselrigg per Curiam upon Evidence at the Bar agreed.

5. If the King gives Licence to a Chantery to purchase an Advowson of a Church in Fee, and to appropriate it to them and their Successors, and after they purchase the Advowson in Fee, and after present their Clerk to the Church upon a Permutation, who is instituted and inducted, and after the Bishop appropriates it to them and their Successors, this is a good Appropriation notwithstanding the intervening Presentation made by themselves between the Licence and Appropriation. Mich. 16 Car. B. R. between Foe and Hasselrigg per Curiam, upon Evidence at the Bar ruled.

Fol. 240.

(E) How it may be made.

1. If the King gives Licence to the Warden and Chaplins of a Chantery to purchase an Advowson of a Parochial Church presentative to them and their Successors, and to have this appropriated to them and their Successors, and after this is appropriated to the Warden of the Chantery and his Successors, by the Bishop, by Force of this Licence, if the Chantery be known as well by the Name of Warden and Successors, as by the Name of Warden and Chaplins and Successors, and so all one Corporation. This is a good Appropriation. Mich. 16. Car. B. R. between Foe and Hasselrigg per Curiam, upon Evidence at the Bar (but Quære how a Corporation Aggregate and a sole Corporation can be one Corporation Politick.

(F) (a) What Act or Thing will disappropriate an Appropriation, and by whom.

The Act of the Party.

(a) By the Dissolution of the Body politick to which it was appropriated. 2 Brownl. 24. Hob. 307. Pl. Com. 497. a.

1. (b) If the Parson appropriate presents to the Church, and the Presentee is instituted and inducted, this disappropriates the Church. (c) 44 E. 3. 33. b.

(b) Hob. 152. S. P. said. 2 Com. 501. a. Leon. 80. S. P. arguendo. 3 Leon. 108. S. P. arguendo. Sav. 21. S. P. per Shute. Pl. S. P. (c) Fitz. Consultation 4. S. C. Br. 1. S. C.

2. If there be a Parson appropriate, and Vicar endowed of the same Church, and after the Parson and Ordinary re-unite the Vicarage to the Parsonage, yet this does not disappropriate the Appropriation, for the Vicarage was derived out of the Parsonage, and now it is come back to that out of which it was derived, and so it is in its first State, and therefore cannot disappropriate the Church, 7 Jac. Resolved, at Serjeants Inn, by the Judges upon a Reference out of the Court of Wards in one Stafford's Case.

3. If a Chapel be annexed to a Church, if there be a Presentation by a Stranger to the Chapel, as to a Church, and his Clerk is inducted, this Chapel is hereby made a Church. (d) 47 E. 3. 5. 21. b. 17 E. 3. 58.

4. If Lessee for Years of an Appropriation presents thereto a Chaplain, and he is inducted, this disappropriates the Church during the Years. 44 Ass. 37. (e) 44 E. 3. 33. admit.

(d) Br. Quare impedit 39. S. C. Fitz. 140. S. C.

(e) Fitz. Consultation 4. S. C. Br. 1. S. C.

(G) Acts of a Stranger.

1. If a Man recovers the Advowson in a Writ of Right, this disappropriates the Church. 17 E. 3. 51. b.

2. If a Stranger presents, and his Clerk is instituted and inducted for seven Years, this Continuance for this Time hath disappropriated it, till it be recovered again by Writ of Right. (a) 44 E. 3. 34. 44 Ass. 37. adjudged, (but it seems that this is not Law, for Co. 5. 101. per Curiam, (b) there cannot be an Usurpation upon such an Appropriation.)

3. If a Woman be endowed of an Advowson which is appropriate, and she presents, and he thereupon is admitted, instituted and inducted, this disappropriates the Church. 2 E. 3. 8 per Scrope said to be adjudged. Co. Lit. 46. b.

(a) Fitz. Consultation 4. S. C. Br. 1. S. C.

(b) Pl. Com. 500. b. S. P.

(H) Who shall be bound by the Disappropriation.

Fol. 241.

1. If a Lessee for Years of an Appropriation present thereto, this Disappropriation shall not bind him in the Reversion. Vide (a) 44 E. 3. 33. b. 44 Ass. 37. admit.

2. If a Feme be endowed of an Advowson which is appropriate, and presents, and her Clerk is instituted and inducted, though the Incumbent dies, yet is the Appropriation wholly dissolved, because the Incumbent who came in by Presentation, had all the Estate in him. 2 E. 3. 8. per Scrope said to be adjudged. Co. Lit. 46. b.

(a) Fitz. Consultation 4. S. C. Br. 1, S. C.

(a) (b) (c) Arbitrament.

Fol. 242.

(A) Of what Things it may be.

Of a (d) Thing real.

1. Arbitrators cannot make an Award of a Freehold as to (e) adjudge the Land of one to another. (f) 14 H. 4. 19. 23 H. 8. Kell. 99. b.

(a) An Award shall not be unravelled in a Court of Equity, because res judicata per 1 Rol. Rep. 380. unless there was Corruption in the Arbitrators. Vide 1 Chan. Rep. 279. 2 Chan. Rep. 140. (b) Of Awards made upon a Submission by Rule of Court. Vide Raym. 35. 1 Sid 54, 452, 453.—and vide 9 and 10 Will. cap. 15. how all Submissions of personal Matters may at this Day be made a Rule of Court, &c. (c) In the Reference of a Cause the Stay thereof is implied. 1 Mod. 24. per Twisden, and vide 2 Jon. 134. (d) The Stat. of the 9 and 10 Will. cap. 15. extends only to Submissions of such Matters for which there is no other Remedy but by personal Action or Suit in Equity. (e) Hard. 43, 44, 45. vide. (f) Br. Arbitrament 15. S. C.

(g) Fitz. Arbitrament 16. S. C. (h) Br. Arbitrament 15. S. C. vide.

2. **The Law is the ſame if the Submiſſion be by Deed.** (g) 9 E. 4. 44. **The Law is the ſame if the Submiſſion be by Deed indented.** (h) 14 H. 4. 19.

3. **A Partition cannot be made by Award, for a Freehold cannot paſs without Livery.** Paſch. 1 Jac. B. Horton againſt Horton.

4. **An Arbitrator cannot make an Award of a Leaſe for Years of Land, as to adjudge the Land of one to another, by which the Intereſt and Eſtate of one ſhall be transferred to the other, becauſe this is a Chattel real.**

(i) 1 Rol. Abr. 266. pl. 11. S. C. con. 267. pl. 1. S. C.

5. **It ſeems that in Co. 9.** (i) Peytoe 78. **this is admitted**; for there **it is held, that an Award is no Plea in an ejectione firmæ, becauſe it is an Action of Treſpaſs.**

(k) Br. Arbitrament 25. S. C. 1 Rol.

6. **An Arbitrator may make an Award of the Arrearages of a Rent, reſerved upon a Leaſe for Years.** (k) 4 H. 6. 17. b.

Abr. 264. pl. 6. S. C. 266. pl. 8. S. C.

(l) But if he Awards that the Poſſeſſor ſhall hold the Term ſemble, this will not bind or extinguiſh the Right, per New Dier 183. Margine Q. the Reaſon of the Diverſity. (m) 2 Leon. 104. S. C. and S. P. agreed. New Dier 183. a. S. C. and S. P. Margin. 2 Keb. 735. S. C. cited.

7. If upon a Submiſſion of all Title in a certain Leaſe, the Arbitrator Awards that one of the Parties (l) ſhall have the Land, this gives the Intereſt in the Term. *Paſch.* 33 *Eliz.* Between (m) *Truſloe* and *Yewre. Cro. Eliz.* 223. agreed upon Evidence.

(n) 2 Leon. 104. S. C. and S. P. agreed. New Dier. 183. a. S. C. and S. P. Margin. 2 Keb. 735. S. C. cited.

8. But if the Award be, that one ſhall permit and ſuffer the other to enjoy the Term, this gives not the Intereſt in it. *Paſch.* 33 *Eliz.* Between (n) *Truſloe* and *Yewre. Cro. Eliz.* 223. agreed upon Evidence.

(a) Vide 9 and 10 Will. cap. 15. how the Submiſſion may be made a Rule of Court, and the Parties refuſing to perform the Award made liable to the Penalty of the Breach of ſuch Rule, and ſuch Award ſhall not be void or impeached, unleſs for Corruption.

(B) (a) Where the (b) Submiſſion is with a Condition (c) to perform it, in what Caſes the Condition is broke, if it be not (d) performed.

Condition.

Award.

1. **If the Condition of an Obligation be to perform an Award between the Parties of ſuch Things, if the Arbitrator award a Thing to be done meerly out of the Submiſſion, he is not bound to perform it.** (e) 8 H. 6. 18. b. 9 E. 4. 43. B. 44.

(b) Where there was a Submiſſion to the Award of one of the Parties. Hard. 44. vide. (c) Where the Condition is to ſtand, to abide, &c. by a Revocation of the Submiſſion the Condition is broke. Vinyor's Caſe. 8 Co. 81. b. 82. a. adjudged. 2 Brownl. 290. adjudged, and vide 2 Jon. 134.—and where the Submiſſion is by Parol, and there are mutual Promiſes to pay 100 l. if they do not perform, &c. Q. Mugal and Degelder. 1 Sid. 281. 2 Keb. 10, 20.—And where the taking of a Husband is a Countermand, vid. 1 Jon. 388. 1 Rol. Abr. 333. pl. 4. (d) Where the Sealing and Delivery of a Releaſe to the Uſe of the other, but in his Abſence, &c. ſhall be a good Performance. Alford and Lee, Cro. El. 54. 2 Leon. 110. (e) Br. Arbitrament 18. S. C.

(f) Br. Arbitrament 18. S. C.

2. **But otherways it is, if the Award be of a Thing depending upon the Principal.** (f) 8 H. 6. 18. b.

3. If the Submiſſion be of a Term, and all thereupon depending, and the Award is made of the Rent which became due at Michaelmas next enſuing, this is void, becauſe it is not within the Submiſſion, and the Obligor is not bound to perform it. Mich. 10 Jac. B. R. between (g) Grey and Wicker adjudged.

(g) 1 Rol. Abr. 245. pl. 8. S. C.

4. (h) If the Condition of an Obligation be to perform an Award of all Actions between them, and the Arbitrators make an Award, that one ſhall make a Releaſe to the other of all Actions till the Day of the Award made, which was after the Submiſſion, (i) this is a void Award, becauſe it comprehends more Time than was ſubmitted, for by the Submiſſion ſuch Actions only which were then between them were ſubmitted, and this is entire, and therefore the Obligor is not bound to perform it. My Reports 14 Jac. (k) Vaulore againſt Tribb adjudged. Co. 10. (l) Moor and Beedle, 131, 132. adjudged. P. 42. El. (m) Knap and Mawe, Rot. 211. adjudged. P. 12 Jac. B. R. Between Linſey and Aſhton adjudged, M. 13 Jac. B. R. between (n) Lumley and Hutton.

(h) Cro. Jac. 352. bis. S. P. adjudged, unleſs the Plaintiff helps it, with an Averment, that there were no more Cauſes, &c. between them.

(i) Otherways where the Award is to make general Releaſes without fixing them to any Time, for then it ſhall be intended to the Time of the Submiſſion only. All. 87. 3 Mod. 264. 3 Lev. 188, 344. (k) 1 Rol. Abr. 245. pl. 3. S. C. and S. P. 258. pl. 1. S. C. and S. P. 1 Rol. Rep. 437. S. C. adjudged. Dod. non contradicente. (l) 1 Rol. Abr. 245. pl. 3. S. C. and S. P. 258. pl. 1. S. C. and S. P. Jenk. Rep. 264. S. C. adjudged. Goulſ. 91, 92. S. C. and S. P. by all the Juſtices, but adjourned. 1 Leon. 170. S. C but S. P. does not appear. (m) 1 Rol. Rep. 437. S. C. cited. (n) Cro. Jac. 447, 448. S. C. and S. P. per Curiam. 1 Rol. Rep. 270, 271. S. C. the Award being, that he ſhould give a Releaſe to the Date of the ſaid Releaſe, & Dubitatur. Palm. 108. S. C. cited.

5. (o) If the Condition be to ſtand to the Award, &c. and the Award is, that one ſhall pay 15 l. to the other, and that I. S. a Stranger ſhall enter into an Obligation to pay it at a certain Day, (p) this Award is void as to the Entry into an Obligation by the Stranger, and the Obligor is not bound to perform it, becauſe it is out of the Submiſſion. Co. 10. (q) Moor and Beedle 131. b. adjudged and there cited. P. 24 El. B. R. Rot. 2417. between Eccleſfield and Malliard adjudged.

Fol. 243.

(o) 1 Bulſt. 260. S. P. adjudged.

(p) Vide a Diverſity where the Award is, that he ſhall enter into an Obligation with Sureties, and where that he ſhall find Surety by Obligation, &c. 1 Rol. Rep. 270. (q) 1 Rol. Abr. 247. pl. 1. S. C. and S. P.

6. (r) So it is where the Award is to pay a certain Sum of Money to a Stranger who is out of the Award, (s) this is (t) void. Co. 10. Moore and Beedle 131. b. Contra. (u) 22 H. 6. 46. b. Curia.

(r) Eccleſtade and Malliard S. P. Cr. El. 4. adjudged. Godb. 12. 13. adjudged. (s) 1 Rol. Abr. 247. pl. 4. S. P. (t) Where the Award is void it need not be performed, notwithſtanding the Obligation. Dal. 43. per Brown and Dier con. Walſh.—but if after ſuch Award made there be an Aſſumpſit to perform it, this ſhall bind. Noy 62. per Poph. for volenti non fit injuria. (u) Godb. 13. S. C. cited, and a Quære made and ſaid per Curiam, that it ſeemed not to be Law at this Day.

7. If a Condition be to ſtand to the Award, &c. and the Award is, that one ſhall aſſure Lands to the other and his Wife, where the Wife is a Stranger to the Submiſſion, therefore he is not bound to perform this Award as to the Wife. M. 37, 38 El. B. between (x) Samon and Pill per Curiam.

(x) Cro. El. 432. S. C. and S. P. admit per Curiam. 5 Co. 78. S. C. and S. P. ſaid. Moor 359. pl. 489. S. C. adjudged.

8. If A. is indebted to B. in 20 l. by ſingle Bill, and they ſubmit all Matters between them to the Award of I. S. who Awards that A. ſhall pay a certain Sum, ſcilicet a leſſer Sum to B. in Satisfaction of the ſaid Bill, tho' if he pays the Money according to the Award, yet (y) this cannot be any Bar of an Action brought upon the ſaid Bill, becauſe the Action is grounded upon a Deed, yet if each of them was bound to perform the Award, he ought to pay the Money, or otherways he hath forfeited the Obligation, for if he pays it and the other ſues the Bill he hath forfeited his Obligation. Hill. 15 Jac. B. R. between (z) Lumly and Hutton adjudged upon Demurrer. M. 13 Jac. B. R. the ſame Caſe.

(y) Hob. 49. S. P. ſaid. 1 Rol. Rep. 270. S. P. agreed.

(z) Cro. Jac. 447. S. C. adjudged. 1 Rol. Rep. 270. S. C. and S. P. per Co. and Haught. but no Judgment.

9. If

9. If a Condition of an Obligation be to perform an Award, where the Submiſſion is of all Matters depending, and the Award is after made of all Matters generally, this is void, and the Obligor not bound to releaſe the Matters depending. Tr. 4 Jac. B. R. between Hames and Armſtead adjudged.

10. If two ſubmit to the Award of I. S. of all Matters between them till the Submiſſion, and then each of them promiſes to the other to perform the Award, and I. S. after Awards, whereas one was bound in an Obligation to the other (which was made after the Submiſſion and before the Award) that the Obligee ſhould deliver up the Obligation to the other in full Satisfaction of all Matters between them, (and Awards further in ſuch Manner, that all was good, if the aforeſaid Award was good) though this Obligation be out of the Submiſſion, becauſe it was made after the Submiſſion, yet he is bound to perform it, becauſe it is to be given in Satisfaction of Matters contained within the Submiſſion, as a Horſe or Money may be given in Satisfaction, though they are not within the Submiſſion. Trin. 15 Jac. B. R. between Nicklas and Thomas adjudged (Reporter) Quære this, for this is a Thing in Action between them, and out of the Submiſſion, and ſo not like to the Caſe of the Horſe, unleſs the Horſe was in Diſpute between them after the Submiſſion.

11. And it ſeems, that if the Award be to give his Horſe to the other in Satisfaction, that he is not bound to perform this, becauſe this is out of the Award, for he may as well Award him to give his Gown or other collateral Matter, but Money is menſura rerum, and therefore it may be awarded to be paid in Satisfaction. Contr. 9 E. 4. 44. per Moyle.

12. If an Award be, that one ſhall ſerve the other two Years in Satisfaction of an Action, he is not bound to perform this. 9 E. 4. 44. per Litt.

13. If the Award be, that one ſhall releaſe all his Right in certain Lands (*) of which the other is ſeized, in Satisfaction of a Treſpaſs, he is not bound to perform this. Contra (a) 9 E. 4. 44. per Moyle.

(*) Fol. 244.

14. (b) If the Condition of an Obligation be to ſtand to the Award of I. S. for a Title of certain Land, and the Arbitrator Awards the Land to one, and that the other ſhall releaſe to him, &c. though this Award is void as to determine the Right, and to change the Eſtate becauſe it is real, yet becauſe it is within the Submiſſion he is bound to perform it. (c) 9 E. 4. 44.

(a) Fitz. Arbitrament 16. S. C.

(b) Kelw. 99. b. S. P. per Grevil and Pollard, con. but Quære, for others ſeem to agree. 1 Rol. Rep. 270. S. P. per Coke. (c) Fitz. Arbitrament 16. S. C.

15. If the Condition of an Obligation be to ſtand to the Award of I. S. of certain Matters, and the Award is, that one ſhall make a releaſe to the other, if they do not do it the Condition is broke, though there is not any Means to compel them to make the Releaſe it ſelf. (d) 9 Ed. 4. 44.

(d) Fitz. Arbitrament 16. S. C.

16. If the Condition of an Obligation be to ſtand to the Award of I. S. if the Award be (e) impoſſible the Condition is not broke. 8 E. 4. 1. b.

(e) Where the Thing becomes impoſſible after the Award made, whether this ſhall excuſe the Performance. Vide 2 Mod. 27, 28.

17. As if the Award be to pay a Sum at a Day paſt, the Condition is not broke. (f) 8 E. 4. 1.

(f) 1 Rol. Rep. 6. S. C. cited. arguendo.

18. If there be a Controverſy for a certain Thing between A. and B. of the one Part, and C. D. and E. of the other Part, and C. in Conſideration of 6 d. given him by A. and B. ſubmits the Matter for himſelf and D. and E. and aſſumes to ſtand to the Award, and A. and B. ſubmit of the other Part, and the Arbitrators award that C. ſhall pay ſo much to A. and B. in Satisfaction of the Controverſy, this is a good Award, and C. is bound to perform it tho' it concerns two Strangers to the Submiſſion, for C. hath undertaken for them. H. 14 Jac. Bullock againſt Dalby and Gadwood at Serjeant's Inn in a Writ of Error adjudged, and the Judgment affirmed. (g) 22 E. 4. 25. M. 10 Jac. B. R.

(g) Br. Arbitrament 41. S. C. Br. Condition 182. S. C.

19. If

19. If the Condition of an Obligation be to perform an Award, and the Award is that the Obligor and a Stranger shall pay to the other Party 10 l. though this is void as to the Stranger, yet it is good as to the Obligor, and he is bound to perform it. M. 10. Jac. B. R. per Curiam; between Gray and Wicker.

20. If the Condition be to stand to the Award of I. S. and I. D. and they award that he shall stand to the Award of another, he is not bound to perform his Award. Hill. 37. El. B. between Lower and Lower per Curiam.

21. If a Condition be to stand to the Award of I. S. of all Matters, &c. ita quod arbitrium fiat de præmissis, and the Award is made that one shall do two Things, of which one is to make a Release of all Actions till the Release which is out of the Award, and so void, and the other is good, the Obligor is bound to perform that which is good, because they are not intire, and though the Award be that he shall release all Actions, yet it does not appear that there were any Actions between them, so that the Release is made de præmissis for any Thing that appears. My Reports 14 Jac. (h) Vanlore and Tribb adjudged.

(h) 1 Rol. Abr. 257. Pl. 4. S. C. and S. P. 1 Rol. Rep. 437. S. C. adjudged Dod' non contradicente. All. 87. S. C. cited.

22. So it would be a fortiori if the Condition was without the Clause ita quod arbitrium fiat de præmissis. Co. 10. Moore and Beedle 131 b. adjudged, because there is a Recompence of each side, though not all the Recompence which was intended.

23. If a Condition be to stand to the Award of I. S. of all Matters, &c. ita quod arbitrium fiat de præmissis, and the Award is made upon the Premisses, that one shall release to the other all Matters till the Award which is out of the Submission, though there are Matters between them which arose after the Submission, and before the Award, yet the Award is good, (i) if it be not averred to the Court that there were Matters between them in the mean Time. P. 17. Jac. between (k) Alabaster and Clifford adjudged.

(i) Cro. Jac. 352. bis. like case adjudged con. and that the Plaintiff must take an Averment that there was no other Matters, &c. (k) Hut. 29. S. C. and S. P. admit. per Curiam.

24. If the Condition be to stand to the Award of I. S. of all Matters depending till 29 Jan. &c. ita quod, &c. and the Award recites that whereas there (*) were depending the said 29 Jan. divers Matters, &c. and he awards de & super præmissis of all Matters till the 28 Jan. yet this is a good Award, because it does not appear that any Matter was depending the said 29 Day of Jan. which was not depending before the said 28 Jan. and therefore without special Matter shewn it shall be intended a good Award with the said Averment de & super præmissis. Tr. 7. Car. B. R. between (l) Ward and Unwin adjudged, which intratur Tr. 6. Car. Rot. 590.

(*) Fol. 245.

(l) Cro. Car. 216. S. C. adjudged.

25. (m) If the Condition be to stand to the Award of I. S. ita quod the Award be made, signed and delivered by the Arbitrators as their Deed before such a Day, and after the Arbitrators make an Award, and this is sealed and delivered as their Deed, but they did not sign it, the Obligor is not bound to perform it, for the Signing is a particular Thing distinct from the Delivery. (n) Mich. 17. Jac. B. per Curiam.

(m) 2 Mod. 77, 78. S. P. adjudged, and that it must be pleaded accordingly. 1 Bulst. 110. S. P. adjudged, and that if the Arbitrator cannot write, he ought to subscribe his Mark. Palm. 121. S. P. adjudged. and vide Stil. 334.—So it must be pleaded to be under their Seal. Cro. Jac. 278. for want thereof a Judgment reversed accordingly. (n) Thaire and Thaire seems to be S. C. Palm. 109, 112. Judgment reversed in Cam. Scacc. accordingly. 2 Rol. Rep. 243. cited to be adjudged.

26. If the Condition of an Obligation be to ſtand to the Award of *I. S.* and he awards that one ſhall enjoy a certain Houſe (o) (p) paying to the other 20 s. yearly; if the Rent is not paid, the Condition is broke. *Trin.* 32. *Eliz.* between *Parſons* and *Frowd. Cro. Eliz.* 211. adjudged.

(p) So if an Award be that A. ſhall make a Leaſe to B. and that for this Leaſe B. ſhall pay to A. a certain Sum yearly. N. Bendl. 15. Pl. 16. Moor 3. Pl. 8.—Otherways if the Award be that A. ſhall make a Leaſe to B. rendring Rent, for there the Payment of the Rent is no Part of the Subſtance of the Award. N. Bendl. 15. Pl. 16. Moor 3. Pl. 8. (p) That this Word paying muſt be taken as an expreſs Award to pay. vide 1 Sid. 54.

(C) Of what Things they may make an Award.

1. (a) **If the Submiſſion be of all (b) Actions, they cannot make an Award of ſuch Things of which the Parties have Cauſe of Action.** (c) 36. H. 6. 11. b.

(a) Co. Lit. 285. S. P. (b) By the Submiſſion of all Demands all Matters concerning the Title of Land are ſubmitted. Kelw. 99. b. Semble per Curiam. (c) Br. Arbitrament 50. S. C. vide.

2. **But otherways it is where the Submiſſion is of all Actions and (d) Quarrels.** (e) 36 H. 6. 11. b.

(d) Upon a Submiſſion of all Differences whether the Arbitrators may award a Releaſe of all Demands. Vide Stil. 170.—upon a Submiſſion of all Injuries. 3 Bulſ. 312. (e) Br. Arbitrament 50. S. C. Vide.

3. **If a Submiſſion be of all Actions between them, and the Award is to make a Releaſe of all Actions till the Day of the Award, which is after the Submiſſion, this is a void Award, becauſe the Time between the Submiſſion and the Award is not ſubmitted.** My Reports 14 Jac. (f) Vanlore and Tribb 29. adjudged. Co. 10. (g) Moor and Beedle 132. adjudged.

(f) 1 Rol. Abr. 242. Pl. 4. S. C. and S. P. 1 Rol. Rep. 437. S. C. adjudged. Dod. non contradicente. adjourned.

(g) 1 Rol. Abr. 242. Pl. 4. S. C. Jenk. Rep. 264. S. C. adjudged. Goulſ. 91, 92. S. C.

4. **They may make an Award of a Thing which depends upon the Principal.**

5. **As if two ſubmit all Treſpaſſes, and the Arbitrator makes an Award, and awards further that the Parties put their Seals to the Award, they are bound thereby to put their Seals to the Award, for this depends upon the Principal.** Dubitatur (h) 8 H. 6. 18. b.

(h) Br. Arbitrament 18. S. C.

6. **So if the Submiſſion be of all Treſpaſſes, and the Award is that one ſhall pay 10 l. to the other, and that he ſhall enter into an Obligation to him for it, this is good, and he ought to enter into the Obligation, becauſe this makes the Award effectual.** 8 H. 6. 18 b.

7. **Upon a Submiſſion of an Action, if the Award be in part, that the one Party ſhall be at ſuch a Place with his Counſel to hear the Award, this is void, becauſe it is out of the Submiſſion.** 19 H. 6. 36. b.

8. **If the Submiſſion be of a Term for Years of Land, and of all thereupon depending, and the Award is that one ſhall pay to the other 10 l. for the Rent (i) that ſhall become due upon this Term at Michaelmas next enſuing, this is no good Award for (k) the Rent is not within the Submiſſion, inaſmuch as the Rent may be extinct by Surrender, Eviction, &c. before Michaelmas. M. 10. Jac. B. R. between (l) Gray and Wicker adjudged.**

(i) Whether Intereſt accruing after the Submiſſion may be awarded for Money due before. Winch. 114. 120. dubitatur. (k) Stil. 306. vide. (l) 1 Rol. Abr. 243. Pl. 3. S. C.

9. If there be a Submiſſion of all Debts, the Arbitrators may award a Releaſe of all Bonds, Judgments, Executions and Extents, for as by the Submiſſion the Arbitrators have Power to make an Award concerning the Debts themſelves, ſo *ex conſequenti* they have Power to award a Releaſe

leaſe of the Specialities, Judgments, &c. by which the ſaid Debts are due. *Trin.* 22. *Car.* between *Roberts* and *Marriot.* 2 *Sand.* 190. adjudged.

(D) What Things ſhall be ſaid to be ſubmitted.

1. If the Baron and Feme are poſſeſſed of a Term in the Right of the Feme as Executrix of her firſt Husband, and a Stranger pretending Title thereto, and the Baron by Writing ſubmit to an Award for the Intereſt and Title of the Leaſe, and the Arbitrator awards one Part to the Pretender, and the other (*) Moiety to the Baron and Feme, (a) the Feme after the Death of the Baron ſhall be bound by this Award. D. 2 Eliz. 183. 57. Quære.

(*) Fol. 246.

(a) The Baron may ſubmit for the Feme. Stil. 351. March. 77, 78.

2. If a Feme be indebted to I. S. in a certain Sum, as Adminiſtratrix to J. D. and ſhe takes Husband, and the Husband and I. S. ſubmit all Matters between them to the Award of W. N. he may make an Award of this Debt which is due by the Husband and Wife, though it be due in the Right of his Wife, and as Adminiſtratrix, for he is now chargeable by the Intermarriage. H. 15. Jac. B. R. between (b) Lumley and Hutton adjudged upon a Demurrer. M. 13. Jac. B. R. the ſame Caſe.

(b) Cro. Jac. 447. S. C. adjudged 1 Rol. Rep. 269. S. C. and S. C. per Coke, but no Judgment.

3. So upon ſuch a Submiſſion the Arbitrator may make an Award, of a Debt due to a Feme as Executrix. (c) 21 H. 7. 29. b. per Curiam.

(c) Bridg. 91. S. C. cited.

4. If A. and B. ſubmit to the Award of I. S. of all Suits and Actions depending between them two, the Arbitrator cannot make an Award of an Action which B. and his Wife have depending againſt A. for this is out of the Submiſſion. H. 38. El. Br. between Brockas and Sir J. Savage adjudged.

5. (d) If A. and B. of the one Part, and C. of the other Part, ſubmit themſelves to the Award of I. S. of all Matters between them, I. S. may make an Award of any Matter between A. only and C. though (e) B. hath nothing to do therewith, for the Submiſſion ſhall be taken diſtributively. Mich. 9. Car. B. R. between Arnold and Pole adjudged upon a Demurrer.

(d) 1 Rol. Rep. 298. S. P. per Crew. 8 Co. 98. a. S. P. Bridg. 91. S. P. vide Yelv. 203.

S. P. cited and ſeems to be allowed per Curiam. 1 Brownl. 112. S. P. cited and ſeems to be allowed per Curiam. 3 Bulſ. 69. bis. and vide Hard. 399. (e) But if the Submiſſion was with an *item quod*, &c. ſomething muſt be awarded as to B. 1 Rol. Abr. 261. Pl. 8. Stil. 152.

6. If a Submiſſion be of all Actions perſonal ſectis & querelis, he Arbitrator cannot make an Award of any Suit, Action or Quarrel which is real, but only of ſuch which are perſonal, for the Word perſonal refers to all which comes after in the copulative. (f) 9 E. 4. 45. b.

(f) 8 Co. 85. b. S. C. cited. Lit. Rep. 63. S. C. cited.

7. But if the Submiſſion had been of all Actions perſonal ac ſectis & querelis, the Arbitrator might have an Award of real Things, for the Word ac disjoins them. (g) 9 E. 4. 44. per Choke.

(g) 8 Co. 85. b. S. C. cited. Lit. Rep. 63. S. C. cited.

8. If there be a Controverſy between the Parſon and Pariſhioners, whether Tithes ſhould be paid in Specie or not, and they reciting the ſaid Controverſy ſubmit themſelves to the Award of I. S. for all Matters as well Spiritual as Temporal from the Beginning of the World to the preſent Day, and the Arbitrator awards that the Parſon ſhall have 7 l. for the Tithes due before the Submiſſion, and that the Pariſhioners ſhall pay 4 l. per Annum for the Tithes that ſhall grow due after; this is a good Award, for the Tithes which ſhall grow due after the Award, for the Right of the Tithes was in queſtion, and not the Poſſeſſion, and ſo the Right of them was ſubmitted to the Award. H. 42. El. B. R. 8. between Beckingham and Hunter adjudged.

9. If

9. If A. and B. ſubmit themſelves to the Award of I. S. touching a Suit depending between them in an ejectione firmæ, I. S. upon this Submiſſion cannot make an Award of the Land for which the Action is brought. P. 10. Car. B. R. between Taylor and Waltam adjudged in Arreſt of Judgment, in an Action upon the Caſe for Non-performance of the Award, after a Verdict for the Plaintiff.

(E) What ſhall be a good Award.

Fol. 247.

Where the Award is to do a Thing out of the Submiſſion (a) to a Stranger or by a Stranger.

(a) For this vide Cro. Car. 226. Moor 3. Pl. 11. Cro. El. 4. 1 Leon. 140. 304. Sid. 12. Hard. 45.

1. Upon a general Submiſſion if the Award be, that the one ſhall pay ſo much to the other at a certain Day, and that one I. S. a Stranger ſhall enter into an Obligation to pay it, &c. this is void, becauſe it is out of the Submiſſion, for he cannot by Intendment procure I. S. to do it. Co. 10. (b) Moor and Beedle 131. b. adjudged.

(b) 1 Rol. Abr. 243. Pl. 5. S. C. and S. P.

2. If an Award be that one ſhall pay ſo much to the other (c) at the Houſe of I. S. this is good, for he may come to the Houſe without entring the Houſe, and ſo he ſhall be no Treſpaſſer. My Reports 10 Jac. between (d) Lynſey and Aſhton, Curia. Paſch. 12. Jac. B. R. the ſame Caſe adjudged. Paſc. 13. Jac. in Scaccario upon a Writ of Error adjudged in the ſame Caſe. Mich. 22. Car. B. R. between (e) Linnen and Williamſon adjudged upon Demurrer. Intratur Paſc. 22. Car. Rot. 101. and this was after affirmed upon a Writ of Error in Parliament. Trin. 24. Car. B. R. between (f) Wickerd and Langly adjudged upon Demurrer. Intratur Hill. 23. Car. Rot. 792.

(c) A Diverſity where the Payment is to be in and where at the Houſe of I. S. Stil. 112.—but if to be paid in vel ad domum I. S. it is good. 3 Lev. 153. for if he cannot get Leave to pay it in the Houſe, he may go to the Door, and there pay it without being a Treſpaſſer. (d) Godb. 255. S. C. adjudged. 1 Rol. Rep. 6. S. C. adjudged and affirmed upon a Writ of Error. 2 Bulſ. 40. S. C. adjudged. Stil. Rep. 112. S. C. cited. (e) Stil. Rep. 112. S. C. cited. (f) Stil. 110. S. C. but this Point does not appear.

(g) Vide the Original Caſe. Cro. Car. 226. where the Award was that the Payment ſhould be at the Houſe of I. S. in C. being the Sign of the Cock, and ſo intended a common Inn. (h) But Q. if in ſuch Caſe he ought not to come as near to the Houſe as he can, or elſe get Leave to come thither. Vide Godb. 255. 1 Rol. Rep. 6. 2 Bulſ. 40. 1 Rol. Abr. 249. Pl. 10. (i) Cro. Car. 226. S. C. but S. P. does not appear, but that in ſuch Caſe the other muſt procure Leave, and if the Stranger refuſes this ſhall excuſe the Performance. Vide.

3. But it ſeems that if the Owner of the (g) Houſe hath Lands adjoining to the Houſe. (h) ſo that he cannot come to the Houſe without doing a Treſpaſs, that this is a void Award, for the Arbitrator cannot ſubject him to an Action of Treſpaſs. Mich. 7. Car. B. R. between (i) Taverner and Skingly adjudged per Curiam upon Demurrer.

(k) 1 Rol. Abr. 243. Pl. 6. S. P.

4. (k) If an Award be that one of the Parties ſhall pay ſo much to a Stranger this is void, becauſe it is out of the Submiſſion. (l) 22 H. 6. 46. b. Curia. Co. 10. Moor.

(l) Br. Arbitrament 24. S. C. Fitz. Dett. 49. S. C. Br. Condition 59. S. C.

(m) The Original is ſemble.

5. It ſeems that it is to be intended that this Payment could not be any Advantage to the other, for no Advantage to the other appeared, and ſo Doddridge (m) thought. P. 16. Jac. B. R. in Buckhurſt and Mayo's Caſe.

6. If I. S. and I. D. are bound in 20 l. at my Requeſt, and the Requeſt of W. N. and after there is a Controverſy between us two, which of us ſhall pay this Money among other ſuch Bargains between us; upon which all Matters in Controverſy are ſubmitted to Arbitrament, and

and the Arbitrator Awards, that I shall pay one Moiety of the Money with the Use, and W. N. the other Moiety to the Obligee; this is a good Award, though he be a Stranger to whom it is to be paid by those who submitted themselves, for here appears to be an Advantage to the Parties. Pasch. 16 Jac. B. R. Between (n) Gray and Gray per Curiam.

(n) Cro. Jac. 525. seems to be S. C. but this Point does not appear. Godb. 275. seems to be the S. C. but this Point does not appear. 1 Rol. Abr. 249. pl. 8. S. C. 263. pl. 2. S. C.

7. An Award that one of the Parties shall surrender his Copyhold into the Hands of two of the Tenants of the Manor, who shall present it, &c. it is a good Award, though this is to be done to Strangers who are not compellable, because they are to be used but as Instruments. Mich. 13 Jac. B. between Coote and Pooly per Curiam.

8. So it is a good Award that one of the Parties shall make a Deed of Feoffment with a Letter of Attorney to I. S. to make Livery, for there I. S. is to be used but as an Instrument. Mich. 13 Jac. B. per Curiam.

9. If there be a Controversy concerning certain Lands, between A. B. and C. and thereupon A. of the one Part, and B. and C. of the other Part, submit to the Award of I. S. and thereupon A. binds himself in an Obligation of 1000 l. to B. and C. with Condition to perform the said Award of I. S. touching this, and B. and C. because they would not be bound the one for the other, enter into several Obligations of 1000 l. a-piece to A. with several Conditions for the Performance of the Award of the said I. S. and the Arbitrators Award that A. shall make a Release of all (*) his Right in the Land to B. and C. and in Consideration thereof B. and C. should pay 300 l. to A. in an Action of Debt by A. against B. upon his Obligation for Non-performance of the Award, this is a good Award, and Breach assigned, that nec B. nec C. paid the 300 l. at the Time appointed, according to the Award, all this Matter being disclosed in pleading for upon all the Matter shewn, it appears that C. is no Stranger to the Award, for he and B. submitted themselves jointly, and though they entered into several Obligations, yet this did not make C. any Stranger to the Award. Hill. 11 Car. B. R. Between (o) Haies and Haies adjudged upon a Demurrer. Intratur Hill. 10 Car. Rot. 1045.

(*) Fol. 248.

(o) Cro. Car. 433 S. C. adjudged.

10. If a Submission be touching a Title of Land between A. and B. and the Arbitrators Award that A. and his Wife and Son and Heir apparent by the Procurement of A. shall pass such Assurance of the Land to B. as B. shall require, this is a void Award as to the Wife and Son, because they are Strangers to the Award. P. 13 Car. B. R. Between Barney and Faierchild adjudged per Curiam in Arrest of Judgment.

11. (p) If there be an Award that one shall acquit the other of an Obligation of 300 l. in which they both are bound to B. for Payment of 105 l. this is a good Award, for though he cannot compel B. being a Stranger, to deliver up the Obligation, or to make a Release by the common Law, yet if the Obligation was not forfeited he might pay the 105 l. to B. at the Day, and this would acquit the other; and if the Obligation was forfeited yet he might pay the Penalty to B. and so acquit the other, or he might upon Satisfaction given, compel B. in a Court of Equity to deliver up the Obligation or to make a Release. P. 15 Car. B. R. Between (q) Barsey and Clipsham adjudged upon a Demurrer. Intratur Tr. 14 Car. Rot. 161.

(p) Becket and Taylor S. P. 1 Mod. 9. adjudged. 2 Keb. 546, 554.

(q) Cro. Car. 441. S. C. adjudged. 1 Jon. 431. S. C. adjudged, because it should be intended the Day of Payment by the Condition was not past. March 18. S. C. and per Curiam, a Diversity taken where the Bond is forfeited and where not, but Jones said, however upon Payment he might in Equity compel the Obligor to deliver up the Bond, &c. 1 Rol. Abr. 263. pl. 8. S. C.

12. If *A.* and *B.* submit to the Award of *I. S.* who Awards, that the Servant of *A.* shall pay Money to the Servant of *B.* this is a void Award, for the Servants of both are Strangers to the Submission. *Trin.* 18 *Eliz.* Between *Dudley* and *Mallery*. 3 *Leon.* 62. *per Curiam.*

13. But if the Award be that *A.* ſhall pay Money to the Servant of *B.* (r) this is a good Award, for *A.* is a Party to the Submiſſion. *Trin.* 18 *Eliz.* 3 *Leon.* 62. *per Curiam.*

(r) But perhaps then it muſt appear by the Award that B. ſhall receive it to the Uſe of his Maſter. N. Dier 242. b. Margine, and vide 1 Rol. Abr. 249. pl. 11. Margine.

(E) What Things may be Awarded to be done.

(a) A Thing impoſſible.

(a) Where a Thing becomes impoſſible after the Award made, whether this ſhall excuſe the Performance. Vide 2 Mod. 27, 28, 29.

1. **If they award a Thing impoſſible, it is void, as to make an Obligation to another** (b) **immediately after the Award, this is void, for a Space is requiſite.** 18 E. 4. 21.

(b) An Award to pay Money without mentioning Time or Place, muſt be intended immediately, and yet good. 2 Brownl. 311. adjudged.

2. **But otherways it is if he Awards that one ſhall make a Feoffment to the other of one Acre, and ſhall immediately after deliver the Charters, this is good, ſo that he ſhall make an Obligation, and immediately after pay the Money; for it is poſſible,** 18 E. 4. 21. **But an Award to pay** 20 l. **where he hath not** 20 d. **or to pay** 20 **Tun of Wine where he hath not one, is no good Award.** (c) 19 E. 4. 1.

(c) Vide librum for I think it does not warrant this Opinion, but rather the contrary. Br. Arbitrament 39. S. C.

(F) Impoſſible.

Unreaſonable.

1. **If it be awarded that he ſhall procure a Stranger to do a Thing, and he hath no Means by Law to compel the Stranger to do it, the Award is void; but if he hath any Means to compel the Stranger to do it** (a) **either by the common Law or in Chancery, he is bound hereby.** 17 E. 4. 5. b. per Curiam. 21 E. 4. 75.

(a) Stil. 152. S. P. per Rol.

2. **So an Award that he ſhall be bound with Sureties,** (b) **is void as to the Sureties.** (c) 18 E. 4. 23. (d) 19 E. 4. 1. **But the Party himſelf may be awarded to pay any Thing, though he hath it not.** 18 E. 4. 1.

(b) 2 Lev. 6. S. P.

(c) Br. Arbitrament 39. S. C. 59. S. C.

(d) Br. Arbitrament 39. S. C. 59. S. C.

3. **If the Award be, that he ſhall levy a Fine before the Juſtices de Banco before ſuch a Day, it is good, though this cannot be done without the Act of the Court.** 19 E. 4. 1. 5 H. 7. 22. b.

Fol. 249.

4. **But if the Award be, that one ſhall command the Juſtices de Banco to make him to levy a Fine before a certain Day, this is void, becauſe it is not in his Power.** 19 E. 4. 1.

(e) Godb. 276. S. P. per Croke.

5. (e) **If an Award be, that each of the Parties ſhall diſcontinue the Actions which they have one againſt the other (admitting this is good, though it is not final) this is a good Award,** (f) **though here an Act is to be done by the Court, for the Default of the Defendant, and the Denier of the Action is the Act of the Party.** (g) 5 H. 7. 22. Curia.

(f) For if the Court will not ſuffer a Diſcontinuance to be made, the Party ſhall be excuſed. 3 Leon. 62. per Curiam. Cro. El. 4. (g) Fitz. Arbitrament 17. S. C. Br. 31. S. C.

6. The ſame Law is of a nonſuit (admitting ut ſupra.) Dubitatur (h) 5 H. 7. 22. b.

7. So it is a good Award, that the Defendant ſhall make (i) Default in a præcipe quod reddat, and the Plaintiff ſhall make a retraxit though this is to be done by the Court as well as the Party. (k) 5 H. 7. 22. b.

(h) Fitz. Arbitrament 17. S. C. Br. 31. S. C. 52. S. C.

(i) So it is a good Award that the Plaintiff ſhall not proceed or proſecute ſuch an Action during one Term. Gray and Gray. Godb. 276. no Judgment. Cro. Jac. 525. adjudged, and that the Entry of the Continuance from that Term to another was no Breach. (k) Fitz. Arbitrament 17. S. C. Br. 31. S. C. 52. S. C.

8. It is a good Award that one ſhall pay 10 l. to a Stranger, &c. though he cannot compel him to accept thereof. 5 H. 7. 22. b. (it is to be intended that there is Benefit to the other Party. Paſch. 16 Jac. B. R. Between (l) Gray and Gray per Curiam.

(l) 1 Rol. Abr. 247. pl. 6. S. C. Godb. 275. ſeems to be S. C. but S. P. does not appear. Cro. Jac. 525. ſeems to be S. C. but S. P. does not appear.

9. It is a good Award that one ſhall enfeoff a Stranger of certain Lands, though he cannot compel the Stranger to accept thereof. (m) 5 H. 7. 22. b.

10. It is a good Award that one ſhall pay 15 l. to the other apud domum I. S. a Stranger, for he is not bound to pay it in the Houſe of I. S. (n) but as near as he may, and then he ſhall not be any Treſpaſſer. Paſch. 13 Jac. B. R. (o) Aſhton's Caſe in Camera Scaccarii adjudged. 2 Bulſt. 40.

(m) Fitz. Arbitrament 17. S. C. Br. 31. S. C. 52. S. C.

(n) Vide 1 Rol. Abr. 247. pl. 2, 3. Godb. 255. 1 Rol. Rep. 6.

(o) 1 Rol. Abr. 247. pl. 2. S. C.

11. If A. and B. Merchants of a Ship of the one Part, and C. and D. Part-owners (p) with all other the Part-owners and Mariners of the Ship of the other Part, ſubmit to the Award of I. S. of all Matters concerning a Prize taken by way of Reprizal, and A. and B. enter into an Obligation, and C. and D. into another Obligation to perform the Award, and I. S Awards, that A. and B. the Merchants, ſhall pay 1000 l. to C. and D. for the Uſe of them and the Reſidue of the Part-owners and Mariners; this is a good Award, for if A. and B. do not pay the Money, the Part-owners and Mariners may have an Action of Debt againſt them, in as much as all have ſubmitted to the Award, and if they pay the Money to C. and D. to the Uſe of them and the Reſidue of the Part-owners and Mariners, though it be not divided how much each one ſhall have, yet in as much as they have jointly ſubmitted, it may be jointly Awarded to be paid to them, and (q) though it be to be paid to C. and D. (r) for the Uſe of them and the Reſidue of the Part-owners and Mariners; and it was objected, that the Reſidue of the Part-owners and Mariners had no Remedy for their Part but by Action, yet this is a good Award, for it is a good Award to Award that one ſhall enter into an Obligation to pay a Sum which is but a Thing in Action, and the reſt of the Part-owners and Mariners may have Remedy at leaſt in Chancery againſt C. and D. if not at common Law. Mich. 24 Car. B. R. Between (s) Wood and others Plaintiffs, and Thompſon and Clement Defendants, adjudged upon Demurrer. Hill. 22 Car. Rot. 803.

(p) If one Partner on the Behalf of himſelf and the other Partner ſubmits, &c. and promiſes to perform the Award, and thereupon the Arbitrator Awards them to pay Money, tho' the other Partner is not bound hereby, yet he that ſubmitted, &c. for himſelf and his Partner, muſt perform it. 2 Mod. 227, 228. adjudged. Stil. 136, 152.

(q) A. and B. ſubmit to the Award of I. S. concerning all Differences between the ſaid Parties, and I. S. makes an Award between A. in the Name and for the Behalf of C. of the one Part, and B. of the other Part, viz. that B. ſhall, &c. this is a void Award, becauſe contrary to the Submiſſion. Brown and Beverel. N. Bendl. 107. pl. 146. Judgment pronounced accordingly. Dier 217. pl. 60. 2 Judges againſt one, and ſaid Margine that the Judgment was never entered, but that the Parties agreed. (r) Vide Lat. 208. (s) Stil. 133, 136, 152. S. C. adjudged niſi.

12. If upon an Award by Parol, it is awarded, that one of the Parties ſhall pay to the other 10 *l.* within 6 Months after the Date of the ſaid Award, this is a good Award, and *per* 2 *Inſt.* 674. if a Bargain and Sale hath no Date, it may be inrolled within 6 Months after the Delivery, for the Date in this Caſe, muſt be intended the giving up of the ſaid Award within 6 Months after which the Money ought to be paid. *Mich.* 1. *Car.* 1. Between *Cable* and *Rogers.* 3 *Bulſt.* 311, 312. *adjudged.*

13. If

13. If there be a Submiſſion of all Controverſies between the Parſon of *A.* and the Pariſhioners there, and the Arbitrator Awards, that the Pariſhioners at all Times ſhall give Notice to the Parſon when they ſhear their Sheep, ſo that the Parſon or his Servants may be there, this is a good Award, for the Notice muſt be given at the Parſonage, where by intendment of Law the Parſon is always Reſident. *Paſch.* 3 *Car.* Between *Mudy* and *Oſam*, *Lit. Rep.* 30, *&* 31. *per Croke*, *ſed Hutton contra*, who held this Award void, becauſe as he ſaid, it was unreaſonable that the Pariſhioner muſt find the Parſon *ubicunque*, *&c.* to give him Notice, *&* *poſtea*, it was adjudged according to the Opinion of *Croke*.

(G) Againſt Law.

(a) In the Original 'tis Arbitrament, and ſo miſprinted.

1. If an (a) Arbitrator awards a Thing (b) againſt Law, this is void. 19 E. 4. 1.

(b) Whether Arbitrators may Award Intereſt, and if ſo for the Time after the Submiſſion made. Winch. 114, 120. dubitatur.

2. If *A.* and *B.* an Infant (admitting he may) ſubmit to the Award of *I. S.* and he awards *A.* to pay 20 l. to *B.* at ſeveral Days, and that *B.* upon the laſt Payment ſhall make a Releaſe to *A.* if *B.* will not then be of Age, this Part of the Award is void, and therefore the Whole is ſo. *Mich.* 3 *Car.* Between *Knight* and *Stone*. 1 *Jon.* 164. *per Curiam.*

(c) Stil. 351. S. P. ſeems to be admitted.

3. (c) If *A.* and *B.* for themſelves, and the Wife of *B.* ſubmit to an Award, the Arbitrators may Award that *A.* ſhall pay Money to *B.* and his Wife, becauſe the Controverſy did ariſe by reaſon of the Wife. *Mich.* 15 *Car. March* 78. adjudged and affirmed upon a Writ of Error.

Fol. 250.

(a) Where the Miſ-recital of the Arbitratorsſhall not prejudice their Award. Vide 1 Vent. 184. All. 87. Stil. 97. 2 Mod. 169. and vid. 1 Lev. 133.

(H) (a) How it (b) may be made.

1. The Arbitrators cannot make their Award by Parcels. 19 E. 4. 1. per Choke.

(b) As to the Time when it may be made, being a judicial Act it may be made in the Night, Cro. El. 676.—where it may be made, the very Day the Bonds of the Submiſſion bears Date. vide Latch 14, 60.—and where the Day of the Submiſſion ſhall be included, vide Stil. 382. and as to the Time of making an Award, vide Stil. 256.

2. If two ſubmit all Debts, Treſpaſſes and other Things, ita quod the Award is made before ſuch a Day, if the Arbitrators make an Award of Debts at one Day, and of Treſpaſſes at another Day, and of other Things at another Day, though they are all before the Day appointed, yet this is not a good Award as to the two laſt Awards, becauſe they have Power to make but one Award. (c) 39 H. 6. 12.

(c) Fitz. Arbitrament 13. S. C.

(d) The Original is convener.

3. But the Arbitrators may at one Day (d) conſider one Point, and at another Day another, and at a third Day the third Point, and then give one Judgment upon all the Points, ſo that the Judgment ought to be one and not ſeveral. (e) 39 H. 6. 12.

(e) Fitz. Arbitrament 13. S. C.

4. If the Arbitrators award that one of the Parties ſhall pay 10 l. to the other, and in Surety of Payment he ſhall be bound in an Obligation to the other, by the Advice of the Arbitrators, this is no good Award, becauſe they cannot Award by Parcels. (f) 19 E. 4. 1. per Choke.

(f) Fitz. Arbitrament 51. S. C. Hard. 45. S. C. cited.

5. But if the Award be, that one ſhall pay 10 l. to the other, and in Surety of Payment he ſhall be bound in an Obligation to the other by the Advice of his Counſel, this is good, for it is incident and purſuant that his Counſel ſhall make the Payment ſure to be paid. (g) 19 E. 4. 1. per Choke.

(g) Fitz. Arbitrament 51. S. C.

6. (h) But

6. (h) But it had been otherways if the Security had been to be made by the Advice of a (i) Stranger. 19 E. 4. 1. per Choke.

(h) An Award that he ſhould releaſe all Actions, &c. ut talis adviſaret, &c. void. Cro. El. 726. adjudged. (i) An Award to pay 20 l. for a Horſe, if I. S. ſhall ſay it is worth ſo much, is good, becauſe a Miniſterial Act only is referr'd to I. S. per 2 Rol. Rep. 214, 215. cited, but Palm. 147. cited con. and ſaid that it was a judicial Act, vide the Original Caſe in Statham Arbitrament.

7. If there be an Award that one Party ſhall pay 10 l. to the other, and that the other ſhall make a general Releaſe as fully and beneficially as Counſel ſhall adviſe, this is a good Award, for the Counſel (k) hereby hath not any Power to do any judicial Act, but a (l) (m) miniſterial only, for the Arbitrator hath directed the Extent of the Releaſe, ſcilicet to be general, and the Counſel are only to make it as ſtrong in Law as they can. Tr. 1650. between (n) Cater and Startut adjudged upon Demurrer. Intratur Hill. 1649. Rot. 1025.

(k) But an Award that one Party ſhall leave ſo many Trees for Houſe-bote, &c. as the Arbitrators upon Advice with Counſel at the next Aſſizes ſhould appoint, is not good. Cro. Jac. 315. adjudged. (l) So an Award to pay ſuch Coſts as the Prothonotary ſhall tax, is good. 1 Sid. 258. adjudged. (m) Vide Hard. 45. (n) Stil. 217. S. C. adjudged niſi.

8. If the Award be that one Party ſhall pay 105 l. at ſuch a Day, and if he does not pay it at the Day, that he ſhall pay at ſuch a Day after 110 l. this is a good Award, for it is but a (o) Penalty for the Non-payment at the Day, which was all in the Power of the Arbitators. Hill. 2. Jac. B. between Royſton and Rydal adjudged.

(o) So an Award may be that one ſhall enjoy Lands for 3 Years rendring to the other 5 l. Yearly, provided that if he does not pay the ſaid Rent, that then the Award as to the Enjoyment of the ſaid Lands ſhall be void. Cro. Jac. 423. adjudged, and vide Hard. 45.

9. If two ſubmit themſelves to the Award of J. S. ita quod fiat before Michaelmas, and the Arbitrators award that one ſhall pay 5 l. to the other for 10 Load of Wood, and awards ſeveral other Matters for other Things; and after this Award if he that is to pay it can diſprove or better prove the Payment of any of the ſaid Sums before them, or any of them before the ſaid Feaſt of Michael, then ſo much as is ſo proved ſhall not be paid at the ſaid Feaſt: this is a good Award for the firſt Part is good, and ſo thereby the Authority of the Arbitrators ended, and then a Reference to Proof or Diſproof is meerly void. Paſch. 16. Jac. B. between (p) Beckwith and Warley adjudged, vide as it ſeems) the ſame Caſe, Hobart's Reports Caſe 281.

(p) Hob. Fol. 218. S. C. adjourned. 1 Sid. 59. S. C, cited.

10. If an Award be made touching certain Currans, that if the Defendant before the 20 December can make it appear that the Currans were delivered to the Plaintiff, that then the Arbitrators ſhould make a further Award within fourteen Days after, if they can agree, otherways (*) I. S. as Umpire ſhould conclude it within 7 Days, and that the Plaintiff and Defendant ſhould ſtand to the Award of the Arbitrators, if they make any, or of the Umpire, &c. and if the Defendant before the ſaid 20 December do not ſhew any ſuch Teſtimony, then the Arbitrators award that the Plaintiff ſhall not pay for the Currans, but ſhall be free from any other Claim, Ac etiam Arbitratores arbitrati fuerunt quod Defendant ſhall pay 19 l. 12 s. before the firſt Day of January after, ſi nullum alterius arbitrium fieret for the Currans before the ſaid Time: this Award is void, though it be averred that no other Award was made before the ſaid 1 of Jan. for the Award, that if it be made appear, &c. that they will make another Award or make an Umpire, is void, for they cannot make an Award by Parcels, nor make an Umpire, and then the laſt Clauſe that the Defendant ſhall pay 19 l. 12 s. if no other Award is made before the 1 Jan. hath Dependance upon the firſt Part of the Award which was void, and it was not intended that the Defendant ſhould pay the Money if the Arbitrators or Umpire made any Award before, and if they had made any Award this had been void. Mich. 9 Car. B R. between Brown and Dalton adjudged per Curiam. Intratur Tr. 9. Car. Rot. 510.

(*) Fol. 251.

11. The Arbitrators cannot award that they shall stand to the Award of others, for the Trust reposed in them cannot be transferred to others, for by the Submission they are made Judges.

12. If an Award be that the Award before made by I. S. shall stand in all Things, but whereas in the said Award one was to pay 10 l. at Michaelmas, now they award that he shall have Day to pay it till the Feast of Christmas after. Tr. 3. Jac. B. dubitatur.

(q) Hard. 45. like Point cited.

13. (q) If an Award be that one shall pay so much Money to the other, and if it can appear that more was due, and due Proof is made thereof within one Month, then he shall pay this also, and the Submission was ita quod arbitrium fiat before such a Day, which was before the End of the Month, it seems that this is not a good Award, (r) because it is not final. Mich. 10. Car. B. R. between Jeanes and Fouch, dubitatur, the Issue being nullum fecerunt arbitrium and this found for the Plaintiff. Intratur M. 9. Car. Rot. 470. but Hill. 10. Car. the Judgment in Banco was affirmed upon the Words of the Submission, admitting this Part to be void, because it was not averred that there was any Doubt thereof before the Summission.

(r) Where the Arbitrators reserve to themselves a Power within their Time, and over a Matter submitted, the Award is not final, and so void: but when the Power goes to a Matter not within the Submission, the Power is void, and the Award good. Palm. 110. 146. per Curiam.

(s) 2 Vent. 242. S. P. as to the Payment of the Costs of a certain Suit adjudged, and for this Point vid. 1 Sid. 12. 358.—that A. shall pay to B. the

14. (s) If there be a Submission of all Controversies touching a Voyage to Sea, and an Obligation with Condition for Performance thereof, and an Award is made that one shall pay his Part of the Charge of the Voyage, and shall allow his proportionable Part of the Loss that shall come to the Ship by the Voyage upon (t) Account; and it is awarded further of the other Part, &c. tho' this Award be of it self uncertain, yet in as much as it may be reduced to a Certainty, this is a good Award. Mich. 10. Car. B. R. between (u) Beale and Beale adjudged upon a Demurrer in an Action of Debt upon an Obligation. Intratur 10. Car. Rot. 866.

Costs of a certain Suit, and that B. shall deliver to A. a Bill thereof, &c. 3 Lev. 18. adjudged a good Award.—but yet vide. Lev. 3. 414 where the Award was to pay all Expences of a Suit, and all reasonable Expences circa lectam pred. and it was admitted per Curiam to be void. (t) 1 Rol. Abr. 252. Pl. 9. vide. (u) Cro. Car. 383. S.C. the Award being to pay the Costs in such a Suit, and adjudged certain enough when the Attorney has made his Bill.

(x) An Award was made that one of the Parties should pay Money, and the other should make a Release, provided that if one of them should be discharged of any Arrears

15. If there be a Submission to the Award of *I. S.* so that it be made at or before the last Day of *April*, and *I. S.* upon the last Day of *April* makes an Award, that the said Parties within 4 Days after the said Award should give to each other Releases to the Time of the Submission, provided that if either of the said Parties should be discontented with the said Award, and within 20 Days after the said Award should pay to the other 10 s. that then the said Award should be void, yet this is a good Award, for the (x) Proviso to make it void after the Execution of the Releases is repugnant, and if by not making a Release either of the said Parties hath forfeited his Bond, it cannot be helpt, or become not forfeited by dissolving the Award by Proviso. *Ignoti temporis.* Between (y) *Sherry* and *Richardson.* *Poph.* 15, 16. adjudged *per totam Curiam.*

due to Soldiers by an Act of Indemnity, that then the Award should be void, & per totam Curiam the Proviso being void, the whole Award is void because intire, and the whole being awarded to be void upon a subsequent Accident, what they have awarded in present is not good, neither is it consonant to the Submission, (which is in præsenti,) to make the Award depend upon a Thing in futuro. 1 Sid. 59. adjudged. (y) 1 Sid. 59. S. C. cited.

16. But if the Proviso had been to be performed within the said 4 Days, the Award would have been void, because no final End of the Controversy, in as much as it is not certain by reason of the Condition whether it shall be an End or not. Between *Sherry* and *Richardson.* *Poph.* 16. *per Popham, Gaudy* and *Clench.*

17. If *A.* and *B.* ſubmit to the Award of *I. S.* ſo that he makes his Award before the 8th of *March*, and *I. S.* accordingly makes his Award that *A.* ſhall pay to *B.* 30 l. *viz.* 10 l. at *Michaelmas*, 10 l. at *Chriſtmas*, and 10 l. at *Lady-day*, and if before the ſaid laſt Payment *videretur* to the ſaid *I. S.* that *A.* was engaged for the ſaid *B.* in any Debt not ſatisfied, that then the ſaid *B.* ſhould repay unto the ſaid *A.* ſo much money as the ſaid Debt amounted unto; this Award is void, becauſe not final, for Part is reſerved to his future Judgment, which an Arbitrator cannot do. *Mich.* 18. *Jac.* between (z) *Winch & al. & Sanders. Cro. Jac.* 584. adjudged *per totam Curiam.*

(z) 2 Rol. Rep. 189. 214, 215. S. C. adjudged. Palm. 110. 145, 146. S. C. adjudged. 1 Sid. 59. S. C. cited.

18. But if the Award be that if *A.* ſhews any Bill of Debt to ſuch a Sum, that then this Sum certain ſhall be repaid, perhaps this is a good Award. *Mich* 18. *Jac.* between (a) *Winch. & al. & Sanders. Cro. Jac.* 585. *per Curiam.*

(a) 2 Rol. Rep. 214, 215. S. C. and like Point. put per Dod'. viz. in caſe A. ſhall produce an Acquittance, &c. and a Diverſity by him taken where the Arbitrator reſerves to himſelf a Power after the Day, to do a miniſterial, and where a judicial Act. Palm. 146. S. C. and like Point of an Acquittance and the ſame Diverſity per Dod'.

19. If among other Things it be awarded that one of the Parties before the Mayor of *T.* and three others, ſhall make an Acknowledgment that he hath done ſuch Injuries to the other Party, this is a void Award, becauſe the Mayor and the three others are Strangers to the Submiſſion, and there is no Means to compel the Mayor and the three others to meet. *Mich.* 12. *Car.* 2. between *Spignurel* and *Jene*, 1 *Sid.* 12. according to the better Opinion of the Book, though Judgment is ſaid to have been given for another Reaſon.

20. But if the Award be that one of the Parties ſhall make his Acknowledgment, &c. before the Mayor of *T.* only, this is a good Award. *Mich.* 12. *Car.* 2. 1 *Sid.* 12. *per Bridgman* and *Tyrril contra Hide.*

21. If *A.* and *B.* ſubmit to the Award of *I. S.* and he awards that *A.* ſhall pay 20 l. to *B.* upon Condition that each of the Parties ſhall acquit the other of all Things ſubmitted, &c. this is a good Award, and not conditional, but an Award that they ſhall acquit one another. *Paſc.* 33. *Car.* 2. between *Linfield* and *Fern.* 3. *Lev.* 18. adjudged.

(I) How it is to be made.

1. If a Treſpaſs be put to Award, if they award nothing to be paid or done by him that did the Treſpaſs, it is worth nothing. (a) 43 E. 3. 28. b. (b) 46 E. 3. 17. b. (c) 19 H. 6. 37. (d) 20 H. 6. 19.

(a) Br. Arbitrament 6. S. C. (b) Fitz. Arbitrament 21. S. C. Br. 8. (c) Br. Arbitrament 21. S. C. (d) Fitz. Arbitrament 8. S. C.

2. So if they award that he ſhall (e) wage his Law that he is not guilty, and that he ſhall be quit, and he does it accordingly without Satisfaction. (f) 46 E. 3. 17. b.

(e) The Original is faira ſon ley, &c. (f) Fitz. Arbitrament 21. S. C. Br. 8.

3. If a Treſpaſs for taking his Cattle be put to Award, if they award that the Owner ſhall have his Goods again; this is not good, becauſe there is no (*) Satisfaction awarded for the Damage of the Taking and Detinue. (g) 45 E 3. 16.

(*) Fol. 252. (g) Fitz. Arbitrament 18. S. C.

4. An

(h) If it appears by an Award that 72 l. was in Controverſy for Rent due. and 50 l. is awarded in Satisfaction thereof, and general Releaſes to be given; yet this is a good Award, for though it did not appear that other Matters were in Controverſy, yet perhaps the Arbitrators did conſider other Matters, and 'tis but reaſonable for him to find Fault in whoſe Caſe this Award is made. 2 Mod. 303, 304. adjudged. & vide 1 Rol. Rep. 270. Stil. 112, 113.

4. An Award to pay but (h) Parcel of a Debt due, is not good. 45 E. 3. 16. contra.

(i) Br. Arbitrament 7. S. C.

5. So an Award that the Owner ſhall have Parcel of his own Goods, and the other Parcel, is not good. Contra (i) 45 E. 3. 16. 10 H. 4. Arbitrament 19.

(k) Br. Arbitrament 21. S. C.

6. It is a good Award where each Party is indebted in 40s. the one to the other, that the one ſhall be quit againſt the other, for there is a ſufficient Satisfaction. (k) 19 H. 6. 37. b.

(l) Fitz. Arbitrament 8. S. C. Br. 3.

7. So where each had done a Treſpaſs againſt the other. (l) 20 H. 6. 19. (m) 22 H. 6. 39. agreed.

(m) Fitz. Arbitrament 9. S. C. Br. 23.

(n) The Original is Bailiff, &c.

8. In a Writ of Account againſt a (n) Maſter of a Ship it is a good Plea for the Defendant to ſay, that there was a great Tempeſt upon the Sea, ſo that he was driven to Land and ready to be drowned, and thereupon he laid out much Coſt upon the Ship, and that after the Plaintiff and Defendant ſubmitted to the Award of I. S. who awarded that he ſhould deliver to the Plaintiff the ſame Goods of which he demanded an Account, &c. the which he hath delivered, &c. (for in this Caſe he ought to have been allowed the Coſts, which might amount to more than the Profit he made of his Goods.) 2 H. 5. 2.

(o) 1 Rol. Abr. 251. Pl. 14. vide.

9. (o) If two ſubmit an Account of a certain Thing to the Award of certain Arbitrators, who award that the one ſhall account before ſuch Auditors that the other ſhall aſſign, and that if he be found in Arrears he ſhall pay them, & ipſo facto each ſhall be quit againſt the other, this is no good Award. 30 H. 6. Arbitrament 27. adjudged, and Statham Arbitrament ſame Caſe.

10. If a Man and a Woman ſubmit themſelves to an Award, it is no good Award that they ſhall intermarry, &c. for this is not intended any Advange. 9 E. 4. 44. per Choke.

11. So it is no good Award that one ſhall go to Rome or Pauls, for this is not any Advantage. 9 E. 4. 44. per Choke.

12. It is no good Award that one ſhall make a Releaſe to the other of Land in Satisfaction of an Action, if he to whom the Releaſe is to be made had nothing in the Land at the Time, for then it is no Advantage to him. (p) 9 E. 4. 44 b.

(p) Fitz. Arbitrament 16. S. C.

13. If a Man makes to me a Releaſe of certain Land of which I am ſeized, and after he gets the Releaſe again, and after he and I ſubmit all Matters to the Award of I. S. who awards that he ſhall deliver to me all the Evidences concerning the Land in Satisfaction of a certain Action, this is a good Award, though theſe are my own Evidences, for this is an Advantage to me to have them without Suit. 9 E. 4. 44. b. per Catesby.

14. If an Award be that one of the Parties ſhall releaſe all his Right to the other in certain Land, of which the other is ſeiſed, &c. though he who is to make the Releaſe hath not any Right, yet this is a good Award, for it is an Advantage to have ſuch Releaſe. (q) 9 E. 4. 44.

(q) Fitz. Arbitrament 16. S. C.

15. An Award ought to be a final Determination of the Matter, otherways it is not good. (r) 19 H. 6. 37.

(r) Fitz. Arbitrament 6. S. C. Br. 21. S. C.

16. As if two have Actions one againſt the other, and the Award is that each ſhall be nonſuit in his Action againſt the other, this is not good, becauſe it is not final, for they may bring new Actions for the ſame Matter. (s) 19 H. 6. 36. b. 37. adjudged, dubitatur. (t) 5 H. 7. 22. b.

(s) Fitz. Arbitrament 6. S. C. Br. 21. S. C.

(t) Fitz. Arbitrament 17. S. C. Br. 31. S. C. 52. S. C.

17. So it is no good Award that one ſhall diſcontinue an Action which he hath againſt the other, and that the other ſhall ſo do of an Action which he hath againſt him, becauſe it is not any final Determination of the Matters between them. Contra (u) 15 H. 7. 22. per Curiam.

(u) This is miſprinted, for there are not ſo many Fol. in that Year, and ſhould be 5 H. 7. 22. as it is cited. 1 Rol. Rep. 362. Fitz. Arbitrament 17. S. C. Br. 31. S. C. 52. S. C.

18. But it is a good (x) Award, that the Plaintiff in an Action ſhall (y) make a retraxit (for this is a good Bar.) (z) 5 H. 7. 22. b. Fol. 253.

(x) The Original is Bar, and ſo appears miſprinted. (y) So it is a good Award that all Suits ſhall ceaſe. Stil. 110. adjudged. (z) Fitz. Arbitrament 17. S. C. Br. 31. S. C.

(K) How it may be made.

An Award of (a) one Part only is not good.

(a) Where all the Matters of one Part were pardoned by the general Par-

1. AN Award of one Part only is not good. Co. 8. (b) Baſpoole 98.

don. Vid. 1 Sid. 178. (b) 2 Brownl. 310. S. C. adjudged. 1 Rol. Rep. 1. S. C. cited.

2. If the Award be, that one ſhall go quit of all Actions had by the other againſt him, and nothing is ſaid of the Actions which he hath againſt the other, this is void. (c) 7 H. 6. 41. Co. 8. Baſpoole 98. 21 H. 6. Arbitrament 9. (d) 22 H. 6. 39.

(c) 2 Rol. Rep. 1. S. C. cited. (d) Br. Arbitrament 23. S. C.

3. (e) If the Award be, that one ſhall pay 10 s. to the other without ſaying for any Matter in certain, or for all Matters, this is not good, for it cannot be known for what Matter this was to be paid, and ſo no Matter diſcharged thereby, and ſo the Award but of one Part. Hill. 15 Jac. B. R. between (f) May and Samuel per Curiam.

(e) Hob. 49, 50. S. P. per Curiam. (f) 2 Rol. Rep. 1. S. C. and S. P.

ſeems to be admitted per Curiam. Poph. 134. S. C. and S. P. per Curiam.

4. (g) But it is otherways if this is to be paid in Satisfaction of all Matters, for by this the Matters are diſcharged. Hill. 15 Jac. B. R. between May and Samuel per Curiam.

(g) Cro. Jac. 354. S. P. adjudged.

5. If an Award be, that one ſhall pay to the other in Conſideration of ſuch a certain Debt of 20 l. long while due, and for the great Coſt in his Part ſuſtained, the Sum of 22 l. this is a good Award, for he who paid the Money ſhall be diſcharged of the ſaid Debt, and ſo the Award of both Parts. Co. 8. (h) Baſpoole 98. reſolved.

(h) 2 Brownl. 310. S. C. adjudged. 1 Bulſt. 144.

S. C. upon a Writ of Error, the Court inclined to affirm the Judgment. Cro. Jac. 285. S. C. upon a Writ of Error, and without Argument upon this Point, (the Court refuſing to hear any further Argument therein) the Judgment was affirmed accordingly. 1 Rol. Rep. 1. S. C. cited. 1 Brownl. 60. S. C. cited.

6. (i) If two ſubmit all Matters between them, and the Award is made de & ſuper præmiſſis in Manner and Form following, ſcilicet, that one ſhall pay 40 s. to the other, this is a good Award of both Parts, for in as much as this was made de præmiſſis, it cannot be intended but that the Award was made in Satisfaction of all Matters, for this cannot be intended to be paid for any other Cauſe, and the Words expreſs that it is in Satisfaction of all Matters. Hill. 15 Jac. B. R. between May and Samuel per totam Curiam agreed.

(i) Hob. 49. 50. like Point dubitatur. Stil. 459. like Point adjudged.

(k) Hopper and Hacher S. P. 1 Lev. 133. per Curiam. 1 Keb. 738. per Curiam.

7. (k) So a fortiori, if it be awarded that one shall pay 10 l. to the other (l) for all (m) Matters between them, this is a good Award, for this is a good Discharge of all Matters. Hill. 15 Jac. B. R. between May (n) and Samuel.

(l) Cro. El. 904. like Point adjudged con. but Hob. 49. S. P. for a Satisfaction implies a Discharge. (m) But if the Payment is applied to one Particular only, and nothing said as to the rest. Hard. 399. dubitatur and vide 1 Lev. 133. (n) 2 Rol. Rep. 1, 2. S. C. adjudged.

(o) The Original is & ensuant, &c. which I take to be misprinted, and that it should be in simul, and if the Words were transpos'd, viz. that this together with

8. If an Award be made de & super præmissis submitted in Manner and Form following, scilicet, that one shall pay 40 s. to the other, and that the other shall make a general Release of all Matters till the Award made, this is void as to the Release, because it compreheds more Time than was submitted: In this Case the Award is void in all, for it cannot be intended that the 40 s. shall be paid in Satisfaction of all Matters, for it may be paid in Part of Satisfaction, so that this is a good Discharge of all Matters which the other hath against him, (o) together with the general Release; for the Arbitrators intended, that the Release with the Money given, should be a Satisfaction for all Matters between them, and not the Money without the general Release. Hill. 15 Jac. B. R. between (p) May and Samuel adjudged upon a Demurrer per totam Curiam præter Houghton, who was against the Judgment, because the appointing of the Release shews their Intention, that this should be the Discharge, peradventure there was some Obligation in Controversy which cannot be discharged by an Award without a Release.

the Release is a good Discharge, &c. the Sense would be more plain. (p) 2 Rol. Rep. 1, 2. S. C. adjudged. Poph. 134. S. C. adjudged. Cro. Jac. 448. S. C. cited.

(q) Cro. El. 809. S. P. adjudged.

9. (q) If an Award be, that one shall give 40 s. to the other in Satisfaction of all Matters between them, and that the other shall make such a Release as aforesaid, which is void, yet the Award is good, for the 40 s. of it self is a good Discharge of all Matters, and the Release was made but to make it the more sure.

Fol. 254.

(r) Stil. 351. like Point, per Rol. Chief Justice.

10. (r) If an Award be, that all Controversies shall cease, and that one shall give 12 d. to the other, this is a good Award, (s) though the other hath nothing given to him, for it may be that he hath done a greater Trespass than the other. M. 8 Jac. B. Cole's Case per Curiam.

2 Mod. 228. like Point per Curiam. 1 Lev. 58. like Point adjudged. (s) That one shall enjoy a Seat that was in Controversy, &c. and that both Parties shall bear their own Charges, is a good Award. 2 Mod. 29.

(t) Stil. 44. seems to be the S. C. cited per Rol. Chief Justice.

11. If an Award be de & super præmissis in Manner and Form following, videlicet, that one shall depart from his House, remove his Hay, and shall pay to the other 3 l. this is no good Award, because it is but of one Part only, for it is not made de præmissis generally, but modo & forma sequente, by which he refers it to the Court upon the Matter. M. 13 Jac. B. between (t) Nichols and Grunwin adjudged, Vide same Case. Hobart's Reports (u) 68. where it is said that no Judgment was given in this.

(u) Hob. Fol. 49. 1 Brownl. 60. S. C. adjudged pro quer. and that it was a good Award.

(x) The Original is semble, &c.

(y) Moor 642. pl. 885. like Point semble per Curiam con.

12. If an Award be de & super præmissis that each of the Parties shall make a Release the one to the other of all Matters till the Award, and that one of the Parties shall pay 10 l. to the other at a Day, & quod partes prædictæ continuarent amantes & amici ut in priori tempore, this is a good Award, for though it be admitted that the Award, as to the general Release till the Award made, is void (though the Court (x) inclined econtra as to this) yet the Award for the Payment of 10 l. is an Award of both Parts, because it shall be intended to be in Satisfaction of all Matters between them, especially (y) in this Case, when it is said the Parties shall be Friends, ut in

in priori tempore. Tr. 8 Car. B. R. between Raimond and Popley adjudged upon a Demurrer in Debt upon an Obligation for Non-performance of the Award, and the Breach assigned in Non-payment of the Money, and the same Term also adjudged upon Demurrer in another Case upon the same Award. Between Popley and Popley, I my self being de consilio Querentis.

13. If an Award be made between A. and B. that A. shall pay to B. 10 l. and that B. shall pay for the Making the Writings of the Award, this is a void Award, there being nothing awarded for B. to do (z) but the making of the Writings, which was out of the Submission, this arising after the Submission, and not awarded in Recompence of the precedent Matters submitted, and so an Award but of one Part. Hill. 22 Car. B. R. between (a) Capel and Allen adjudged Rot. 639.

(z) Cro. Jac. 578. S. P. adjudged. Bridg. 91. S. P. adjudged.

(a) Stil. 44. S. C. adjudged. All. 10. S. C. adjudged. Hard. 45. S. C. cited.

14. So if the Award be, that one shall pay to the other 10 l. and that both Parties shall pay and discharge the Reckoning of the House, which was expended at the Meeting upon making the Award; this is an Award but of one Part, and the Discharge of the Reckoning is out of the Submission, this coming after the Submission. Tr. 1650. (b) Hall and Massey adjudged upon a Demurrer. Intratur Hill. 1649. Rot. 673.

(b) Hard. 45. S. C. cited.

15. If two submit themselves to the Award of I. S. for the Title of certain Copyhold Land, and I. S. Awards that one, scilicet A. shall pay to the other scilicet B. 6 l. upon the 21 Day of May, and 6 l. at Michaelmas next ensuing, and that B. shall release to A. all his Right in the Copyhold super præd. primo die Maii omitting vicissimo, and Awards over, that he shall make further Assurance within 3 Days after, &c. this is a void Award, (c) for the Award for making of the Release super præd. primo die Maii is void, there being no such Day before-mentioned, and it appears that the Release at the said Day should be the principal Consideration of his Part, who ought to make it, and then the rest of the Award for further Assurance, which is good, is not sufficient, this being but Part of the Consideration and Award of his Part. Hill. 4 Jac. B. R. (d) Between Markham and Jennings adjudged upon Demurrer.

(c) So where it is awarded that Money shall be paid to an Infant, and that he shall make a Release, it is void. 1 Jon. 165. per Curiam. (d) Yelv. 98. S. C. adjudged, because the Clause for further Assurance depends upon the repugnant Clause, and was intended only for strengthning the first Release. Cro. Jac. 149. S. C. adjourned. 1 Brownl. 92. S. C. reported in the same Words as in Yelv.

16. If two submit themselves to the Award of I. S. of all Controversies, and I. S. Awards, that (*) one shall pay 10 l. to the other at such a Day, and that the other upon the Receipt of the 10 l. shall make a general Release to the other, without appointing any other Thing to be done by him who shall have the Money, and not expressing that the 10 l. shall be in Satisfaction of Matters in Controversy, and though it is objected, that if he to whom the 10 l. is to be paid, refuses to receive it, then he is not bound to make any Release, and then nothing is to be done by him, and so the Award is but of one Part, and only at the Will of him whether he will make a Release, yet it was adjudged a good Award, because when one is awarded to pay the 10 l. to the other, the other is (e) by Implication awarded to accept it, as if one had been awarded to pay 10 l. in Satisfaction of all the Controversies to the other, if the other refuses to accept the 10 l. yet this is a good Award, because he is implicitely awarded to accept it in Satisfaction, &c. Mich. 22 Car. B. R. between Linnen and Williamson adjudged upon Demurrer. Intratur P. 22 Car. Rot. 101. and this was after affirmed in a Writ of Error in Parliament, by the Advice of all the Judges.

(*) Fol. 255.

(e) The Word per is wanting in the Original.

17. If the Condition of an Obligation be to perform the Award of I. S. of all Controversies, &c. ita quod fiat de Præmissis, &c. and the Award is in this Manner in Writing de & super præmissis, scilicet, they recite the Submission, and then say that the Differences being understood

understood by them pro eo quod Things (f) uncertain in a Bill by the Plaintiff exhibited, or likely to be exhibited in Camera Stellata against the Defendant, were for the most part acknowledged by the Defendant, namely, that the Defendant had taken of the Plaintiff 40 s. for a Supersedeas to reverse an Outlawry against the Plaintiff, but had not performed it, & pro eo quod the Defendant had taken of the Plaintiff 20 s. more as a Fee, pretending it to be due to him upon an Execution of 26 l. sued against the Plaintiff, the which the Defendant or any for him never executed, (he being then Under-Sheriff of the County of Dorset) & pro eo quod the Plaintiff by the Means of the Defendant was imprisoned by I. S. who arrested him without any Warrant to him directed, and the Plaintiff was compelled by I. S. to pay 20 s. for the said injurious Arrest, before he was permitted to go at large ac pro eo quod the Plaintiff was an honest Man, and of good Reputation, and an Artisan, Anglice a Tradesman, having a Wife and 6 Children, and by the said Means had sustained great Damage, Discredit and Scandal (g) they awarded in ea parte, modo & forma sequentibus, videlicet, that the Defendant shall pay 500 l. to the Plaintiff at certain Days, &c. this is a good Award, though it was objected nothing was awarded of the other Part, for they do not say that they awarded the 500 l. to be paid in Satisfaction of the said Wrongs, nor in Consideration of them, nor for them, so that it cannot be pleaded in Bar of the said Wrongs, for the Words (pro eo quod are not intended for the Wrongs, but only for a Reason of their Award, which induced them to give the Money, and the Words in (in ea parte) do not imply it to be in Satisfaction, but he made his Award (in ea parte) scilicet upon the Premisses. Mich. 16 Car. B. R. between Burbridge and Raymond in a Writ of Error upon a Judgment in Banco, where this was adjudged a void Award upon Demurrer, but now the Court seemed to incline that the Award was good, but they affirmed the Judgment for another clear Defect in the pleading of the Award. Intratur Tr. 15 Car. Rot. 1657. for it cannot be intended that the Money was paid for any other Cause than that which is mentioned in the Award.

(f) The Original is incertain, but Q. if it should not be in certain, &c.

(g) The Original is he, here and in other Parts of this Case, and so appears misprinted.

18. If *A.* and *B.* of the one Part, and *C.* of the other Part, submit to the Award of *I. S.* who Awards that *B.* shall pay a certain Sum of Money unto *C.* in Satisfaction of all Differences between *A.* and *B.* of the one Part, and *C.* of the other Part, this is a void Award as to *A.* and he is not concerned therein, for the Money paid by the one can be no Satisfaction for the other. *Mich.* 1655. between *Morden* and *Hart. Stil.* 471. *adjudged nisi.*

19. If *A.* and *B.* submit to the Award of *I. S.* and he Awards that *A.* shall pay to *B.* 10 l. and that *B.* shall pay to *A.* the Expences at the making the Award, and that upon the Performance of the Whole they shall make to one another general Releases; this is a good Award, for the Releases ought to be made upon the Performance of that which is well Awarded, and not to stay till the Performance of that which is void. *Pasch.* 23 *Car.* 2. between (h) *Pinkney* and *Bullock.* 2 *Lev.* 3. *Hale Chief Justice* inclined accordingly, but adjourned, and in the same Book there is a *Nota* by the Reporter, that in 7 *W. & M.* between (i) *Bargrave* and *Atkins*, upon such an Award it was adjudged, that upon the Performance of that which was well awarded, the Releases ought to be made, and that it was a good Award.

(h) 1 Keb. 759, 832. S. C. but no Judgment, & per Hale super performe. præmissorum refers only to that which is well awarded, but where upon Performance of a particular Matter it makes a Condition precedent. (i) 3 Lev. 413. S. C. adjudged accordingly.

20. If *A.* and *B.* submit to the Award of *I. S.* who makes an Award, that *A.* shall be bound with such Sureties as *B.* shall approve for the Payment of 100 l. to *B.* and that thereupon they shall seal mutual Releases to one another, this is a void Award; because *B.* must first approve of the Security before, and without which the Releases are not to be given, so that it is but an Award of one Side. *Hill.* 1 *Will. & Mar.* between *Thirsby* and *Hellbot.* 3 *Mod.* 272. adjudged semble, because subject to be defeated at the Pleasure of *B.*

21. If *A.* and *B.* ſubmit to the Award of *I. S.* who makes his Award that *A.* ſhall pay to *B.* 15 *l.* which the ſaid *I. S.* did adjudge the ſaid *B.* to have ſuſtained in Coſts and Damages, by reaſon of a Suit without Cauſe commenced by *A.* againſt *B.* and that all Suits and Differences between them ſhall ceaſe; this is a good Award, for by this Award *A.* is not ſubject to have Coſts taxed againſt him at the Prayer of *B.* and therefore the Award is not of one Side only. *Mich.* 2. *Will. & Mar.* between *Walmough* and *Holgate.* 2 *Vent.* 221. the Court inclined accordingly, but adjournatur, and it was objected that *B.* had no Advantage by ſtaying his own Suit, and paying 15 *l.* Coſts; and ſaid that it did not appear there were any other Differences between them.

(L) How it is to be made.

Fol. 256.

When the Submiſſion is general without an *ita quod*, &c. *de præmiſſis.*

1. If there be a general Submiſſion, the Award may be of Part of that which is ſubmitted without the Reſidue, and this ſhall be good. (b) 19 H. 6. 6. b. Curia. (b) Fitz. Arbitrament 5. S. C. Br. 20. S. C.

2. (c) If a Submiſſion be by two, to certain Arbitrators of all Matters, &c. without any Clauſe de ita quod fiat de præmiſſis, &c. in this Caſe the Arbitrators have Power to make an Award of Part of the Matters between them, and not of the reſt. M. 5. Jac. B. between (d) Middleton and Wikes per Curiam. (c) Hob. 49. S. P. Cro. El. 839. S. P. per Poph. ſaid to have been adjudged. 4 Leon. 94.

S. P. arguendo. Dier 216. b. S. P. arguendo. Noy 62. S. P. adjudged. Stil. 471. like Point arguendo. (d) Cro. Jac. 200. S. C. and S. P. per Coke.

3. (e) So if three Things in particular are ſubmitted generally without the ſaid Clauſe, they may make an Award of any of them without the others. Contra (f) 39 H. 6. 11. b. (e) Cro. Jac. 355. S. P. per Coke Chief Juſtice.

8 Co. 98. a. S. P. All. 52. S. P. per two Judges. (f) Br. Arbitrament 29. S. C.

4. If the Submiſſion be of the right Title and Poſſeſſion of certain Land, if they make an Award only of the Poſſeſſion, this is good. (g) 19 H. 6. 6. b. Curia. (g) Fitz. Arbitrament 5. S. C. Br. 20. S. C.

5. So if the Submiſſion be of all Actions real and perſonal, an Award of Actions perſonal will be good, tho' he makes no Award of Actions real. (h) 19 H. 6. 6. b. (h) Fitz. Arbitrament 5. S. C. Br. 20. S. C.

6. If a Submiſſion be to the Award of I. S. &c. upon all the Premiſſes or any Part thereof, in this Caſe I. S. may make an Award of any Parcel only. (i) 39 H. 6. 11. b. (i) Br. Arbitrament 29. S. C.

7. (k) If the Submiſſion be of all Controverſies between, &c. (l) ita quod, &c. the Award ought to be made of all Controverſies of which they have Conuſance, or otherways the Award is void. M. 5. Ja. B. between (m) Middleton and Wikes per Curiam. (k) Cro. Jac. 355. S. P. per Coke Chief Juſtice. Godb. 256.

S. P. pur. 8 Co. 98. a. S. P. Cro. El. 839. S. P. per Poph. ſaid to have been adjudged. Cro. El. 858. S. P. per Curiam. 4 Leon. 94. S. P. arguendo. Dier 216. b. S. P. arguendo. Noy 62. S. P. adjudged. (l) It is all one where the Words are ſo that the Award be made of the Premiſſes, and where ſo that the ſame Award be made before, &c. for the Words ſame Award refers to all the Things before mentioned. Cro. El. 839. per Curiam, vide Goulſ. 125. (m) Cro. Jac. 200. S. C. and S. P. per Coke, to which the reſt of the Judges inclined but adjourned.

8. (n) But upon such general Submission with an ita quod, &c. if the Arbitrators make an Award of all Controversies, of which they have Conusance, and not of others of which they have no Conusance, yet the Award is good, because without Information of the Parties, they cannot take Conusance thereof. M. 5. Ja. B. between (o) Middleton and Wikes per three Justices against two.

(n) 2 Brownl. 310. S. P. per Coke. Hob. 49. S.P. 8 Co. 98. a. S. P. 2 Bulst. 40. S. P. per Coke. (o) Cro. Jac. 200. S. C. and S. P. per Coke Chief Justice, to which the rest of the Judges inclined but adjournatur.

9. (p) If the Submission be special as of such a Thing and such a Thing, &c. ita quod, &c. the Arbitrators ought to make an Award of all Things so specially named, or otherways the Award is void, for they ought to take Notice of those which are mentioned in the Submission without other Information. Mich. 5. Ja. B. between (q) Middleton and Wikes per Curiam agreed.

(p) 8 Co. 98. a. S. P. Hard. 45. S. P. cited. Goulst. 125. S. P. adjudged. (q) Cro. Jac. 200. S. C. and S. P. per Coke.

(M) What shall be an Award of all.

1. If the Submission be of all Actions personal ita quod arbitrium fiat de præmissis before Easter, and the Award is made before Easter de & super præmissis, that one shall pay to the other 20 l. at Midsummer next ensuing, and that then the one shall release to the other all Actions personal in Satisfaction of all Matters personal between them, this is made super præmissis, for by this it is intended that the Release shall be only of Actions till the Submission, and not till Midsummer. Mich. 5. Ja. B. between (a) Gosse and Brown per Curiam adjudged. Hobart's Reports 258. same Case.

(a) Hob. Fol. 190. S. C. adjudged. Moor 885. S. C. cited.

2. (b) If the Submission be of all Matters between the Parties, and the Award is made of all præter one Obligation, and of this the Award is that it shall (*) stand, this is a good Award of all, for he is not bound to discharge this without Cause, and it shall be intended there was no Cause. Hill. 14. Jac. between (c) Berry and Penrin at Serjeants Inn adjudged, and Judgment was affirmed there in a Writ of Error accordingly.

(*) Fol. 257.

(b) Cro. Jac. 278. like Point per Fleming Chief Justice, 1 Bulst. 123. like Point per Fleming Chief Justice. (c) Cro. Jac. 400. S. C. adjudged upon a Writ of Error in Cam. Scac. and Judgment affirmed accordingly per totam Curiam. Bridg. 90, 91. S. C. adjudged upon a Writ of Error, and Judgment affirmed accordingly. 3 Bulst. 62, &c. 68. S. C. adjudged and affirmed upon a Writ of Error. Moor 849. Pl. 1154. S. C. but S. P. does not appear. 1 Rol. Rep. 375. S. C. but S. P. does not appear.

3. If A. and B. submit all Controversies of Woods and Underwoods, and all Quarrels and Suits between them ita quod, &c. and the Award is that A. shall have the Underwoods, and that he shall pay to B. 50 l. and says nothing of the Woods, but awards further that all manner of Actions, Quarrels, &c. between them shall cease; this is a good Award of all, because the Beginning of the Award was (We do award of the Premisses) and also the Award is of all Actions, &c. Ergo Mich. 5. Jac. B. between Humfrey and Wiburn per Curiam.

4. If a Submission be of all Matters, Actions, &c. between them, ita quod fiat de præmissis, and the Award is that one shall make a certain Release of all Actions, which is void, because it comprehends more Time than was submitted, and that he shall pay a certain Sum of Money, and awards also of the other Part, this is a good Award for the Money, though the Award be void for the Release. My Reports 14 Jac. (d) Vanlore and Tribb adjudged, for though the Award is to release all Actions, yet it does not appear by this, that any Actions were between them.

(d) 1 Rol. Abr. 244. Pl. 23. S. C. and S. P. 1 Rol. Rep. 437. S. C. adjudged Dod'. non contradicente All. 87. S. C. cited.

5. (e) If

5. (e) If two ſubmit all Controverſies, the 4th of May, to the Award of I. S. ita quod arbitrium fiat de præmiſſis, and I. S. makes an Award de præmiſſis of all Controverſies till the 1 May, though here he hath not made any Award for Part of the Time ſubmitted, but the Award is ſhorter, yet becauſe it is made (f) de premiſſis it ſhall not be intended there were any mean Controverſies between them, between the 1 of May and the 4 of May, unleſs this be ſhewn of the other Part, and therefore the Award is good enough. Trin. 44. El. B. Rot. 1447. between (g) Barnes and Green adjudged. Hill. 15. Jac. B. between (h) Ley and Pains this was agreed per Curiam, and the ſame Term, this was alſo agreed in B. R. per Curiam, between May and Samuel vide the ſame Caſe cited Hobart's Reports 258.

(e) Cro. Jac. 577. S. P. adjudged and affirmed upon a Writ of Error. 2 Rol. Rep. 193. S. C.—Busfield and Busfield S. P. Cro. Jac. 577. adjudged and affirmed upon a Writ of Error. 2 Rol. Rep. adjournatur. (f) Vide a Diverſity where the Submiſſion is general, and where a particular Thing only is ſubmitted. 1 Sid. 252. (g) 2 Rol. Rep. 1. S. C. cited. 2 Rol. Rep. 193. S.C. cited. Hob. 190. S. C. cited, and ſaid that a Writ of Error was thereupon brought, but what was done therein he knew not. Moor 885. S. C. cited. Cro. El. 858. S. C. adjudged. Cro. Car. 216. S. C. cited. Hut. 9. S. C. cited. (h) 2 Rol. Rep. 193. S. C. 1 Rol. Abr. 258. Pl. 3. S. C. Hut. 9. S. C.

6. If a Condition be of all Controverſies, Doubts, &c. had, made, moved or ſtirred between the Parties from the Beginning of the World until the Day of the Date of the Bond, and the Arbitrators award that one ſhall pay 10 l. to the other, which appears by his Confeſſion that he hath received, and if it ſhall appear within one Month, and due Proof thereof ſhall be made that he hath received more than this, which he hath ſo confeſſed, then he ſhall pay that alſo; though this laſt Part be void, yet the Award is good, though it was objected that all Doubts are referred and the Condition is ita quod fiat de præmiſſis, and ſo they have not made an End of all Doubts, for it appears the Arbitrators doubted of this whether more was due or not, but per Curiam adjudged good, becauſe it is not averred that this was a Doubt moved or ſtirred between the Parties at the Time of the Submiſſion, for perhaps this Doubt aroſe between the Arbitrators after the Submiſſion, and it ſhall not be intended without an Averment that this was a Doubt at the Time of the Submiſſion, and this was made in Majorem Cautelam by the Arbitrators. Hill. 10. Car. B. R. Jeanes and Fourth per Curiam adjudged in a Writ of Error upon a Judgment in Banco, and the firſt Judgment affirmed accordingly. Intratur Mich. 9. Car. B. R. Rot. 470.

7. If *A.* and *B.* ſubmit all Controverſies between them concerning a Wine-Licence and the Arrears of certain Rent, and the Arbitrators reciting 15 *l.* to be due to *A.* make an Award that B. ſhall pay 7 *l.* 10 *s.* to *A.* in Satisfaction of Part of the ſaid 15 *l.* and ſhall aſſign the Wine Licence to *A.* this is a void Award as to the Aſſignment of the Wine-Licence. *Paſch.* 24. *Car.* between *Roſe* and *Spark.* *All.* 52 *per Rol.* but *Bacon* held that it ſhould be intended in Satisfaction of the other 7 *l.* 10 *s.*

8. If the Arbitrators reciting, that whereas there were ſeveral Differences between the Plaintiff and the Defendant concerning a Houſe, and divers Elms, and Arrears of Rent; they to make a final End of all, award the Defendant to pay to the Plaintiff 4 *l.* (i) for all the ſaid Arrears of Rent; this is a good Award, for either it ſhall be intended that the other Matters were otherways determined, or when the Award ſays to end all Differences, it ſhall be intended that the 4 *l.* was given in Satisfaction of all. *Trin.* 16. *Car.* 2. between (k) *Hopper* and *Hatchet.* 1 *Lev.* 133. adjudged.

(i) Vid. Hard. 399. where the Payment was applied to one particular Thing and nothing ſaid as to the reſt, and dubitatur. (k) 1 Keb. 738. S. C. adjudged.

(N) In

Fol. 258.

(N) In what Caſes an Award ſhall be void, in part or in the whole.

1. If two ſubmit the 1 of May, all Controverſies between them, and an Award is made, that one ſhall make a Releaſe of all Controverſies till the Time of the (a) Award, which was the 4 of May, this Award is void in the whole, becauſe the Releaſe which is to be made comprehends more Time than was ſubmitted, for perhaps there were other Controverſies between them between the 1 May and 4, and the Releaſe is entire, and therefore being void in part it is void in the whole. My Reports 14 Jac. B. R. between (b) Vanlore and Tribb adjudged. Co. 10. (c) Moor and Bedell 132. adjudged.

(a) The Original is Submiſſion, ſo appears to be miſprinted.

(b) 1 Rol. Rep. 437. S. C. adjudged.

(c) 1 Rol. Abr. 242. Pl. 4. S. C. 245. Pl. 3. S. C. Jenk. Rep. 264. S. C. adjudged. Goulſ. 91, 92. S. C. and S. P. by all the Juſtices being firſt moved upon the Writ of Error, ſed adjournatur.

2. (d) But in theſe Caſes it appears to the Court that by this Releaſe the Obligation or Aſſumpſit by which the other was bound to perform the Award, ſhould be releaſed, which are not within the Submiſſion. Hill. 15. Jac. B. R. between (e) May and Samuel adjudged upon a Demurrer, for the ſaid Reaſon, Mich. 24. Car. B. R. between (f) Kinniſton and Jones agreed per Curiam.

(d) Winch. 1. S. P. vid.

(e) 2 Rol. Rep. 2. S. C. adjudged. Poph. 134. S. C. adjudged.

(f) All. 86. S. C. and S. P. per Curiam. Stil. 97, 98. S. C. darkly reported & adjournatur.

3. (g) But if two ſubmit the 1 May all Matters between them, and the Award is that one ſhall pay to the other 20 s. in Satisfaction of all Matters between them (h) till the Time of the Award made, which was the 4 May, tho' this comprehended more Time than was ſubmitted, (i) yet becauſe it ſhall not be intended there were any Matters between them, mean between the Submiſſion and Award, unleſs it be ſhewn of the other Part, the Award is good, Mich. 24. Car. B R. between (k) Kinniſton and Jones per Curiam. Hill. 15. Jac. B. between (l) Ley and Pain adjudged. The Reporter (m) thought this is good Law, but that this is not the Reaſon of the Caſe, altho' the Court relied upon this, for this croſſed the Reaſon of the Judgment ſupra, for the Award is void, becauſe there may be other mean Controverſies, but it ſeems that the Reaſon of this Caſe, i , for that although there were other Matters mean between the Submiſſion and Award between them, and ſo the Award for theſe Matters void, yet here is no entire Act to be done as in the Caſe ſupra of the Releaſe, (n) but the ſaid 20 s. continues a good Satisfaction of the other Matters ſubmitted; and all the Inconvenience is, that Peradventure the Money to be given was increaſed for the mean Matters, and ſo he was at ſome Prejudice, but there is no Prejudice of the other Part. In (o) this Caſe a Precedent was cited to be, Hill. 43 El. B. Rot. 2079. between (p) Goodwin and Fountain, which was adjudged in Point vide accordingly. Hill. 42. Eliz. B. R. between Beckingham and Hunter adjudged.

(g) All. 26. S. P. adjudged, but the rather becauſe the Award was de & ſuper præmiſſis.

(h) Diverſity where the Award is general without Limitation of Time, and where as here till the Time of the Award for in the laſt Caſe, if new Controverſies are averred, the Award is void. 3 Lev. 188. 344.

(i) Where an Award is more or leſs extenſive than the Submiſſion, and yet ſhall be intended purſuant thereto and other Matters, &c. ſhall not be intended, &c. Vid. Cro. Jac. 639. (of the Authority of which Caſe Q.) 663. Stil. 170. Cro. El. 66. 177. 344. Moor 686. Pl. 948. Cro. Car. 434 2 Sand. 190. 1 Sid. 154. 2 Mod. 228. 309. Stil. 351. Cro. Jac. 285. 278. a ſtrong Caſe. All. 52.

(k) All. 85, 86, &c. S. C. and S. P. may be thence inferred. Stil. 97, 98. S. C. darkly reported & adjournatur.

(l) Moor 885. Pl. 1242. S C. adjudged. Hob. 191. S. C. cited to have been adjudged, and yet ſaid that if the Money had been paid and accepted according to the Award, it would have diſcharged any Treſpaſs done by the Defendant between the Submiſſion and the Award. All. 26. S. C. cited. Hut. 9. S. C. adjudged.

(m) In the Original 'tis ſemble.

(n) 3 Lev. 188. S. P. adjudged con. where awarded in Satisfaction of all Demands to the Time of the Award, and it is averred there were other Mean between the Submiſſion and Award.

(o) 2 Rol. Rep. S. C. and ſame Precedent cited.

(p) Cro. El. 861, 862. S. C. adjudged, the rather becauſe by the Words de & ſuper præmiſſis, it is reſtrained to the Things ſubmitted, and vid. 3 Lev. 188. 344.

4. (q) Upon a Submiſſion by A. and B. of all Suits between them concerning certain Tithes, if the Award be, that A. ſhall pay to B. ſuch a Sum of Money, and that B. ſhall ſuffer all Suits to be diſcontinued which he hath againſt A. where he hath againſt A. other Suits which do not concern the ſaid Tithes, by which the Award is void for this, yet the Award is good for the reſt, for this is not ſo (r) entire as a (s) Releaſe. Trin. 18 Jac. B. R. Between (t) Ingram and Webb adjudged.

(q) Palm. 109. like Point per Curiam.
(r) Godb. 165. like Point per Coke contra Foſter.
(s) According to the Report of this Caſe in Palm. the Award was, he ſhould releaſe all Suits, and yet adjudged good, becauſe the other Actions in their Nature are ſeveral, and may be ſevered from thoſe which concern Tithes. Vide Palm. 108. (t) Cro. Jac. 663, 664. S. C. adjudged and affirmed upon a Writ of Error in Cam. Scacc. Palm. 107, 108. S. C. adjudged and affirmed upon Error in Cam. Scacc. per totam Curiam. 1 Rol. Rep. 362. S. C. and for a Default in the Pleading, a Repleader awarded by Conſent.

5. If the Submiſſion be of all Matters depending, and the Award is, that he ſhall not proſecute any Action depending or ariſing till the Award made, where there are mean Actions depending between the Submiſſion and the Award, by which the Award is void for theſe, yet the Award is good for thoſe which are ſubmitted, becauſe this is not ſo entire, but that this Part of the Award which is good, may well be perform'd. Trin. 18 Jac. B. R. between Sayer and Sayer adjudged.

6. If the Submiſſion be of all Matters depending, &c. and the Award is, that one ſcilicet A. ſhall pay to the other ſcilicet B. 1000 l. at ſuch Days, (*) &c. and further awards, that all Actions, Controverſies and Matters in Difference whatſoever between the ſaid Parties, preſently ſhall ceaſe, determine, be void, relinquiſhed and die between them, and it is further awarded, that each Party ſhall make general Releaſes of all Matters and Demands between them till ſuch a Day, which by Admittance comprehends the Obligation of Submiſſion, yet although this Award be void as to the Releaſe, becauſe if it ſhould be made it would releaſe the Obligation of Submiſſion, yet the Award is good, in as much as there is an Award of both Sides, præter this, (u) ſcilicet the Payment of the 1000 l. and alſo that all Matters between them in controverſy ſhall ceaſe, which is good, and ſo the Award of both Parts, and Recompence to them. Mich. 24 Car. B. R. between (x) Kinnaſton and Jones adjudged upon a ſpecial Verdict. Intratur Mich. 23. Car. Rot. 587.

(*) Fol. 259.

(u) Cro. Jac. 448. like Point adjudged. Hard. 339. like Point per Curiam.
(x) All. 85, 86. S. C. adjudged. Stil. 97,

6. (y) (z) If the Award be void in Part for the Unreaſonableneſs or Impoſſibility, yet that which is reaſonable is good.

98. S. C. darkly reported & adjornatur. (y) This ſhould be pl. 7. and ſo appears miſprinted in the Original (as 'tis here) throughout this Diviſion. (z) Lit. Rep. like Rule per Richardſon.

7. (a) If the Arbitrators award that one ſhall pay ſo much to the other, and that he ſhall be bound for this in an Obligation with two Sureties, though this is void as to the Sureties for the unreaſonableneſs, (b) yet this is good to bind the Party himſelf. (c) 19 E. 4. 1. (d) 18 E. 4. 23.

(a) 3 Leon. 62. S. P. adjudged, and that a Tender of his own Bond is a good Performance. (b) 1 Brownl. 93. like Point per Tanfield. Yelv. 98. per Tanfield. Godb. 165. S. P. per Curiam. 256. like Point per Curiam. Hut. 9. Kelw. 43. a. 49. like Point adjudged. 3 Leon. 226. S. P. per Coke. 2 Sand. 337. S. P. adjudged. 2 Lev. 6. S. P. (c) Br. Arbitrament 51. S. C. (d) Br. Arbitrament 21. S. C.

8. If the Arbitrators award that one ſhall make an Aſſurance of certain Land within the Submiſſion, to the other and his Wife, where the Wife is a Stranger to the Submiſſion, and therefore the Award is void as to her, (e) yet the Award is good for the reſt, (f) for he ought to make the Aſſurance to the Party the Husband. Mich. 37, 38 El. B. R. between (g) Samon and Pitt, for this may be ſever'd.

(e) So if the Award be, that one of the Parties ſhall make a Leaſe for Life to the other, the Remainder to a Stranger in Fee, though as to the Remainder, this is a void Award, yet it is good as to the particular Eſtate. Cro. El. 758. adjudged. (f) Hut. 9. S. C. cited, and a like Point made a Quære. (g) Cro. El. 432. S. C. and S. P. per Poph. con. but to this none of the other Judges ſpoke, the Judgment being given upon another Point.

9. If A. and B. ſubmit themſelves to certain Arbitrators touching the Title of certain Land, and the Arbitrators award that all Controverſies touching the Land ſhall ceaſe, and that B. ſhall pay to A. 8 l. and that A. his Wife and Son and Heir apparent, by the Procurement of A. ſhall paſs to B. ſuch Aſſurance of the Land as B. ſhall require, and awards further, that one of the Arbitrators promiſes to repay 20 s. Part of the 8 l. to B. upon Payment thereof to A. if A. does not repay it. This Award is void in the Whole, for A. is not bound to procure his Wife and Son to paſs any Aſſurance of the Land, they being Strangers to the Award, and it may be, that the Wife and the Son have the Eſtate of the Land in them, and it was intended that they ſhould paſs their Eſtate, and this was the Conſideration that 8 l. was awarded to be paid by B. to A. and therefore the Award is void in the Whole, though there be other Conſiderations of both Parts in the Award. P. 13 Car. B. R. between (h) Barney and Fairchild per Curiam adjudged in Arreſt of Judgment after a Verdict for the Plaintiff A. who had brought an Action upon the Caſe for the Non-performance of the Award, and had aſſigned for Breach that B. had not paid the 8 l.

(h) 3 Mod. 272. S. C. cited.

10. (i) If there be a Submiſſion to the Award of I. S. of all Matters till the Submiſſion, ita quod fiat de præmiſſis, and thereupon an Award is made at a Day after the Submiſſion, that one ſhall make a general Releaſe of all Matters till the Award, and that the other ſhall pay 10 l. though there be an Award of both Parts, præter the Releaſe which is void, yet the Award is void in the Whole, becauſe it was intended that the Releaſe ſhould be Part of the Conſideration. Trin. 16 Car. B. R. between Munday and Smith per Curiam adjudged, as I conceive the Caſe Quære thereof.

(i) Cro. Jac. 585. like Point per Curiam. Pope and Bret like Point. 2 Sand. 292, 293. adjudged. 2 Keb. 736. adjudged.

11. If in Debt upon an Obligation conditioned for the Performance of an Award, the Defendant ſhews that the Arbitrators did make an Award, that the Defendant before ſuch a Day ſhould pay to the Plaintiff 100 *l.* or otherways ſhould procure one *A.* being a Stranger, to be (k) bound to the Plaintiff for the Payment of 12 *l. per Annum* to the Plaintiff for his Life, and the Defendant pleads that he hath performed the ſaid Award, and the Plaintiff replies that the Defendant hath not paid the ſaid 100 *l.* without ſaying, nor hath procured *A.* &c. yet this is a good Replication, for the Award as to that Part is meerly void. *Trin.* 29 *Eliz.* between (l) *Wilmer* and *Oldfield.* 1 *Leon.* 304. *adjudged per totam Curiam.*

(k) But per 1 Leon. 140. the Award was, that he ſhould find Sureties to be bound together with himſelf to the Plaintiff, &c. and if ſo Q. if the Award was not good as to his own being bound.

(l) Ow. 153. S. C. adjudged by three Judges againſt two, who held the Plaintiff ſhould have ſhewn the whole Award, and thereupon the Law would have adjudged one Part void, and not to be done. 1 Leon. 140. S. C. adjudged.

12. If *A.* and *B.* ſubmit to the Award of *I. S.* who awards that *A.* ſhall pay to *B.* a Sum of Money at two ſeveral Days, and that they ſhall preſently give to one another mutual (m) Releaſes; this is a void Award, for by the Releaſes the Bonds of Submiſſion and the Money would be diſcharged. *Hill.* 28. *&* 29 *Car.* 2. between *Adams* and *Adams.* 2 *Mod.* 169, 170. *per totam Curiam.*

(m) I ſuppoſe this muſt be intended to the Time of the Award.

13. (n) But if an Award be made, that a certain Sum of Money ſhall be paid at two ſeveral Days, and that mutual (o) Releaſes ſhall be given; this is a good Award, for by the very Method and Order of the Award, the Releaſes are not to be given till after the Money is paid. *Hill.* 28 *&* 29 *Car.* 2. between *Adams* and *Adams.* 2 *Mod.* 170. *adjudged.*

(n) Raym. 169. like Point adjudged, and ſaid it differed from the Caſe where Money is to be paid after the Releaſes given, and vid. 3 Mod. 264. (o) 2 Bulſt. 117. vide a good Diverſity where the Releaſe is general and where particular.

(O) How to be made.

Fol. 260.

When the Submiſſion is *ita quod fiat de præmiſſis.*

1. (a) If an Award be made de & ſuper præmiſſis, and the Condition is ita quod fiat de præmiſſis, and the Award is, that one ſhall make a general Releaſe to the other of all Matters (b) till the Award, and that the Parties ſhall be Friends and loving, this is good, for the Award is void as to Matters after the Submiſſion, and (c) therefore he is not bound to make any Releaſe of them, but of thoſe only which were before the Submiſſion: Alſo in as much as it is averred that the Award was (d) de & ſuper præmiſſis, it ſhall be intended there were not any other Matters. Trin. 8 Car. B. R. between Raymond and Popely, and in another Caſe between Popely and Popely, upon Demurrer adjudged, but the Court gave Judgment principally, becauſe the Money was awarded to be paid by one, and the Breach is aſſigned upon this, but nothing was to be done of the other Part, but to make the Releaſe, and ſo an Award but of one Part, if the Award as to the making of the Releaſe be not good; but Nota, it is awarded that the Parties ſhall be Friends.

(a) Crd. Jac. 352. b. is a like Caſe. adjudged con. and that the Plaintiff ought to take an Averment that there were no other Matters, &c. (b) Diverſity where the Award is to make a Releaſe generally without limitation of Time, and where as here till the Award, for in the laſt Caſe if new Controverſies are averred the Award is void. 3 Lev. 188. per Curiam. 344. per Curiam. (c) 1 Sid. 365. S. P. per Windham. Hut. 29. S. P. per Curiam. 3 Lev. 188, 344. (d) For the Force of theſe Words vide Stil. 110, 306. 1 Sid. 252. All. 52. Stil. 436. 3 Lev. 188, 344.

2. Mich. 1 Car. B. R. between Franklyn and Emlyn, in an Action upon the Caſe for Non-performance of an Award per Curiam, ſuch Award is good for the Cauſe aforeſaid, and I believe it was adjudged accordingly. Intratur Hill. 10 Car. Rot. 1275.

3. But Mich. 12 Car. B. R. between Durbant and Venn, which Intratur Trin. 13 Car. Rot. 1063. If the Submiſſion be by Obligation dated 17 November 11 Car. to be made before February after, and the Award is made 27 January, that the Defendant ſhall make a Releaſe of all Actions, &c. till the Award, and in Debt upon an Obligation for Non-performance of this Award, the Breach is aſſigned in not making of a Releaſe, and it is averred that no other Matter was between them, yet this is no good Breach, (e) becauſe if he ſhould make this Releaſe, it would releaſe the Obligation of Submiſſion, adjudged per totam Curiam upon Demurrer.

(e) 1 Rol. Abr. 258. pl. 2. S. P.

4. If a Condition be to ſtand to the Award of I. S. ita quod fiat de præmiſſis, &c. and the Award is made that A. ſhall pay to B. the other Party 20 l. two Months after the Award, and upon Payment thereof each of the parties ſhall make a general Releaſe the one to the other to the Time of the Payment, this is a good Award, tho' it comprehends more Time than was ſubmitted, for when the Money is paid, then there is an End of the Submiſſion and all, and ſo no Prejudice, though it releaſes the Obligation or promiſe of Submiſſion. Dubitatur M. 14 Car. B. R. between Atnoke and Orwell, this moved in Arreſt of Judgment, and the Poſtea ſtaid thereupon.

5. Upon ſuch Condition of Submiſſion, if the Award be, that A. ſhall pay to B. the other Party 10 l. in Satisfaction of all Actions, Suits and Accounts that B. may have againſt A. for any Matter till the Award made, and that all Suits then depending, or that hereafter ſhould depend between them, for any Matter from the Beginning of the World till the Award made, ſhall ceaſe; this is a good Award, though it comprehends more Time than was ſubmitted, ſcilicet till the Award made, which was after the Submiſſion, for without ſhewing thereof, it ſhall not be intended that there was any Matters between the Submiſſion and Award. M. 23 Car. B. R. between Lerwyn and Hills adjudged. Intratur P. 23 Car. Rot. 99. upon Demurrer.

6. If

(*) Fol. 261.

6. If the Condition be to ſtand to the Award of I. S. of all Suits, Controverſies and Debates, except a certain Obligation by Name, &c (*) ita quod fiat de præmiſſis, and after I. S. makes an Award of all Demands, which comprehends the Obligation excepted, and therefore all the Award is void. P. 14 Car. B. R. between Deely and Bud per Curiam adjudged.

7. If the Condition be to ſtand to the final End of I. S. ita quod fiat de præmiſſis, and the Award is made concerning an Obligation in which one is bound to the other, that the Obligee ſhall not proſecute or cauſe to be proſecuted any Suit againſt the Obligor, upon the ſaid Obligation, this is a good Award, tho' it was objected that this Award is not final, for this Award does not extinguiſh the Duty, but it is only awarded that he ſhall not ſue upon, and if the Duty is not extinguiſhed it may be forfeited by Outlawry, but this is a good Award, for this Award ſhall be taken according to the Uſe in ſuch Award, ſcilicet to extinguiſh the Duty, and therefore it is good. Tr. 14 Car. B. R. between Milwood and Stokes adjudged upon a Demurrer. Intratur Tr. 13 Car. Rot. 756.

(f) Bean and Newbury S. P. 1 Lev. 139. adjudged. Keb. 790, 832, 857. adjudged.
(g) 1 Rol. Abr. 246. pl. 5. vide.

8. (f) If three Perſons, ſcilicet A. B. and C. of the one Part, and D. of the other Part, ſubmit themſelves to the Award of I. S. ita quod, &c. and he makes an Award (g) between A. and B. of the one Part, and D. of the other Part, and (h) makes no Award between C. and D. this is not good, becauſe the Submiſſion is conditional, and it is recited in the Submiſſion, that there were divers Controverſies between them all, for this differs from the Caſe in 2 R. 3. 18. b. becauſe there the Submiſſion is not conditional. M. 14 Car. B. R. between Harris and Painter per Curiam, Croke and Bark: No others being preſent. Intratur H. 13 Car. Rot.

(h) But if the Father and Son (being an Infant) ſubmit to an Award (admitting the Submiſſion of an Infant, or of his Father on his Behalf is void) yet the Submiſſion quoad the Father is good, and the Arbitrators may make an Award quoad him and the other Party alone. 3 Lev. 17. per Curiam. Vid. Lat. 207. con. ſaid arguendo.

(i) 1 Keb. 790, 832, 857. S. C.

9. If the Condition of an Obligation be to ſubmit to the Award of *A.* and *B. ita quod*, &c. *ante* 1 *May*, and if they made none to the Award of ſuch Umpire, as they ſhould chuſe to be made before the 1 *June*; tho' the *ita quod*, &c. be in the Clauſe referring to the Arbitrators, yet by Conſtruction it relates to, and as well ſhall reſtrain the Umpire as Arbitrators. *Mich.* 16 *Car.* 2. between (i) *Bean* and *Newbury*. 1 *Lev.* 139. *adjudged.*

(P) Umpirage.

(a) That by Intendment is if they do not agree and make an Award. Cro. Car. 226. adjudged.
(b) 1 Rol. Rep. 268. S. C. but S.P. does not appear. Cro. Jac. 447. S. C. but S. P. does not appear.

1. If a Submiſſion be to the Award of certain Arbitrators, and (a) if they cannot agree, or are not ready to deliver their Award in Writing before the 1 May, then the Submiſſion is made to I. S. to be the Umpire, to be made before a certain Day after, if the Arbitrators do not treat of the Matter, ſo that there is no Diſagreement between them, yet if they do not make any Award before the Day, the Umpire may make an Award upon this Submiſſion, for the Words, and if they cannot agree, are not to be taken literally, but as if they had been, if they do not agree upon any Award. H. 15 Jac. B. R. between (b) Lumley and Hutton adjudged upon a Demurrer.

2. (c) If a Submiſſion be to ſtand to the Award of certain Arbitrators, and that if they diſagree, then to the Umpirage of I. S. ita quod the Award or Umpirage are made before the 1 May, in this Caſe

(c) Coppin and Hurner S. P. Raym. 187. adjudged. 1 Lev. 285. adjudged. 1 Sid. 428, 455. adjudged. 1 Mod. 15. per Twiſden. 2 Sand. 132. adjudged, becauſe in Debt upon the Award the Plaintiff had only averred, that the Arbitrators non potuerunt, &c. but if he had ſhewed that they diſagreed and declared they would meddle no more, or that one of the Arbitrators was dead, &c. per totam Curiam præter Twiſden, the Award made by the Umpire had been good. 2 Keb. 562, 619. adjudged niſi, and that the Plaintiff ought to have ſaid penitus recuſaverunt.

the Umpire cannot make any Award (d) till a Disagreement made by the Arbitrators, and the Arbitrators have Time to make the Award at any Time before the said Day, and so no Time is limited for the Umpire, and so his Power meerly void. Hill. 15. Jac. between (e) Barber and Giles per Curiam, but referred to (f) Composition.

(d) That after such Disagreemhnt the Umpire may make an Award. 2 Sand. 132, 115. S. C. cited.

hence inferred arguendo. (e) 1 Sid. 455. S. C. cited. 2 Sand. 130. S. C. cited. 2 Vent. ted. (f) The Original is Com-promise.

3. (g) If two submit themselves to two others with such a Clause; nevertheless if they do not end it within 10 Days they shall nominate another that shall end it within the 10 Days, and after they cannot agree within the 10 Days, by which they appoint another who makes an Award within the 10 Days, this is good, because it is the Appointment of the Parties and their special Agreement, and (h) by making the Umpire the Authority of the Arbitrators determines. Mich. 11. Jac. B. between (i) Fyal and Varier. adjudged.

(g) 1 Sid. 428. S. P. agreed per totam Curiam. (h) 1 Rol. Abr. 262. Pl. 5. vid. and Notes Margine.

(i) Godb. 241. S. C. adjudged. 2 Sand. 132. S. C. cited.

4. If the Condition of an Obligation be to stand to the Agreement of A. and B. being Arbitrators chosen for that Purpose, to end a Controversy between the said Obligor and Obligee, and I. S. being Umpire for both (*) Parties, &c. in this Case if A. and B. who are the Arbitrators make an Award (k) without I. S. this is a good Award, for though the Words are in manner prima facie uncertain, yet because the common Usage is to limit an Umpire to make an End, if the Arbitrators cannot, it shall be so interpreted, and that the Words I. S. being Umpire shall be taken as an affirmative per se, that he is an Umpire. Mich. 12. Car. B. R. between Osborn and Roydon adjudged per Curiam in a Writ of Error upon such a Judgment in the Court of Kingston upon Thames. Intratur Hill. 12. Car. Rot. 513.

(*) Fol. 262.

(k) But if a Submission be to four and to the Umpirage of I. S. the four and I. S. may join in the making of

an Award, otherways if their Power had been divided in the Submission, as if it had been to the four, and if they could not agree then to I. S. 1 Bulst. 184. per Curiam, and vide Hard. 44.

5. (l) If A. and B. submit themselves by Condition of an Obligation to the Award of I. S. ita quod the Award be made super, or before the last Day of May next ensuing, and if he does not make any Award super or before the said last Day of May, then if they stand to the Award of such Person who shall be elected by the Arbitrator to be Umpire, to be made before the 10 Day of June after, in this Case, if the last Day, of May the Arbitrator not having made any Award elects an Umpire, (m) who makes an Award before the 10 Day of June, This is a good Umpirage, for though the Arbitrator had all the last Day of May to make his Award, yet he might the same Day elect an Umpire when he perceived that he could not make any Award himself, and when it appears after that he relinquished and did not make any Award after the naming of the Umpire. Mich. 24. Car. B. R. between (n) Watson and Clement adjudged per Curiam. Intratur Hill. 22. Car. Rot. 803.

(l) Vandeput and Jennings S. P. per Curiam and like Point. Cro. Car. 263. adjudged. 1 Mod. 275. cited per Twisden, who said the Arbitrators notwithstanding such Nomination of an Umpire, might within

their Time make an Award. 2 Sand. 133. cited and agreed per Curiam. (m) But notwithstanding the Umpire can make no Award upon the last Day of May, for the Power of the Arbitrator is not extinguished by his chusing an Umpire. Delaval and Mascal. Raym. 206. per two Judges. 1 Mod. 275. per Curiam sed adjornatur. 1 Lev. 302. by two Judges against one, sed adjornatur. (n) Stil. 133. 136. 152. S. C. adjudged nisi, but this Point not fully stated.

6. (o) If the Condition of an Obligation be to stand to the Award of I. S. and I. D. so as the Award be made and delivered to Morrow, and they cannot then agree, then to stand to the Umpirage of I. N. so

(o) 2 Jon. 168. S. P. adjudged con. per Pemberton Jon. and Dolben (Raymond ægrotante) because the Arbitrators had expresly given that Day to the Umpire for the Execution of his Authority, and it would be hard to reject any Part of the Time which is expresly allotted. But note in that Case the Umpire was elected by the Arbitrators, and Q. how far by that Election they dismissed themselves of their Authority, and vid. 1 Lev. 175. 302. 1 Mod. 275.

he makes and delivers his Umpirage to Morrow, or next Day after that (which was Thursday) in this Case, though it be alledged that the Arbitrators could not agree upon any Award, and that they denegassent and deseruissent to make any Award, yet the Umpire cannot make his Umpirage upon the Morrow, for that altho' the Arbitrators could not agree, and (p) though they have deserted it and denied, yet at any Time after during the said Day they might have made an Award, and the Words are if they cannot then agree, by which is intended all the Day till the last Moment thereof, and this is a Condition precedent to the Power of the Umpire, which extends to all the Day, and no Act of the Arbitrators can hasten this beyond the Power, and if the Arbitrators and Umpire also should have Power at the same Time, and both should make two several Awards, (q) this would bring great Doubt and Confusion to the Court, which of them would be good. M. 1651. between (r) Barnard and King adjudged per totam Curiam upon a Demurrer. Intratur P. 1651. Rot. 661.

(p) Where the Arbitrators were to nominate an Umpire, and accordingly did, whether they had not thereby dismissed themselves of all Authority. 1 Lev. 174. dubitatur.

(q) 2 Jon. 168. S. P. per Curiam con. for the Award of the Arbitrators, if they make any, shall be good, but if not, then the Award of the Umpire shall stand; and there is no Confusion in the Concurrence of Authority, for the Umpire hath not an absolute concurring Authority, but conditionally only, if the Arbitrators do not make an Award. (r) Stil. 306, 307. S. C. adjudged nisi. 1 Sid. 455. S. C. cited by Twisden, who said, he was in Court when the Case was adjudged, and that then Roll was of another Opinion, scilicet contra to this Report thereof, but Twisden said, he took the Law to be according to the Report, viz. That they could not have a concurrent Jurisdiction. 2 Sand. 130. S. C. cited. 131. S. C. cited. 1 Mod. 275. S. C. cited per Twisden, who said he was at the Bar when the Case was spoke to, and that then Roll did hold and deliver that by the Words denegassent, &c. the Power of the Umpire was let in, so that he might make an Award within the Time allowed to the Arbitrators, but Twisden said, This was a hard Opinion, and that Roll in this Place reports his Judgment to be otherways. 2 Keb. 619. S. C. cited. 2 Vent. 115. S. C. cited. 2 Jon. 167, 168. S. C. cited, and the Court inclined it was not Law. 1 Lev. 285. S. C. cited, and Twisden said the Umpirage was adjudged void, because it was not pleaded that the Arbitrators refused to make any Award.

7. If two Men submit themselves for all Matters, &c. to the Award of certain Arbitrators to be made before a certain Day, and that if they do not make any Award before the Day, that then they submit to the Ordinance and Judgment of I. S. if the Arbitrators make an Award of Part of the Things submitted, and of Part not, the Umpire cannot make any Award of this Part of which the Arbitrators have made no Award, because he hath no Power given, but if the Arbitrators make no Award. (s) 39 H. 6. 10. Curia.

(s) Fitz. Arbitrament 13. S. C. Br. 29. S. C.

8. But if the Submission be that if the Arbitrators make no Award of the Premisses, or of any Parcel thereof, that then the Umpire shall have Power to make an intire Award, or (t) of Parcel, which remains as the Case is, in this Case the Arbitrators may make an Award of Parcel, and the Umpire of the Residue, because this is expresly ordained. (u) 39 H. 6. 11. b.

(t) The Original is le Parcel, &c. and so appears misprinted.

(u) Fitz. Arbitrament 13. S. C. Br. 29. S. C.

9. (x) If the Condition of an Obligation be to stand to the Award of *A. B. C.* and *D. ita quod* the said Award before such a Day be made in Writing by the said *A. B. C.* and *D.* or any two of them under their Hands, &c. any two of the Arbitrators without the rest may make an Award; for tho' by the first Part they are bound to stand to the Award of those four, yet their Power is divided by the subsequent Words, and the *ita quod*, &c. is but an Explanation of the Condition, and the whole makes but one Sentence. *Pasch.* 9 *Jac.* between (y) *Sallows* and *Girling*, *Yelv.* 203. adjudged upon Demurrer.

(x) Hill, and Langly S. P. there being only some little Variance in the Words of the Condition. 1 Vent. 50, 51, adjudged. 2 Keb. 571. 580. adjudged. Perry and Penrin S. P. with only some little Variance in the Words of the Condition. Cro. Jac. 400. adjudged and affirmed upon a Writ of Error. Bridg. 90. adjudged and affirmed upon a Writ of Error. Moor 849. Pl. 1154. adjudged. 1 Rol. Rep. 223. 375, 376. adjudged. 3 Bulst. 62, &c. 68. adjudged and affirmed upon a Writ of Error. (y) 1 Brownl. 112. S. C. adjudged in the same Words, and seems to be only a Translation thereof. Cro. Jac. 277. S. C. adjudged per totam Curiam. præter Fleming Chief Justice, who doubted and said that the so as, &c. implied a Necessity for two only to put their Hands and Seals, but that the Award ought to be made by all four, but upon a Writ of Error in Cam. Scacc. the Award was agreed to be good, though Judgment was reversed for another Cause. 1 Bulst. 123. S. C. adjudged per totam Curiam, and according to this Book, Fleming in particular delivered his Opinion accordingly. 3 Bulst. 62. S. C. cited. Cro. Jac. 4. S. C. cited.

10. If the Condition of an Obligation be that whereas A. and his Son of one Part, *&c.* have ſubmitted to the Award of *B.* and *C. ita quod, &c.* before the 1 *May*, and if they make none to the Award of ſuch Umpire as they ſhould chuſe to be made before the 1 *June*, and the Arbitrators make no Award, but chuſe an Umpire who makes an Award, but *quoad* the Son awards nothing, this is a void Award, for though the *ita quod* be in the Clauſe referring to the Arbitrators and the Award is made by the Umpire, yet the *ita quod* by Conſtruction relates as well to the Umpire as Arbitrators. *Mich.* 16. *Car.* 2. between (z) *Bean* and *Newbury*. 1 *Lev.* 139, 140, adjudged. (z) 1 Keb. 790. 832. 857. S. C.

11. If the Condition of an Obligation be to ſtand to the Award of *A.* and *B.* ſo as the ſaid Award be made before ſuch a Day, and if they make no Award, then to ſtand to the Award of (a) ſuch Umpire as the ſaid *A.* and *B.* ſhall nominate, ſo as the ſaid Umpire do make his Award before another Day, and the Arbitrators before the firſt Day make no Award, but afterwards name *C.* to be Umpire, who thereupon immediately refuſes, and the Arbitrators afterwards nominate *D.* who before the laſt Day makes an Award, this is a good Award; for the Nomination of *C.* to be Umpire did not make him ſo, but when he refuſed it amounted to no more than a bare Propoſal to him, and the Form of Pleading always is *ſuſcepto ſuper ſe onere Arbitris*, ſo that it is the Acceptance makes him Umpire. *Hill.* 1 *&* 2 *Will. & Mar.* between (b) *Tryppet* and *Eyres*. 2 *Vent.* 113, 114. adjudged by *Powel*, *Rokely* and *Ventris contra Polexfin* Chief Juſtice, who held that *C.* might have proceeded notwithſtanding his Refuſal, and there could not be two concurrent Juriſdictions in ſeveral Perſons.

(a) Nota, it is not of ſuch Perſon as they ſhall nominate to be Umpire. 2 Vent. 114. vide.

(b) 3 Lev. 263. adjudged.

Fol. 263.

(Q) In (a) what Caſes the Award ſhall be void for (b) (c) Uncertainty.

(a) If the Award be to pay Coſts in ſuch a Suit brought againſt the Party for ſcandalous Words, it ought to appear by the Award that the Words are actionable, per Spignurel and Jenes Caſe. 1 Sid. 12. but 2 Vent. 243. that Caſe is cited, and the Court were not ſatisfied with this Opinion, and ſaid that Spyerfin was then a young Reporter. (b) An Award is in Nature of a Judgment or Sentence, in which there ought to be Plainneſs and nothing left for Collection and Inference, for it ought to contain the Judgment of the Arbitrator himſelf, and not of another upon his Words, per Yelv. 98. 1 Brownl. 92. (c) An Award to deliver dimiſſionem præd. muſt be intended the Indenture of Demiſe. Stil. 112. & vide 3 Bul. 65. (d) Cro. Eliz. 432. S. C. Moor 359. Pl. 489. S. C. Jenk. Rep. 340. S. C.

1. **If an Award be uncertain it ſhall be void, for the Arbitrators are Judges of the Caſe, and the Award ought to be certain, ſo that thereby the Controverſy be decided, and that for the Uncertainty it be not the Cauſe of a new Controverſy.** Co. 5. (d) Samon 78.

2. **If two ſubmit all Matters in Controverſy between them, and the Award is, that one ſhall pay the one Moiety to I. S. and the other the other Moiety** cujuſdam debiti **due to I. S. by two Strangers, who were bound to the ſaid I. S. at the Requeſt of them two; this is no good Award, becauſe it does not appear within the Award in what Sum they were bound, though it be averred in the Plea after, becauſe it cannot be known what Sum they intended.** P. 16. Ja. B. R. between (e) Gray and Gray per Dodderidge and Houghton, but Montague econtra. (e) 1 Rol. Abr. 247. Pl. 6. S. C. Cro. Jac. 525. ſeems to be S. C. but S. P. does not appear. Godb. 275. ſeems to be S. C. but S. P. does not appear.

3. **But** Houghton (f) **inclined that he might have helpt it by an** (g) **Averment that there was not any other Obligation** præter **this**, &c. (f) The Original is ſemble, &c. (g) But the Intent of the Arbitrators cannot be explained by Averment. Dier 242. b. 1 Rol. Rep. 263. Hob. 50.

4. (h) If

4. (h) If two ſubmit all Controverſies concerning certain Land and the Arbitrator awards that one ſhall enjoy the Land, and the other ſhall enter into an Obligation to him, this is a void Award, becauſe it does not appear (i) of what Sum the Obligation ſhall be, for it ſhall not be imagined that he intended an Obligation according to the Value of the Land, and he cannot aſſign over his Power to the Parties themſelves to aſſeſs the Sum. Co. 5. (k) Samon 77. b. adjudged.

(h) Yelv. 98. S. P. per Tanfield ſaid to have been adjudged. 1 Brownl. 92. 93. S. P. per Tanfield ſaid to have been adjudged. 1 Lev. 88. S. P. per Curiam. (i) An Award that one Party ſhall give Security for the Payment of 16 l. to the other, void for the Uncertainty what Security is intended. Thinn and Rigby. Cro. Jac. 314. adjudged. Palm. 147. cited. 2 Rol. Rep. 214. cited. (k) Cro. El. 432, 433. S. C. adjudged upon this Point principally. Moor. 359. Pl. 489. S. C. adjudged. Jenk. Rep. 340. S. C. but varies in the Report, vide March. 18. S. C. cited. Cro. Jac. 315. S. C. cited.

5. (l) If two ſubmit all Controverſies concerning the Right, Title and Poſſeſſion of 200 Acres of Land called Kelſtom-Linge, and the Arbitrators award that in the Waſte Lands of the Town of Kelſtom, one ſhall have the Brakes there growing during his Life, paying to the other 2 s. per Annum, without giving any Name of the Land in the Award, this is a void Award, and it cannot be helpt by an Averment that the Land where the Brakes grow, is the ſaid Land called Kelſtom-Linge ſubmitted and not other, nor divers, for he cannot expound the Intent of the Arbitrators. D. 8. El. 242. per Curiam.

(l) Cro. El. 676. S. P. adjudged.

6. If an Award be that one ſhall pay to the other 6 l. 21 May, and 6 l. at Michaelmas following, and that the other ſhall releaſe all his Right in ſuch Lands ſuper prædict' primum Diem Maii (omitting viceſimum) this is a void Award, becauſe there was not any firſt Day of May mentioned before. Hill. 4. J. B. K. between (m) Markham and Jennings adjudged.

(m) Yelv. 97. S. C. adjudged. 1 Brownl. 92. S. C. adjudged, and reported in the ſame Words as in Yelv. Cro. Jac. 149. S. C. adjornatur.

7. If an Award be made between A. and B. touching certain Quarters of Malt before delivered by A. to B. that B. ſhall pay to A. ſo much for every Quarter, as one Quarter of Malt was then ſold for, this is a void Award, becauſe it is not mentioned in what Place the Sale ſhould be, for perhaps in one Market or Place it was ſold for more than in another Market or Place, and therefore the Award void for the Uncertainty. Mich. 10. Car. B. R. between Hurſt and Bambridge per Curiam upon a Demurrer, this Award being pleaded in Bar of an Action upon the Caſe for the Malt, but after the Demurrer was waived by the Aſſent of the Parties. Intratur Hill. 9 Car. B. R. Rot. 1159.

8. If an Award be that one ſhall acquit the other of an Obligation of 200 l. aut eo circiter in which they are bound for the Payment of 105 l. aut eo circiter to B. this is a good Award. P. 15 Car. B. R. between (n) Barſey and Clipſham adjudged per Curiam upon Demurrer. Intratur Tr. 14. Car. Rot. 161.

(n) March. 18. S. C. adjudged. 1 Rol. Abr. 247. Pl. 11. S. C.

9. If the Condition of an Obligation be to perform the Award of I. S. between A. and B. of all Controverſies and Demands between them, &c. and an Award is made of the Premiſſes, ſcilicet that A. ſhall permit B. to enjoy certain Leaſes of certain Land then in his Poſſeſſion, which were the Lands of W. S. and then the Inheritance of A. he ſcilicet B. paying the Rents and performing the Covenants in the Leaſes, and that B. ſhall deliver true Copies of the Leaſes to A. made by the ſaid W. S. and that B. ſhall pay the Arrears of Rent due to the ſaid A. after the Purchaſe thereof made. This Award as to the Payment of the Arrears (tho' it be averred that there was 2 s. of the Arrears of Rent then due) is not good for the Uncertainty, becauſe it does not appear by the Award how much Rent was due after the Purchaſe, for B. the Leſſee does not know when A. the Plaintiff purchaſed the Reverſion of W. S. nor hath any Means to know it unleſs A. or W. S. will ſhew it him, which he cannot compel them to do, Hill. 1652. between (o) Maſſey and Aubrey adjudged after Verdict for the Plaintiff. Intratur Hill. 1651. Rot. 1328.

Fol. 264.

(o) Stil. 365, 366. S. C. adjudged.

10. If an Award be, that one of the Parties ſhall pay to the other ſo much as is due in Conſcience, this is a void Award. *Trin.* 23 *Car.* Between *Watſon* and *Watſon. Stil.* 28. adjudged.

11. If an Award be, that one ſhall pay the other for certain (p) Task-work and Day-work, this is a void Award, becauſe of the Uncertainty of the Sum he ſhould pay, and this cannot be helped by any Averment. *Mich.* 22 *Car.* 2. Between (q) *Pope* and *Brett.* 2 *Sand.* 292. *adjudged.*

(p) 5 l. Awarded for quit Rents and other ſmall Things void for the Uncertainty. March 144, 145. (q) 2 Keb. 736. S. C. adjudged.

12. In an Aſſumpſit the Plaintiff declared, that whereas there had been ſeveral Differences between the Plaintiff and Defendant (but ſaid not touching what) they ſubmitted to the Award of I. S. who awarded *de & ſuper præmiſſis* that the Defendant ſhould pay to the Plaintiff 30 l. in Satisfaction of all Sums due to him out of the Eſtate of *W. &c.* and *Mich.* 30 *Car.* 2. between *Adams* and *Statham.* 2 *Lev.* 235. after a Verdict for the Plaintiff, Judgment was ſtaid, becauſe it did not appear that the Defendant was Executor, Adminiſtrator or Truſtee for *W.* or that he had any Thing of his, or had ſubmitted in Behalf of him, and ſo there was no Conſideration to charge him for the Eſtate of *W.*

(R) Of what Things they may make an Award.

In what Actions it ſhall be a good Bar.

1. **IN an Action of Debt for the Arrearages of an Account, an Award is no Plea becauſe the Debt is certain.** 3 H. 4. (a) 4.

(a) This is miſprinted, and I ſuppoſe ſhould be 5. which Caſe vide Br. Arbitrament 47.

2. **If two ſubmit a certain Debt in Controverſy between them, the Arbitrators** (b) **cannot make any Award thereof, becauſe it was certain before the Submiſſion.** 2 H. 5. Arbitrament 23. **and there 'tis cited to be** 2 H. 5. 2. **but this is not in the Book at large.** 10 H. 7. 4. (c) 4 H. 6. 17. b.

(b) Otherways if one claims 5 l. expended for the other *pro diverſis negotiis*, for tho' a Debt upon a Bill or Contract, cannot of it ſelf be put in Arbitrament, yet this may, being claimed as Expences *pro diverſis negotiis.* Cro. Eliz. 422. adjudged. (c) Br. Arbitrament 25. S. C.

3. **If two ſubmit a** (d) **certain Debt and other Things, the Arbitrators may make an Award of the Debt and other Things, becauſe this is an entire Submiſſion, and the Debt with the other Things are uncertain.** 2 H. 5. Arbitrament 23. **and there 'tis cited to be** 2 H. 5. 2. **but this is not in the Book at large.** (e) 4 H. 6. 17. b. 10 H. 7. 4. Tr. 22 Car. B. R. **between** Faver and Bates adjudged. Intratur P. 22 Car. Rot. 162. **after a Verdict for the Plaintiff, this being moved in Arreſt of Judgment,** contra 6 H. 4. 6.

(d) So if of Damages recovered and other Things. Goulſ. 92. per 2 Judges. (e) Br. Arbitrament 25. S. C.

4. **An Action of Account may be ſubmitted to an Award, and the Arbitrators may make an Award thereof, for it is uncertain.** 2 H. 5. 2. Arbitrament 23. adjudged.

5. **In an Action of Debt for** 20 l. **Rent arrears upon a Leaſe for Years, an Award to pay** 10 l. **for this Debt and other Treſpaſſes is a good Bar of the Action, tho' it is a leſs Sum than the Debt demanded, and tho' the Action is for a Debt certain;** (f) **in as much as other Things are ſubmitted with this, and ſo altogether are uncertain, and it may be the Sum of** 20 l. **was adjudged to** 10 l. **in reſpect of a Treſpaſs done by the Plaintiff to the Defendant.** 10 H. 7. 4.

(f) All. 52. S. P. noted.

6. **In an Action of Debt for** 10 l. **for the Arrearages of an Account found before Auditors, an Award upon the Submiſſion of this and all other Matters, &c. is not any Bar, becauſe this Action is grounded upon a Record, in as much as the Auditors are Judges of Record by the Statute.** (g) 4 H. 6. 17. b. adjudged. Fitzh. Arbitrament 20.

(g) 1 Rol. Abr. 242. pl. 6 S. C. Br. Arbitrament 25. S. C.

Fol. 265.

(S) In what Actions.

In Actions grounded upon a Record.

(a) Br. Arbitrament 47. S. C. (b) Fitz. Arbitrament 20. S. C. (c) Br. Arbitrament 25. S. C.

1. IN an Action of Debt for the Arrears of an Account before Auditors assigned of Record, an Award is no Plea. (a) 3 H. 4. 5. (b) 6 H. 4. 6. adjudged. (c) 4 Hen. 6. 17. adjudged. 10 Hen. 7. 4. quære. 3 Hen. 6. 55. contra. (d) 2 Hen. 4. 18.

(d) Q. if this is not misprinted, for I can find no such Opinion in the Book.

2. In an Action upon the Statute of Labourers, an Award is a good Plea in Bar, for the Action is not meerly grounded upon the Statute, but partly upon a Matter in pais, scilicet his Departure. 12 R. 2. Arbitrament 24.

(T) In Actions grounded upon a Deed.

(a) Dier 51. pl. 14. S. C. cited.

1. IN Debt upon an Obligation, an Award is no Plea. (a) 4 Hen. 6. 18. 10 Hen. 7. 4.

(b) 'Tis a general Rule, that where an Accord with Satisfaction may be pleaded, there an Award may be pleaded, and Blake's Case was upon a Plea of an Accord, therefore vide that Case, ante in the Pleadings after Title Accord.

2. When a Duty accrues by the Deed in Certainty tempore confectionis scripti as by Bill, there is a certain Duty, and it takes its Essence and Operation originally and only by the Writing, and therefore in Debt, thereupon an (b) Award is no Plea. Co. 6. Blake 43. b.

3. So it is in an Action of Debt upon an Obligation upon Condition to pay a certain Sum, for there the Duty commences originally and only by the Deed. Co. 6. Blake 43.

4. So it is in an Action of Covenant for Non-payment of a certain Sum which he covenanted to pay. Co. 6. Blake 43. b.

5. When no certain Duty accrues by the Deed, but a Wrong or Default subsequent together with the Deed, gives an Action to recover Damages, which are only in the Personalty for such Wrong or Default, an Award or Accord with Satisfaction is a good Bar. Co. 6. Blake 44. resolved.

(c) The Original is sows de Iron, &c.

6. As in an Action of Covenant for not doing of a certain Thing, as for not repairing of a House, or for the Non-delivery of certain (c) Pieces of Iron or such like, an Award or Accord with Satisfaction is a good Bar. Co. 6. Blake 43. b. adjudged for not repairing.

(d) The Original is sows, &c.

7. Contra 3 Jac. B. R. Between Midleton and Chapman adjudged, where it was for the Non-delivery of certain (d) Pieces of Iron.

(e) In what Actions an Accord with Satisfaction is pleadable, vide Ante under Title Accord.

8. Trin. 18 Jac. B. R. between Rabbet and Stocker adjudged upon Demurrer, that an (e) Accord with Satisfaction is a good Bar of an Action of covenant, tho' the Accord was made before the Covenant broke, for this may be in Satisfaction of Damage to come, and also in the same Case adjudged so, where the Covenant was broke at the Time of the Accord.

(f) 2 Keb. 623, 659. S. C. and S. P. per two Judges against one, but no Judgment.

9. In Debt upon a Bond by three Executors, the Defendant pleaded that there were several Controversies between the Defendant and one of the Plaintiffs, upon which they submitted to the Award of, *&c.* who awarded that the Defendant should be quit of the Bond, *&c. Trin.* 22 *Car.* 2. Between (f) *Morris* and *Creech.* 1 *Lev.* 292. it was held *per Curiam*, that a Bond of it self, because a Debt certain, cannot be submitted otherways (g) where it is submitted amongst other Things, and by two Judges the Plea is good, though the Controversies were between the Defendant and one of the Plaintiffs only. *Moreton dubitavit & adjornatur.*

(g) But vide 1 Rol. Abr. 243. pl. 7. Cro. Jac. 447. 1 Rol. Rep. 270.

(U) In Actions real.

1. AN Award is no Plea in Detinue of a Charter of Feoffment, for this is a Thing real, and this Action is to recover the Thing. (a) Contra 9 H. 6. 60. b.

2. But otherways it is in Treſpaſs for taking the Charter, for this Action is but to have Damages for it. (b) 9 H. 6. 60. b.

3. In an Annuity for an Annuity in Fee or for Life, an Award is no Plea. (c) 9 H. 6. 60. b. (it ſeems that this is intended by Preſcription, for if it be by Deed it is no good Plea againſt the Deed.)

4. An Award without writing is no Plea in Bar of Actions real. 19 H. 6. 27. b. contra (d) 11 H. 4. 44. b.

5. The ſame Law in Actions mixt, in which the Land (of an Eſtate of Freehold as it ſeems) ſhall be recovered. 19 H. 6. 37. b.

6. As in an Aſſe it is no Plea in Bar. 19 H. 6. 37.

7. The ſame Law it is if the Submiſſion and Award be in writing. 19 H. 6. 37. b.

8. In an Action of Debt for the Arrears of Rent reſerved upon a Leaſe for Years, an Award is a good Plea in Bar. (e) 4 H. 6. 17. b.

9. In an Action of Waſte in the Tenuit againſt Leſſee for Years, an Award or Accord with Satisfaction is a good Bar. Co. 6. Blake 44. Co. 9. Peytoe 78.

10. Of an Action of Waſte in the Tenuit upon a Leaſe for Life, an Accord with Satisfaction is a good Bar. Mich. 37 El. B. between Sacheverel and Bagnal adjudged, which Intratur Paſch. 36 El. Rot. 959. for this ſounds in the Perſonalty, and Damages only to be recovered.

11. In an Ejectione firmæ an Award or Accord with Satisfaction is a good Plea in Bar, for though the Poſſeſſion is to be recovered, yet this Action is in Nature of a Treſpaſs. Co. 9. (f) Peytoe. 78. reſolved per Curiam.

(a) Fitz. Arbitrament 3. S. C. Br. 2. S. C.

(b) Br. Arbitrament 2. S. C. 1 Rol. Rep. 270. S. P.

Fol. 266.

(c) Br. Arbitrament 2. S. C.

(d) Br. Arbitrament 14. S. C.

(e) 1 Rol. Abr. 242. pl. 6. S. C. Br. Arbitrament 25. S. C.

(f) 1 Rol. Abr. 242. S. C. con.

(X) What Award ſhall be a good Bar of Actions.

1. IF the Award be to do a Thing, &c. that the other hath no Means to compel him to do, if the Action be brought before it is performed, this is no Bar thereof, for then the other ſhould be without Remedy, as if the (a) Award be to enter into an Obligation, or to find Sureties, he ought to plead in Bar that he hath done it. (b) 5 E. 4. 7. 17 E. 4. 3. (c) 19 H. 6. 38.

(a) The Original is Condition, and ſo appears miſprinted.

(b) Fitz. Arbitrament 14. S. C. Br. 36. S. C. (c) Br. Arbitrament 21. S. C. Fitz. 6. S. C.

2. As if two have Actions one againſt the other, of which the Days of Appearance are ſeveral, and they ſubmit, and it is awarded that each ſhall be nonſuit, this Award is not any Bar of the Action in which the firſt Appearance is, becauſe he hath no Means to make the other be nonſuit in his Action when the Day comes. (d) 19 H. 6. 37. b.

(d) Br. Arbitrament 21. S. C. Fitz. 6. S. C.

3. So it is not any Bar of an Action that it was awarded that he ſhould have an Acre of Land in Satisfaction, if he doth not ſay he hath made Livery thereof to him, becauſe the Plaintiff hath no Means to compel him to it. (e) 19 H. 6. 38.

(e) Br. Arbitrament 21. S. C. Fitz. 6. S. C.

4. In Treſpaſs it is no good Bar that the Arbitrator awarded that each ſhould be quit of Treſpaſſes againſt the other, and the Plaintiff ſhould make a Releaſe to the Defendant and (f) 20 s. and that after the Defendant ſhould releaſe to the Plaintiff, and avers that if the Plaintiff would perform his Part, he is ready, &c. this is not any good Bar, for if the Plaintiff ſhould releaſe, he hath no Means to compel the Defendant to releaſe. (g) 20 H. 6. 18. b. 19.

(f) Theſe Words, ſhould pay, ſeem to be omitted in the Printing, vide the Year-Book.

(g) Fitz. Arbitrament 8. S. C. Br. 3. S. C.

5. If

(h) Fitz. Arbitrament 21. S. C.

5. If any Thing be awarded to be paid in Satisfaction of an Action, this will be a good Bar of the Action. (h) 46 E. 3. 17. b.

6. In Treſpaſs an Award to pay a Quart of Wine to the Plaintiff and Performance, is a good Bar of the Action. 43 E. 3. 33. 45 E. 3. 16. b. 13 H. 4. 12. 9 H. 6. 50. b. 9 E. 4. 44.

Fol. 267.

(i) The Original is ſit 'on ley.

7. If it be awarded that he who is ſuppoſed the Treſpaſſer, ſhall (i) wage his Law that he is not guilty thereof, he ſhall be quit of the Treſpaſs if he wages his Law accordingly, yet this is no Bar of the Action, becauſe this is no Satisfaction, nor can be intended the ſame Treſpaſs of which he hath waged his Law. (k) 46 E. 3. 17. b.

(k) Fitz. Arbitrament 21. S. C. Br. 8. S. C.

8. An Award without a Deed of Submiſſion, or of Award, will be a good Bar of a Treſpaſs. 43 E. 3. 28. b.

(Y) (a) Arbitrament and Accord.

In what Actions they ſhall be a good Bar, and in what not.

(a) Where one is pleadable the other is alſo. vid. Ante the Pleadings after Title Accord.

(b) 1 Rol. Abr. 242. pl. 5.

1. CO. 9. (b) Henry Peytoe 78. vide in what Actions an Accord is a good Plea.

2. In a Writ of Conſpiracy, an Accord with Satisfaction is a good Plea. 18 E. 4. 24.

(Z) At what Time it ſhall be a good Bar of Actions,

1. If an Award be to pay Money at a certain Day, in Satisfaction of an Action, if the Money be not paid at the Day, this Award is no good Bar of an Action, tho' he may have Debt upon the Award, becauſe it was his own Fault that the Money was not paid, and therefore he ſhall not compel the Plaintiff to bring an Action upon the Award, and bar the firſt Action. 49 E. 3. 3.

(a) Br. Arbitrament 12. S. C. Fitz. Replication 52. S. C. Br. Treſpaſs 84. S. C.

2. But if the Defendant refuſes to perform the Award at the Day, this Award is no Bar of the Action. (a) 7 H. 4. 30. b. 11 H. 4. 44. b. 21 H. 6. Arbitrament 10. (b) 22 H. 6. 52. b.

(b) Q. If this is not miſprinted, for I rather believe it ſhould be 33 H. 6. 2. b. and vide 28 H. 6. 12. Br. Arbitrament 5.

3. If an Award be, that one Party ſhall pay a certain Sum of Money to the other in Satisfaction, &c. at a certain Day, in an Action before the Day of Payment, this Award ſhall be a good Bar, becauſe he may have an Action upon the Award. (c) 22 H. 6. 52. b. (d) 5 E. 4. 7. vide 13 R. 2. Arbitrament 26.

(c) Q. if this is not miſprinted, for I rather believe it ſhould be 33 H. 6. 2. b. (d) Br. Arbitrament 36. S. C. Br. 14. S. C.

4. But if an Award be, that one ſhall enter into an Obligation of 100 l. to the other, before a certain Day in Satisfaction, &c. in an Action before the Day, this Award is no Bar, becauſe the other cannot compel him to enter into an Obligation at the Day. (e) 5 E. 4. 47. (f) 5 E. 4. 7.

(e) I ſuppoſe this ſhould be 5 Ed. 4. 7. for there are not 47 Fol. in that Year, and if ſo, it ought to be rejected as Surpluſage, and the Miſtake of the Printer, the ſame Book being cited immediately after. (f) Br. Arbitrament 36. S. C. Br. 14. S. C.

5. If an Award be, that one ſhall pay 10 l. to the other in Satisfaction of all Treſpaſſes, &c. if he who ought to pay it tenders it at the Day, and he refuſes, and after brings an Action for the Treſpaſs aforeſaid, this Award ſhall be a good Bar of the Action, becauſe it was his own Fault that it was not paid, and he hath his Remedy for the Money.

6. If A. and B. ſubmit themſelves to the Award of I. S. of all Actions, who awards that A. ſhall make an Obligation which ſhall be (g) labelled with War, and ſhall bring it to B. and B. ſhall ſeal it to A. in Satisfaction, &c. if A. does never bring the Obligation to B. to ſeal, yet this Award ſhall be a Bar of Actions brought by A. which are within the Award, tho' he hath no Means to compel B. to enter into an Obligation, becauſe the Default was in himſelf (h) 5 E. 4. 7.

(g) The Original is entire.

(h) Br. Arbitrament 36. S. C. Br. 14. S. C.

(A) What Perſons ſhall be bound by their Submiſſion.

Fol. 268.

1. If an Infant (a) ſubmits a Battery done to himſelf, and an Award is made thereupon, yet this ſhall not bind the Infant 13 H. 4. 12. dubitatur.

(a) For his Submiſſion is meerly void, and therefore per March. 111. 141. if one gives Bond, in the Condition of which it is recited, that an Infant hath ſubmitted to the Award of I. S. and it is conditioned that he ſhall perform the Award, it is void. But yet Q. and vide the Caſe of Knight and Stone, 1 Jon. 164. Lat. 207. by which he may ſubmit to an Award, and when he comes of full Age, agree or not agree to it as he pleaſes, and vid. 3 Lev. 17. 1 Rol. Abr. 730. Pl. 5.

2. So if an Infant ſubmits a Treſpaſs done to him in his Land, and an Award is made thereupon, yet this ſhall not bind him. Contra (b) 10 H. 6. 14.

(b) Br. Arbitrament 43. S. C. Fitz. 4. S. C. Br. Coverture 62. S. C.

3. An Award made upon the Submiſſion of the Predeceſſor Prior, ſhall bind the Succeſſor.

4. If *A.* and *B.* ſubmit to the Award of *I. S.* and he awards that *A.* ſhall pay to *B.* 30 l. within two Months next following, and that upon Payment thereof they ſhall give mutual Releaſes to one another, and within the ſaid two Months *B.* dies, the Money ſhall be paid to his Executor, and thereupon the Ececutor muſt releaſe, for the Award creates a Duty. *Mich.* 2. *Will. & Mar.* between *Dawny* and *Voſcy.* 2 *Vent.* 249. adjudged, an Action being brought by the Executor upon the Bond for Non-performance of the ſaid Award.

(c) Br. Arbitrament 10.

(B) Who ſhall take Advantage of an Award.

1. If A. hath the Cuſtody of my Cattle, and during the Cuſtody, they do a Treſpaſs to B. and A. and B. ſubmit this Treſpaſs to Arbitrament, and an Award is made, and A. performs it, if B. brings Treſpaſs againſt me for this Treſpaſs, I may plead in Bar the Award between the Plaintiff and the Stranger. (a) 7 H. 4. 31. b.

(a) Br. Arbitrament 13. S. C. 48. S C. Br. Treſpaſs 85. S. C. Fitz. Barre 176. S. C.

Pleading.

(a) Declaration upon an (b) Award.

1. (c) If in an Action of Debt upon an Award, the Plaintiff declares that the Arbitrators did make an Award, that the Defendant ſhould pay unto the Plaintiff 10 *l. &c.* this is a good Declaration, tho' nothing is ſhewn to have been awarded on the other ſide, (d) for it is ſufficient for the Plaintiff to ſet forth that Part of the Award which entitles him to his Action. *Mich.* 29. & 30. *Eliz.* between *Smith* and *Kirfoot.* 1 *Leon.* 72. adjudged.

(a) In ſuch a Delaration the Courſe is not to lay the Time or Place where the Award or Submiſſion were made, but if the Defendant denies either, the Plaintiff may reply that the Award or Submiſſion was made at ſuch a Place. 2 Browni. 137. agreed per totam Curiam.—But where an Award is pleaded in Bar of a Treſpaſs, a Place muſt be laid where the Submiſſion was made. Cro. El. 66. (b) The Plaintiff need not ſet forth a Profert thereof in Curia, becauſe it is no Deed, per Stil. 459. (b) 1 Sid. 161. S. P. ſaid.—and agreed per Twiſden. Lit. Rep. 312, 313. S. P. adjudged after a Verdict for the Plaintiff.—So if upon Demurrer Lit. Rep. 312, 313. by three Judges againſt one. & vide Reg. 111. a. (d) The Plaintiff may declare, &c. quod inter alia it was awarded per Lit. Rep. 312, 313. but 1 Mod. 36. per Twiſden con.

2. If there be a Submiſſion to the Award of *I. S.* ſo as the ſaid Award be made under his Hand and Seal, at or before the 5th Day of *Sept.* following, ready to be delivered at the Shop of *I. N.* in the *Exchange, London,* and in an Action of Debt upon an Award made thereupon the Plaintiff declares that the ſaid *I S.* under his Hand and Seal the 4th Day of *Sept.* following *apud Caſtrum Eborum* did make an Award *ad tunc & ibidem parat'.* to be delivered at the Shop of the ſaid *I. N.* in the *Exchange, London*; this is no good Declaration, (e) for the Parties are not bound to take Conuſance of the Delivery elſewhere than at the Place appointed. *Paſch.* 16. *Jac.* between (f) *Busfield* and *Busfield, Cro. Jac.* 577. by *Dod'* and *Houghton contra Mountague* Chief Juſtice, who held the Publication there and Allegation, that it was ready to be delivered at the ſaid Shop in *London* was well enough & *adjournatur.*

(e) In Debt upon a Bond conditioned for the Performances of an Award, ita quod it be made and ready to be delivered to the Parties at a certain Day and Place, the Defendant pleads nullum fecerunt Arbitrium, and the Plaintiff replies and ſets forth an Award made and delivered to the Parties at another Day and Place. 2 Lev. 68. adjudged. that is good, being delivered to the Parties themſelves, tho' at another Day and Place, but per Hale the Replication is not good, for being but the Execution of an Authority it ought to be done at the ſame Day and Place. (f) 2 Rol. Rep. 193. S. C. and ſame Judges contra Mountague and Chamberlain & adjournatur. 3 Mod. 331. S. C. cited as if adjudged.

(a) (b) (c) Plea, Replication, &c.

The (d) Manner (e) of ſetting forth an Award in Pleading.

1. IF in Debt upon an Obligation conditioned for the Performance of an Award ſo as, *&c.* the Defendant pleads no Award made, and the Plaintiff replies that *ante exhibitionem billæ ſcilicet* the 24 *June* (which was a Day within the Submiſſion) the Arbitrators made an Award, *viz. &c.* and the Defendant demurs generally, the Plaintiff ſhall have Judgment; for tho' the Plaintiff ought to have replied, that the Arbitrators made their Award before the Day limited to them, yet this is Form only, and helped by a general Demurrer. *Trin.* 20. *Car.* 2. between *Skinner* and *Andrews.* 1 *Sid.* 370. adjudged.

(a) Where the Defendant muſt plead non fecerunt Arbitrium de premiſſis nec de aliqua parte. Vid. 2. Mod. 27, 28.

(b) Vid. March 78, 79. a Caſe ill reported.

(c) The Condition was ſo, that the ſaid Award be given up in Writing, &c. and the Defendant pleaded non deliberaverunt in ſcriptis, &c. N. Bendl. 97. Pl. 143. adjudged naught, and that it ought to have been non reddiderunt in ſcriptis. (d) Super quo they made their Award is tantamount, as to ſay they made their Award de præmiſſis, per All. 52. (e) Where an Award ſhall not be ſet forth by a cujus tenor ſequitur in hec Verba. All. 87.

2. In an Action of Debt upon a Bond conditioned for the Performance of an Award, the Defendant pleaded that the Arbitrators did make an Award, that the Defendant ſhould pay to the Plaintiff 3100 *l.* and ſhould give to the Plaintiff a general Releaſe, and pleaded that he had paid the Money, and given a Releaſe accordingly, (f) but did not ſhew what on the Part of the Plaintiff was awarded to be done; and the Plaintiff replied without ſhewing the other Part of the Award in his Replication, and took Iſſue that the Defendant had not paid the Money, and the Defendant put in an inſufficient Rejoinder, upon which the Plaintiff demurred. *Mich.* 21. *Car.* 2. between (g) *Veal* and *Warner.* 1 *Sand.* 326, 327. *per Curiam,* the Plaintiff cannot have Judgment, becauſe the Award as ſet forth and agreed in Pleading is void, but if the Plaintiff would have helped himſelf he ought to have ſhewn the other Part of the Award, before he had taken Iſſue. But the Court would not give Judgment for the Defendant, but ſuffered the Plaintiff to diſcontinue, becauſe they apprehended it to be only a Trick in the Pleading, for which the Chief Juſtice reprehended *Sanders,* who excuſed himſelf by reaſon of the Severity of the Award.

(f) The Defendant in ſuch Caſe ought to ſhew the whole Award, per Lit. Rep. 313. where a Diverſity is taken as to this, when the Plaintiff declares upon the Award, and when the Defendant in his Plea ſets it forth.

(g) 2 Keb. 568. S. C. adjudged.

3. In Debt upon a Bond conditioned for the Performance of an Award the Defendant pleaded an Award to pay ſuch a Sum to the Plaintiff at ſuch a Time and Place, and that he tendered it accordingly, and the Plaintiff refuſed to accept it, and the Plaintiff replied, that it was awarded in Satisfaction

faction of all Controverſies, and that the Defendant *non obtulit ſolvere, & hoc petit quod inquiratur*, &c. and the Defendant demurred. *Paſch.* 36. *Car.* 2. 3 *Lev.* 164, 165. and by *Jones Chief Juſtice* and *Charleton* the Plaintiff having alledged new Matters, ought not to have concluded to the Country, by which Means the Defendant is deprived of his Opportunity of traverſing it, but *Windham* and *Levins contra*, for the Defendant having admitted the Award good, and taken upon himſelf to plead Performance, he ſhall not be admitted to traverſe the new Matter, ſo as to make the Award void; but if in Truth, the Money was not awarded in Satisfaction of all Controverſies, he ſhould at firſt have pleaded *nullum fecerunt Arbitrium*, for if he ſhould now be admitted to prove it no Award, it would be a Departure, *adjournatur.*

4. (h) If in Debt upon a Bond conditioned for the Performance of an Award, ſo as it be made, *&c.* and ready to be delivered (i) to the Parties, or to ſuch of them who ſhall (k) deſire the ſame, the Defendant pleads *nullum fecerunt Arbitrium*, and the Plaintiff replies, and ſets forth the Award, and ſhews a Breach, but doth not ſay that it was ready to be delivered to the Defendant, yet this is a good Replication, for when the Award is made it is ready to be delivered to the Parties, or to ſuch of them who deſire it, ſo that it muſt be deſired, and if denied, the Party may plead that Matter ſpecially. *Mich.* 4. *Jac.* 2. between *Rowsby* and *Manning*. 3 *Mod.* 330, 331. *per Curiam*, and ſeems by the Report to have been adjudged.

(h) Cro. Car. 541. S. P. per Curiam. Stil. 110. like Point adjudged. 307. like Point adjudged. Hard. 399. S. P. per Curiam.

(i) If A. and B. of the one Part, and C. and D. of the other Part ſubmit, &c. ita quod the ſaid Award fiat & deliberetur utrique partium; this muſt be taken ſeverally, or diſcretive and not conjunctim, and the Award muſt be delivered to every one of the Parties. Hungate and Meſe, 5 Co. 103. adjudged. Cro. El. 883. Moor 642. Pl. 885. 3 Mod. 331. cited. & vid. Dyer. 218. Pl. 5. (k) Dal. 18. vide.

5. If in Debt upon a Bond conditioned for the Performance of an Award in Writing or by Word of Mouth, the Defendant pleads no Award made, and the Plaintiff replies that at the Time of the Bond and Award, he had an Action againſt the Defendant for ſcandalous Words, and that the Arbitrator *ore tenus* did declare and publiſh his Award in Manner following, *viz.* that the Defendant ſhould pay to the Plaintiff 12 Guineas, and all ſuch Money as he had expended *circa proſecutionem placiti præd.* &c. this is a good Award, and well ſet forth, altho' the Award doth not mention any Suit before: for he that ſets forth a parol Award, is not tied to the very Words, but it is ſufficient to ſhew the Effect and Subſtance of what was awarded by Word of Mouth. *Mich.* 2. *Will. & Mar.* between *Hanſon* and *Liverſay*. 2 *Vent.* 242. adjudged.

6. But if the Award had been made in Writing in ſuch Form of Expreſſion, it would not have been good. *Mich.* 2. *Will. & Mar.* 2 *Vent.* 242. agreed *per Curiam.*

The (a) Breach thereof.

1. IF in Debt upon an Obligation conditioned for the Performance of an Award, the Defendant ſhews that the Arbitrators did make an Award, that the Defendant before ſuch a Day ſhould pay to the Plaintiff 100*l.* or otherways ſhould procure one *A.* being a Stranger, to be bound to the Plaintiff for the Payment of 12 *l. per Annum* to the Plaintiff for his Life, and the Defendant pleads that he hath performed the ſaid Award, and the Plaintiff replies that the Defendant hath not paid the ſaid 100*l.* without ſaying, nor hath procured *A. &c.* yet this is a good Replication, for the Award as to that Part is meerly void, and therefore the Plaintiff (b) need not take Notice thereof. *Trin.* 29. *Eliz.* between (c) *Wilmer* and *Oldfield*. 1 *Leon.* 304. adjudged *per totam Curiam.*

(a) In an Action for Breach of an Award, but one Breach only can be aſſigned, per Stil. 429. Q. if not intended an Action upon a Bond conditioned for Performance.

(b) So if the Award be that the Defendant together with a Stranger, ſhall enter into a Bond, in the Aſſignment of a Breach, the Plaintiff muſt not ſay that the Defendant and Stranger did not enter into a Bond, for tho' both did not, yet the Defendant alone might enter into the Bond. 1 Godb. 165. & vide 2 Rol. Rep. 46. (c) Ow. 153. S. C. adjudged by three Judges againſt two, who held that the Plaintiff ſhould have ſhewn the whole Award, and thereupon the Law would have adjudged one Part void, and not to be done. 1 Leon. 140. S. C. adjudged.

2. (d) If

(d) 1 Sand. 102, 103. S. P. arguendo. and there ſaid that the Reaſon thereof was becauſe an Award may be good in Part, and void in Part, and perhaps the Action may be brought upon the void Part, & vide Stil. 436. (e) For this and like Caſes, vide the Subdiviſions of Replication, Title Pleading, viz. when the Iſſue is joined upon a Matter in bar, and other Matter ſhewed in the Replication, to maintain the Action. (f) Cro. Jac. 220. S. C. adjudged.

2. (d) If in Debt upon an Obligation conditioned for the Performance of an Award, the Defendant pleads *nullum fecerunt Arbitrium*, and the Plaintiff replies and ſhews the Award, *&c.* he muſt alſo ſhew the Breach, without which he hath no Cauſe of Action, for the Obligation is guided by the Condition; and tho' the Defendant can make no Anſwer to the Breach, (e) yet it ought to appear to the Court that the Plaintiff hath a Cauſe of Action. *Paſch.* 7. *Jac.* between (f) *Barret* and *Fletcher*, *Yelv.* 152. reſolved, and for want thereof *per totam Curiam præter Williams* Judgment was arreſted after a Verdict for the Plaintiff.

(g) But I take it the Defendant is eſtopped, and cannot have this Plea, vide 1 Rol. Abr. 873, 874. and therefore am apt to believe the Reporter miſtaken, and that the Action was Debt upon the Award it ſelf.

3. But if in an Action of Debt upon an Obligation conditioned for the Performance of an Award, the Defendant pleads (g) *non ſubmiſit*, the Plaintiff may take Iſſue thereupon without ſhewing any Breach, becauſe in that Caſe he hath no Liberty to reply to any Part of the Award *Trin.* 18. *Car.* 2. between *Kind* and *Carter.* 1 *Sid.* 290. adjudged.

Of the (a) Performance thereof.

(a) In Debt upon a Bond for Performance, &c. the Defendant cannot plead Performance generally, but muſt ſhew the Award, and how he has performed it. Moor. 3. Pl. 9.

(b) 2 Bulſ. 93. 96. adjudged per totam Curiam præter Dod'. 1 Rol. Rep. 7. 8. S. C. adjudged per totam Curiam præter Dod'.

1. IF in Debt upon an Obligation conditioned for the Performace of the Award of *I. S.* the Defendant pleads that whereas there was a Suit in Chancery by the now Defendant againſt the now Plaintiff for ſuch a Cauſe, *&c.* the ſaid *I. S.* did award that the ſaid Suit ſhould ceaſe, and that the now Plaintiff ſhould ſtand acquitted *de qualibet materia in eadem contenta*, and avers that he did not any further proſecute the ſaid Suit, but that the now Plaintiff always after *ſtetit inde quietus*; this is a good Plea without ſhewing any Diſcharge *in facto*, and the Award being that he *ſtaret acquietatus*, it is no more than that by that Award he ſhould be acquitted. *Paſch.* 12. *Jac.* between (b) *Freeman* and *Sheen.* *Cro. Jac.* 339. adjudged *per totam Curiam* (tho' *Dodderidge* upon the firſt Motion held the contrary) and 'tis not like the Caſe of a Condition to acquit another of a Debt.

2. If an Award be to pay the Rent mentioned in ſuch an Indenture, in Debt upon a Bond conditioned for Performance thereof, the Defendant in pleading Performance need not ſet forth the Indenture, but refer generally to it. *Trin.* 22. *Car.* 2. *Anonymus.* 1 *Vent.* 87. ſeems to be adjudged.

3. But if it be to be paid in ſuch Manner, and at ſuch Times as is expreſſed in the Indenture, then it muſt be ſet forth at large. *Trin.* 22. *Car.* 2. 1 *Vent.* 87. ſeems to be *per Curiam.*

4. So if an Award be to pay Money given by a Will. *Trin.* 22. *Car.* 2. 1 *Vent.* 87. ſeems to be *per Curiam.*

(a) (b) Aſſets.

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(A) What (c) Things ſhall be Aſſets to an (d) Heir in (e) Debt.

(a) Where a Man ſhall be ſaid to be in by Purchaſe, and where by Deſcent, vide 1 Rol. Abr. 626.

1. **Land by Deſcent, in ancient Demeſn, ſhall be Aſſets in Debt,** (f) 7 H. 4. 14.

(b) Vide Br. Aſſets per Diſcent, Fitz. Aſſets per Diſcent. (c) Per 29 Car. 2. Cap. 3. Par. 10. a Truſt in Fee-ſimple ſhall be Aſſets, to charge the Heir of the ceſtuy que Truſt. Vide 1 Chan. Rep. 14, 128. (d) Per 3 and 4 Will. and Mar. Cap. 14. Par. 1, 2. and made perpetual, per 6, and 7 Will. 3. cap. 14. All Wills of Land, &c. ſhall be deemed (only as againſt Creditors upon Bond, and other Specialties) fraudulent and void, and ſuch Creditors ſhall have their Actions of Debt, againſt the Heirs at Law, and ſuch Deviſees jointly, &c. (e) What ſhall be ſufficient Aſſets to make a lineal Warranty a Bar to an Eſtate-Tail, vide Co. Lit. 374. B. 2 Inſt. 293. Kelw. 104. b. 124. b. but for this vide 2 Rol. Abr. 774, 775. (f) Fitz. Aſſets, per Deſcent. 1. S. C. Br. 11. S. C.

2. (g) **A Reverſion in** Fee expectant **upon an** (h) **Eſtate-Tail is not** Aſſets, **becauſe it lies in the Will of the Tenant in Tail to Dock and Bar it at his Pleaſure.** Mich. 12 & 13 Eliz. **between** (i) Terlin **and** Trafford **adjudged, cited** Co. 6. Bredeman 58. b. & Mildmay 42.

(g) 2 Rol. Rep. 129. S. P. arguendo. 3 Mod. 257. S. P. 3 Lev. 287. S. P. and that in ſuch Caſe the Heir may plead riens per Deſcent generally. (h) But after the Tail ſpent it is Aſſets. 3 Mod. 257. (i) 1 Rol. Rep. 234. S. C. cited 257. S. C. cited.

3. **If Lands deſcend to an Heir, this is** Aſſets **before Entry, for he may enter when he will.** (k) 42 Ed. 3. 10. b.

(k) Br. Aſſets, per Deſcent, 8. S. C.

4. If a Copyhold deſcends to an Heir, this ſhall not be Aſſets. 4 Co. 22. a.

5. (l) A Right without any Eſtate in Poſſeſſion, Reverſion or Remainder, is not Aſſets, till it be recovered, and reduced into Poſſeſſion. 6 Co. 58. b. at the Top.

(l) 2 Inſt. 293. like Point.

6. If a Rent-Seck deſcends to an Heir, it is not Aſſets till he hath gained Seiſin. 6 Co. 58. b.

7. If Tenant for Life grants his Eſtate to *B.* and his Heirs, and *B.* dies, his Heir is in as a ſpecial Occupant, and this is not (m) Aſſets. 10 Co. 98. a.

(m) But per 29 Car. 2. cap. 3. Par. 12. it ſhall be chargeable as Aſſets by Deſcent,

8. If *A.* hath Iſſue *B.* and *C.* and conveys Land to the Uſe of himſelf for Life, the Remainder to *B.* in Tail male, the Remainder to his own right Heirs, and *A.* dies, and the Reverſion deſcends to *B.* his Son, and *B.* dies ſeiſed, and the Reverſion deſcends to his Son, who dies without Iſſue, ſo that the Tail is ſpent, and *C.* enters, theſe Lands ſhall be Aſſets, to anſwer the Debt of his Father. *Mich.* 1 *Will.* and *Mar.* between (n) *Kellow* and *Rowden.* 3 *Mod.* 253, 254, 257. agreed *per Curiam*, and the only Queſtion there was, Whether he could be charged as Heir to his Father, without naming his Brother and Nephews.

(n) 3 Lev. 280, 287. S. C. and S. P. admitted per Curiam.

(B) What Eſtate.

1. **It ought to be in Fee.** 42 Ed. 3. 10. b.

(C) At (a) what Time it ſhall be Aſſets by the having of it.

(a) Per 3 and 4 Will. and Mary, Cap. 14. Par. 5. and made perpetual per 6 and 7 Will. 3. cap. 14.

1. **If he hath Aſſets** (b) **at the Day of the Writ purchaſed, or after, this ſhall be** Aſſets, **and charge him.** (c) 42 Ed. 3. 10.

where an Heir, before any Action brought, aliens the Lands in reſpect of which he is liable, ſuch Heir ſhall be anſwerable for the Debt, to the Value of the Land made over, ſaving that Lands, bona fide, aliened before the Action brought, ſhall not be liable to ſuch Execution. (b) Co. Lit. 102. b. at the Top. S. P. (c) Br. Aſſets per Deſcent. 8. S. C.

2. But if he (d) had Aſſets by Deſcent, but not at the Day of the Writ purchaſed, nor after, this is not Aſſets to charge him. (e) 42 Ed. 3. 10 b. 26 H. 8. 1. (f) 48 Ed. 3. 32. b.

(d) But notwithſtanding any Alienation, it will continue Aſſets, to Bar the Heir in a Formedon. 2 Rol. Abr. 775. Pl. 9. (e) Br. Aſſets, per Deſcent. 8. S. C. (f) Br. Aſſets, per Deſcent. 10. S. C.

3. If the Heir aliens the Aſſets by Fraud to ouſt the Debtee of his Action, and takes the Profits to the Value of the Debt, this ſhall be Aſſets. (g) 48 Ed. 3. 32. b.

(g) Br. Aſſets per Deſcent, 10. S. C.

(D) (a) How (b) the Judgment ſhall be againſt (c) him.

1. In an Annuity againſt an Heir, upon the Grant of his Father, if the Defendant pleads that he hath nothing by Deſcent, and it is found that he hath (d) ſome Land in certain by Deſcent, but not to the Value, yet he ſhall be charged for the whole Annuity, 5 R. 2. Annuity 21. adjudged for his Falſity. 19 Ed. 3. Annuity 26. adjudged.

(a) For this vid. 2 Rol. Abr. 70.
(b) Vid. 29 Car. 2. Cap. 3. Par. 10, 11. by which, altho' the Heir of the teſtuy que Truſt is made liable to anſwer, &c. yet by reaſon of any kind of Plea, or other Matter, he ſhall not be chargeable to pay the Condemnation out of his own Eſtate. (c) Where the Deviſee ſhall in like manner be chargeable for a falſe Plea. vide 3 and 4 Will. and Mar. Cap.) 14 Par. 3. (d) Although it be not found in certain what Lands he hath by Deſcent. 1 Rol. Rep. 234. adjudged.

2. But otherways, if he had pleaded the Certainty, how much he had by Deſcent, &c. 5 R. 2. Annuity 21. 19 Ed. 3. Annuity 26.

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(a) (b) (c) (d) Aſſiſe.

(A) (e) Of (f) what (g) Things it (h) lies.

(a) The Derivation and Signification of the Word, Co. Lit. 153. b. 154. b. 159. b. (b) How it is Feſtinum remedium, and in what reſpect. (c) For Aſſiſes in confinio comitatus, vide Co. Lit. 153, 154. 7 Co. 3. b. 7 R. 2. cap. 10. Kelw. 98. a. (d) For an Aſſiſe of Sovent Diſtreſs, vide Kelw. 20. a. 2 Inſt. 413, 414. F. N. B. 178. H. 9. (e) Where it doth not lie for a Nonfeſance, vide 1 Rol. Abr. 104. Pl. 1, 2, &c. (f) Of Rent iſſuing out of Tithes barely, no Aſſiſe lies, Vaugh. 204. but of Eſtovers yearly in a certain Wood an Aſſiſe lies yearly, tho' the Wood be grubbed up. Yelv. 43. F. N. B. 58. J. 9 Co. 112. b. Cro. Jac. 257. but Yelv 188. per Curiam, is contr. becauſe when the Whole is deſtroyed, he cannot be put in Seiſin. (g) Not of Suit to a Mill, but the Writ de Secta ad molendinum, but of Toll of a Mill, it lies, per 8 Co. 46. b. (h) For Tenant by Elegit per 13 Ed. 1. cap. 18. explained. 2 Inſt. 396, 397. For Tenant by Stat. Staple, per 27 Ed. 3. cap. 9. For Tenant by Recognizance, in Nature of a Stat. Staple, per 23 H. 8. cap. 6.

1. It lies not of Homage. 1 Hen. 4. 1. b.
2. It lies not of an Annuity. 1 Hen. 4. 2.

3. It lies not of a (i) Penſion due out of an Abby or Priory. (k) 14 H. 6. 12.

(i) Where it lies of Tithes Penſions, and other Eccleſiaſtical Duties in temporal Hands, vide Co. Lit. 159. a. 32 H. 8. cap. 7. (k) Br. Aſſiſe 100. S. C.

4. But it lies of a Corody due out of an Abby or Priory. (l) 14 H. 6. 12. contra. 17 Ed. 3. 27. (m) b.

(l) Br. Aſſiſe 100. S. C.
(m) I ſuppoſe this is miſprinted in the Original, and that it ſhould be a.

5. (n) **An Aſſiſe does not lie of a Way over certain Land, but a quod permittat, for it is but an Eaſement.** (o) 34 Aſſ. 113. vel (p) 13. **adjudged.**

(n) 8 Co. 46. b. S. P. becauſe it is not profi-cuum, as the Stat' ſpeaks, Jenk. Cent. 17. S. P. 20. S. P. if intended of a Way in groſs, but otherways if appurtenant to Land, &c. (o) Br. Aſſiſe 337. S. C. Fitz. 317. S. C. Bz. Chemin 8. Bz. Pleint. 31. (p) 'Tis pl. 13. for there are not 113 in that Year.

6. At the Common Law there were but two Forms of Writs of Aſſiſe of *novel diſſeiſin*, either an Aſſiſe (q) *de libero tenemento*, or (r) *de communia paſturæ*. 2 Inſt. 411.

(q) So at this Day for a profit aprender, the Writ muſt be general de libero tenemento, and the Plaint ſpecial. 8 Co. 47. b. Co. Lit. 159. a. becauſe no ſpecial Writ is given by the Statute. Dyer 83, 84. (r) In ancient Time they held themſelves ſtrictly to the Forms in the Regiſter, and therefore, becauſe there was no Writ of Common of Turbary, &c. it was held no Aſſiſe lay thereof, 8 Co. 48. a. b.

7. The Aſſiſe *de libero tenemento*, did lie of Houſes, Land, Rent, or other Things, which lay in *render*, but for Profits *aprender*, which conſiſted in *Capiendo*, *Colligendo*, *Habendo*, *Recipiendo*, & (s) *Exercendo*, no Aſſiſe lay (t) at the Common Law, but a *quod permittat*, in which there was great Delay, and they who had but an Eſtate for Life could not maintain that Writ. 2 *Inſt.* 411.

(s) But an Aſſiſe lay of an Office at common Law, becauſe a Præcipe lay thereof. 2 Inſt. 412. 8. Co. 47. b. (t) But now by the Statute of Weſtm. 2. cap. 25. a ſpeedy Remedy is given in theſe Caſes, de proficuis, &c. in certo loco capiend', &c. vide the Statute 2 Inſt. 411. explain'd. 8 Co. 46 a.

8. (u) The Aſſiſe *de communia paſturæ*, lay for Common of Paſture for his Cattle, *&c.* which was ſo neceſſary, as without it his Freehold could not be manured. 2 *Inſt.* 411.

(u) 8 Co. 46. a. S. P.

9. An Aſſiſe lay at common Law for an Office, and therefore tho' the Stat. of *Weſtm.* 2. ſpeaks only of Offices in Fee, yet an Aſſiſe lies for an Office for Life. *Mich.* 6 *Jac. Jehu Web's* Caſe. 8 *Co.* 47. *a.*

10. (w) An Aſſiſe lies for the Office of Regiſter of the Admiralty, for tho' their Proceedings are according to the Civil Law, yet the Right of their Offices is determinable at the Common Law. 8 *Co.* 47. b.

(w) 2 Inſt. 412. S. P.

11. (x) But for an Office of Charge, and no Profit, an Aſſiſe does not lie. 8 *Co.* 47. b 49. b.

(x) 2 Inſt. 412. S. P.

12. (y) If a Man be diſſeiſed of Parcel of the Profits of an Office, he may have an Aſſiſe of that Parcel only. 8 *Co.* 49. b.

(y) 2 Inſt. 412. S. P.

13. A Man ſhall not have an Aſſiſe of the whole Office, unleſs he be diſſeiſed of the Whole, *per* 8 *Co.* 49. b.

14. So if a Man hath a Corody to take 4 Loaves, and 4 Flagons of Beer by the Week, tho' it is but one Corody, and one Freehold, if he be diſſeiſed of the Bread only, he ſhall not make his Plaint of both, but if he be diſſeiſed of 2 Loaves only, yet he ſhall make his Plaint of the 4, 8 *Co.* 50. a.

(B) Of (a) what Seiſin.

(a) What is a good Seiſin to maintain an Aſſiſe, vide 2 Hol. Abr. 463.

For an Office.

1. **The taking of 3d of A. for a Capias againſt B. is a ſufficient Seiſin of the Office of Filizer,** de Banco, D. 2, 3 Ma. 114, 63.

7. If one by the Houſe of Commons was committed to *A.* who before, and long after, was in Poſſeſſion of the Office of Serjeant at Arms to the Houſe, and the Priſoner compounds with *B.* for the Fees, and gives him 20 *s.* this is a good Seiſin of the Office by *B.* for he cannot be diſſeiſed thereof but at his Election. *Hill.* 25, and 26 *Car.* 2. between *Cragg* and *Norfolk*, 2 *Lev.* 120. adjudged, and alſo upon the Trial it being proved that *B.* being

being in the Lobby of the Houſe of Commons, took hold of the Door of the Houſe, and laid his Hands upon the Mace, then being in the Hands of *A.* to take it, but *A.* hindred him, it was held good Evidence both of a Seiſin and Diſſeiſin.

3. The Serjeant of the Mace to the Houſe of Commons, in an Action upon the Caſe for Diſturbance, recovered Damages, and whether this was a ſufficient Seiſin, the Damages being recovered in Satisfaction of the Fees, and he then being out of Poſſeſſion of his Office. *Trin.* 26 *Car.* 2. between *Cragg* and *Norfolk.* 2 *Lev.* 108. upon a Trial in *B. R. dubitatur*, ſome of the Judges inclining one way, and ſome the other, and it was intended to have been found ſpecially, but the Plaintiff being unwilling to ſtand to it, was nonſuit.

(C) (a) Abridgment in an (b) Aſſiſe.

(a) Plaint. de meſſuage, and 4 Acres, abridged quoad the Meſſuage, becauſe the Jurors had the View of the Land only, and that ex propria notitia, without the Sheriff, vide Dier 61. Pl. 33. (b) In an Aſſiſe for Lands in 2 Towns, the Demandant cannot abridge his Plaint in one of them intirely, becauſe a Jury de vicineto of both Towns appears the firſt Day. But in Dower the Demandant may abridge all her Demand in one Town, becauſe no Jury is returned the firſt Day, and ſo the Venue may ariſe, as it ought, from the other Town, Fitz. Plaint 7. 19. (c) Br. Aſſiſe 3. S. C. Jenk. Cen. 111. S. C. and there ſaid, that after the Verdict given and entred, the Plaint cannot be abridged, but yet Kelw. 116. it is ſaid, a Man may abridge his Plaint at any Time before Judgment, and for this vide Dier, 88. Pl. 106. —— but after Judgment the Plaint cannot be abridged. 2 Brownl. 237.

1. **The Demandant in an Aſſiſe may abridge his Plaint at any Time after the Jury are charged, and after they are in the Hoſtel, in Communication of the Matter, and before Verdict.** (c) 33 H. 6. 18 b. **adjudged.**

(d) Kelw. 16. b. S. P. per Vaviſor Fitz. Plaint 7. S. P. (e) So if a Plaint be made for 50 s. Rent, it cannot be abridged to 20 s. becauſe it is intire. Dier 65. b. admit per Curiam.

2. (d) If in an Aſſiſe the Plaint is made of a Manor, the Demandant cannot abridge it, for a Manor is (e) intire, and if 5 Acres thereof ſhould be abridged, it would not be ſuch a Manor of which he hath made his Plaint, *incerti temporis*, *Kelw.* 116. b. *per Curiam.*

3. But if a Plaint be of a Moiety of 10 Acres of Land, the Demandant, if he will, may oblige the Moiety of 5 Acres, becauſe the Acres of which he hath made his Plaint of a Moiety, are ſeveral, and not intire, *incerti temporis*, *Kelw* 116. b. *per Curiam.*

(f) But per 21 H. 8. cap. 3. the Demandant may ſever and abridge his Plaint of any Part or Parts whereunto any Bar is pleaded, in ſuch like Manner as he might do in Caſe the Pleas in Bar had been made and divided to any Certainty or Number of Acres in the Plaint.

4. But if a Man makes his Plaint of 10 Acres, and the Tenant pleads in Bar, and ſevers the Acres by Moieties, the Demandant (f) cannot abridge his Plaint in the Moiety of any of the Acres, for his Plaint is made by the Name of Acres, and not of a Moiety, and therefore he cannot abridge his Plaint in Moieties, but in Acres he may. *Kelw.* 116. b. ſaid.

(D) (a) Of what Poſſeſſion an Aſſiſe lies.

(a) What ſhall be a good Seiſin to have an Aſſiſe. vide 2 Roll. Abr. 463. For Seiſin of Common, vide 1 Roll. Abr. 404. (b) Fitz. Colour 20. S. C. Br. 47. S. C. (c) Kelw. 110. a. S. P. per Cur'.

1. (b) 2 Ed. 4. 5. b. e. Conceſſ' to Lit. (c) **if the Guardian be ouſted the Heir may have an Aſſiſe, and with this** Concordat. Co. 6. Brediman 57. b.

(d) I ſuppoſe this Reference ſhould have been placed after the following Placitum.

2. 1 H. 7. 18. b. per Keble, **the King ſeiſes of a Ward by Office, of this Poſſeſſion the Heir may have an Aſſiſe.** 45 Ed. 3. 26. 3 H. 6. 33. b. (d) 21 Ed. 3. 34. 9 Ed. 4. 33. per Genny & Co. 6. Brediman 57. b. **Leſſee for Years is ouſted, the Leſſor may have an Aſſiſe.**

3. (e) 2 Ed.

3. (e) 2 Ed. 4, 5. b. per Lit. (f) the Lessor dies, and after the Lessee for Years is ousted, the Heir of the Lessor shall have an Assize of novel Disseisin, and not a Mort d'Ancestor. (g) 22 Ed. 4. 14. (h) 45 Ed. 3. 26. 22 Ass. 24.

(e) Fitz. Colour, 20. S.C. Br. 47. S. C. (f) Kelw. 110. a. S. P. per Curiam.

(g) Br. Trespass, 365. S. C. (h) Fitz. Assize, 61. S. C. Br. 31. S. C.

4. 27 H. 8. 7. A Reversion of a Lease for Years is recovered, and before Execution (for the Execution shall cease during the Term) the Lessee is ousted, the Recoveree shall have an Assize: But Quere this; for Co. 1 Shelly 106. b. by all the Justices if Tenant in Tail in Reversion upon a Lease for Years suffers a common Recovery, the Reversion is not in the Recoverors by the Judgment.

5. 9 H. 7. 24. per Curiam if cestuy que vie dies, or a Lease for Years is determined, the Lessor or his Heir shall not have an Assize against the Occupiers of the Land, without an Entry in Fact after the Determination of the Term. Fol. 271

6. Tenant at Will grants the Possession to another, who enters, the Lessor may have an Assize. 22 Ed. 4. 6.

7. If Tenant by Elegit, or Statute Merchant be ousted, he in the Reversion may have an Assize. 3 H. 6. 33. b.

8. If Tenant at Will be ousted, the Lessor may have an Assize. 21 Ed. 3. 34.

9. (i) The Heir cannot have an Assise against an Abator, for he had not Possession. (k) 22 Ed. 4. 14.

(i) Kelw. 109, 110. S. P. per Curiam.

(k) Br. Trespass. 365. S. C.

10. (l) If Lessee for Years be ousted, the Lessor may have an Assize. 21 Ed. 3. 34.

(l) 9 Co. 105. b. S. P. per Curiam arguendo. Dier, 354. Pl. 35. S. P.

11. If Tenant for Years of a Common be ousted, the Lessor may have an Assize. 21 Ed. 3. 34 (m) 22 Ass. 84. (n) 45 Ed. 3. 26.

(m) Fitz. Assize, 228.

S. C. Br. Seisin 36. S. C. (n) Fitz. Assize, 61. S. C. Br. 31. S. C.

12. The same Law, if Lessee at Will of a Common be ousted, the Lessor may have an Assize. 21 Ed. 3. 34.

13. If a Man leases for Years, the Remainder over in Fee, and after the Tenant for Years is ousted of his Term, he in the Remainder may have an Assize, because the Freehold was in him at the Time of the Disseisin. *Incertis temporis, Kelw.* 109. *per Curiam*, Resolved.

(E) Of what Possession an Assize lies, and what not.

1. If Baron and Feme purchase Lands in Fee jointly, and after the Baron is attainted of Felony, upon which the King seises the Land, and after the Lord, of whom the Land is holden, comes into Chancery, and upon his Suggestion hath it delivered to him as his Escheat, because the Woman had a joint Estate with her Husband, and the Lands were delivered out of the Hands of the King by a false Suggestion, this is a Disseisin to the Woman, and she may have an Assize, (it is intended that the Husband was dead before the Delivery out of the Hands of the King) (a) 4 Ass. 4. adjudged.

(a) Fitz. Assize, 166. S. C. Br. 113. S. C.

(F) In what Cases it shall be awarded at large.

1. If the Tenant pleads in Bar, and after demurs upon another Thing out of the Point of the Assize, and after this it is adjudged for the Demandant, the Assize shall not be awarded at large, but

but the Demandant shall have Judgment presently. 17 Ed. 3. 42. b. for the Land. (a) 17 Ass. 2.

(a) Br. Assize, 207. S. C.

2. As in Assize, if the Tenant pleads the Release of the Demandant, and the Demandant says that it was upon Condition, and shews how he hath performed it, upon which the Tenant demurs, and this is adjudged for the Demandant, he shall have Judgment presently, without awarding the Assize at large, because (b) the Demurrer is upon a Matter out of the Point of the Assize. 17 Ed. 3. 42. b. adjudged. (c) 17 Ass. 2.

(b) In the Original 'tis pur ceo que est d'inquire sur matter, &c. and therefore I take it to be misprinted. (c) Br. Assise. 207. S. C.

3. In an Assize, if the Tenant makes Title as Heir to J. S. and pleads an Estoppel upon Record against the Plaintiff, to estop him to claim as Heir to J. S. upon which the Plaintiff demurs, and this is adjudged no Estoppel, the Assize shall not be awarded at large. (d) 30 Ass. 51. admit.

(d) Br. Estoppel, 138. S. C.

4. In an Assize, if the Tenant pleads as Daughter and Heir to J. S. and that the Plaintiff is a Bastard, and so not Heir, upon which they are at Issue, and he is certified a Mulier, the Assize shall not be awarded at large, but only in Right of the Damages. 43 Ass. 11. 43. adjudged.

5. In an Assize, if the Tenant says the Plaintiff is a Nun professed, and it is certified by the Ordinary, that she is no Nun, the Assize shall be awarded at large, and not only in Right of the Damages, altho' the Plea was tried against him. 21 Ed. 3. 38. b. 59. b. (e) 21 Ass. Pl. 20. adjudged, but Quere, 1 Ed. 3. (f) 9. b.

(e) Br. Resceit. 94. S.C.

(f) I suppose this is misprinted in the Original, and should be 8 b.

Fol. 272.

6. In an Assize, if the Tenant pleads in Bar an Extent, and the Plaintiff avoids it, because the Conusor was Tenant in Tail of whom he is the Issue, and so he entred after his Death, upon which the Tenant demurs, whether the (g) Plaintiff can avoid the Extent made upon his Father by Entry, without an Audita Querela, and this is adjudged against the Tenant, the Assize shall not be awarded at large, but only in the Right of the Damages. Dubitatur, 38 Ass. 5.

(g) In the Original it is Tenant, and so appears to be misprinted.

7. In an Assize, if the Tenant says that the Plaintiff acknowledged a Statute to I. who thereupon extended this Land, whose Estate he hath, and the Plaintiff saith that he himself was seised, till disseised by the Tenant, absque hoc, that the Tenant hath the Estate of I. upon which the Tenant demurs, and this is adjudged against him, the Assize shall not be awarded at large, but only in the Right of Damages, for the Possession is acknowledged without Title. contra (h) 30 Ass. 43. adjudged.

(h) Br. Assize, 314. S. C.

8. In a Mort d'Ancester, as Heir to I. if the Tenant says that H. was seised in Fee, and devised to I. in Tail, and that if he died without Issue, his Executor might sell, and that after the Death of I. without Issue, the Executor sold to him, to which the Demandant says that I. was seised in Fee, absque hoc that he had any Thing by the Devise, upon which the Parties demur, whether this be a good Replication, without shewing how it came to the Fee, and this is adjudged for the Demandant, the Assize shall be awarded at large, for no Fee is acknowledged in I. contra 35. Ass. 1.

9. If in an Assize the Tenant pleads a Recovery against the Plaintiff in another Assize by Default, and the Plaintiff saith, that he was then within Age, upon which the Defendant demurs, and this is adjudged against him, yet the Assize shall not be awarded in Right of the Damages but at large, because the Tenant hath not acknowledged any Ouster. (i) 26 Ass 6.

(i) Fitz. Assize, 235. S. C.

10. In an Assize, if the Tenant pleads a Plea in Bar, and acknowledges an Ouster, and the Plaintiff makes Title, upon which the Parties demur, and this is adjudged against the Tenant, the Assize shall not be awarded at large, but in Right of the Damages, because he hath acknowledged an Ouster by his Plea. (k) 28 Ass. 21. adjudged.

(k) Br. Assize, 282. S. C. Fitz. 268. S. C.

11. In an Assize, if the Tenant pleads an ill Bar, and acknowledges an Ouster, and the Plaintiff makes Title to himself, and this is found

found against the Defendant, it shall not be inquired of the Seisin and Disseisin, as well as if he had pleaded a good Bar. (l) 6 H. 7. 2.

(l) Fitz. Assize, 36. S. C. Br. 378. S. C.

12. So if the Tenant says, Let the Assize come upon the Title, and this is found against the Defendant, there shall be no Inquiry of the Seisin and Disseisin. (m) 6 H. 7. 2.

(m) Fitz. Assize, 36. S. C. Br. 378. S. C.

13. So in an Assize, if the Tenant pleads an ill Bar, the Plaintiff is not bound to answer it, but may make a Title at large, and pray the Assize; if the Title be found, it shall not be inquired of the Seisin and Disseisin. (n) 6 H. 7. 2.

(n) Fitz. Assize, 36. S. C.

14. If in an Assize, the Tenant pleads a Bar at large, and the Plaintiff makes a Title at large, and the Tenant says, *Let the Assize come upon the Title*, the Jury shall not intermeddle with, or the Plaintiff take Advantage of, any other Title. *Mich.* 6. *H.* 8. *Kelw.* 170. b. *per Pigot.*

15. But if the Bar is not sufficient, and the Seisin and Disseisin is found, the Plaintiff may take Advantage of any other Title found by the Assize. *Mich.* 6. *H.* 8. *Kelw.* 170. b. *per Pigot.*

(G) In what Cases it shall be taken at large.

1. If in a Mort d'Ancester, the Tenant pleads a Plea in Bar of the Action, and this is found against him, the Assize shall not be taken at large, to inquire of the Points of the Writ. (a) 39 Ass. 13. Curia.

(a) Br. Mort d'Ancester, 46. S. C. Fitz. 32. S. C.

2. In an Assize of Mort d'Ancester, if the Tenant alledges Bastardy in the Demandant, and he is certified by the Bishop to be a Mulier, the Assize shall not be taken at large, but only in the Right of Damages. 30 Ed. 3. 8. b.

3. In a Mort d'Ancester, if the Tenant pleads the Release of the Demandant in Bar, which is denied, and found against the Tenant, the Assize shall not inquire of the Points of the Writ, because the Plea was in Bar. (b) 39 Ass. 13. adjudged.

(b) Br. Mort d'Ancester, 46. S. C. Fitz. 32. S. C.

4. In a Mort d'Ancester of the Seisin of his Father, if the Tenant pleads in Bar an Attainder of Felony of the elder Brother of the Plaintiff which survived their Father, and the Plaintiff takes Issue that he did not survive their Father, and the Defendant has a Day to have the Record of the Attainder, and after the Defendant makes Default, by which he fails of the Record, yet the Assize shall be taken at large for all the Points of the Writ, but whether the Plaintiff be next Heir. (c) 29 Ass. 11. adjudged; but Quere, (for it seems not to be Law) for the Plea was in Bar.

Fol. 273.

(c) Fitz. Mort d Ancester, 28. S. C. Br. 36. S. C.

5. But in this Case it shall not be inquired whether the Plaintiff was next Heir or not, for it is acknowledged by the Plea, that he is next Heir, but for the Record of which he hath failed. (d) 29 Ass. 11. adjudged.

(d) Fitz. Mort d' Ancester, 28. S. C. Br. 36. S. C.

6. In an Assize, if the Tenant says the Plaintiff is his Villein, &c. and this is found against him, yet it shall be inquired at large of the Points of the Writ, because this Plea was but to the Person, and not to the Freehold. (e) 31 Ass. 12. adjudged.

(e) Fitz. 305. S. C. Br. 321. S. C. vide.

(H) In what Cases it shall be inquired at large.

1. In an Assize, if in the Pleading an Ouster be not acknowledg'd, the Seisin and Disseisin shall be inquired. (a) 37 Ass. 14.

(a) Fitz. Assize, 330. S. C. Br. 345. S. C.

2. In an Assize of a Rent, if the Tenant says, hors de son Fee, and the other says, within his Fee, if it be found within his Fee, it shall be inquired further of the Seisin and Disseisin. 37 Ass. 14.

3. If in a Mort d'Ancester, the Tenant pleads a Plea that goes in Bar, yet if the Plea be one of the Points of the Writ, the Assize shall be taken at large.

4. As

4. As in a Mort d'Anceſter, if the Tenant ſays the Plaintiff is not the next Heir, and this is found againſt him, yet the Points of the Writ ſhall be inquired. (b) 40 Aſſ. 6.

(b) Br. Mort d'Anceſter, 47. S. C. Fitz. Judgment, 218. S. C.

5. And in this Caſe the Aſſize may find that altho' the Plaintiff is the next Heir, yet that he is not the next Heir as to this Land (for it ſeems that this Inquiry is in regard of their Inquiry at large, for the Iſſue will not warrant it) (c) 40 Aſſ. 6. adjudged.

(c) Br. Mort d'Anceſter, 47. S. C. Fitz. Judgment, 218. S. C.

6. In an Aſſize of Mort d'Anceſter, if the Tenant ſaith that the Plaintiff hath an elder Brother living, and after makes Default, the Aſſize ſhall be taken at large, (d) 29 Aſſ. 11.

(d) Br. Mort d'Anceſter, 36. S. C. Fitz. 28. S. C.

(I) In what Caſes it ſhall be taken at large.

1. IN an Aſſize of Mort d'Anceſter, if a Plea be pleaded in Abatement of the Writ, and this is found againſt the Tenant, yet the Points of the Writ ſhall be inquired. (a) 39 Aſſ. 13. Curia.

(a) Br. Mort d'Anceſter, 46. S. C. Fitz. 32. S. C.

2. In an Aſſize by a Woman, if the Tenant ſays the Plaintiff is covert Baron, which is found againſt him, yet it ſhall be inquired over of the Points of the Writ. 1 Ed. 3. (b 9. b.

(b) I ſuppoſe this is miſprinted, and ſhould be 8. b.

3. In a Mort d'Anceſter, if the Tenant vouches, and the Demandant counterpleads, upon which they are at Iſſue, and it is found againſt the Tenant, yet the Points of the Writ ſhall be inquired. (c) 39 Aſſ. 13. Curia. (d) 29 Aſſ. 48. but Quere.

(c) Br. Mort d'Anceſter, 46. S. C. Fitz. 32. S. C. (d) Br. Mort d'Anceſt. 37. S. C.

4. In an Aſſize, if the Tenant and Demandant go to iſſue upon a Matter out of the Point of the Aſſize, and this is found againſt the Tenant, the Aſſize ſhall not inquire of the Points of the Writ, but only in Right of the Damages. (e) 44 Aſſ. 6. adjudged.

(e) Br. Aſſize, 368. S. C.

Fol. 274.

5. As in the Aſſize, if the Tenant pleads an Entry for the Alienation of his Leſſee to the Plaintiff, and the Parties go to iſſue whether the Alienor had a Fee, and this is found againſt the Tenant, the Aſſize ſhall not inquire of the Points of the Writ, but only in Right of the Damages. (f) 44 Aſſ. 6. adjudged.

(f) Br. Aſſize, 368. S. C.

6. In an Aſſize, if the Deed of the Anceſtor of the Plaintiff be pleaded in Bar, and this is denied, and found for the Demandant, it ſhall be inquired only of the Damages. (g) 17 Aſſ. 13. adjudged.

(g) Fitz. Aſſize, 210. S. C.

7. In an Aſſize, if the Tenant pleads the Feoffment of the Anceſtor of the Plaintiff in Bar, to which the Plaintiff ſays that the ſame Anceſtor died ſeiſed, and that he entred as Son and Heir, and the Iſſue is taken upon the dying ſeiſed, and this is found for the Plaintiff, it ſhall not be inquired at large of the Points of the Writ. (h) 17 Aſſ. 18. adjudged.

(h) Br. Aſſize, 211. S. C.

8. In an Aſſize, if the Tenant ſays that J. S. was ſeiſed of the Land, and acknowledged a Statute to him, per quod he extended it, &c. and the Plaintiff takes Iſſue that J. S. was not ſeiſed of the

Land at the Time of the Statute acknowledged, and this is found for him, and against the Tenant, it shall not be inquired of the Points of the Writ, but of the Damages only, for the Seisin is acknowledged. (i) 24 Ass. 2. adjudged. (i) Br. Assise, 255. S. C.

9. In an Assise, if the Defendant says that there is not any Tenant of the Freehold named in the Writ, and the Plaintiff says that he hath made a Feoffment, to Persons unknown, and he himself hath continually taken the Profits, and they are at Issue upon the taking the Profits, if this be found against the Defendant, it shall not be inquired of the Points of the Assise, because the Disseisin is acknowledged. (k) 30 H. 6. 1. b. Curia. (k) Fitz. Assise 15. S. C. Br. 398. S. C.

10. So it is, if a Traverse be taken of the Esplees, for by this the Disseisin is acknowledged. (l) 30 H. 6. 1. b. Curia. (l) Fitz. Assise, 15. S. C. Br. 398.

(K) In what Cases it shall be awarded at large.

1. If the Title be traversed, the Assise shall not be awarded at large, but upon the Title, and the Seisin and Disseisin upon the Title. 28 Ass. 23. & (a) 17. (a) Br. Assise, 281. S. C.

2. In an Assise of a Rent by an Abbot, if the Plaintiff makes a Title by Prescription in him and his Predecessors, upon which the Parties demur, whether this be a good Title without Specialty, and this is adjudged for the Plaintiff, the Assise shall be awarded upon the Title. (b) 18 Ass. 17. adjudged. (b) Fitz. Title 10. S. C.

3. In an Assise, if the Tenant pleads in Bar, and the Plaintiff makes Title, and the Tenant does not answer nor traverse the Title, the Assise shall be awarded at large, and not upon the Title, inasmuch as this is not put in Issue, and if any other Title is found for the Plaintiff, he shall recover. (c) 28 Ass. 17. per Curiam adjudged. 28 Ass. 23. (d) 48. per Curiam. 32 Ed. 3. Assise 99. per Shard. contra 18 Ed. 3. 13. b. (e) 17 Ass. 18. (c) Br. Assise, 281. S. C. (d) Fitz. Assise 273. S. C. (e) Br. Assise, 211. S. C. Br. Title 23. S. C.

4. In an Assise in Pais, if the Release of the Plaintiff be pleaded in a Foreign County, and denied, upon which it is adjourned in Banco, at which Day the Tenant makes Default there, the Assise shall be awarded at large. (f) 22 Ed. 3. 4. b. adjudged. 30 E. 3. 12. adjudged. (g) 17 Ass. 31. adjudged. 11 R. 2. Assise 72. adjudged, because no Ouster is acknowledged by the Plea. (f) Fitz. Assise 125. S. C. (g) Br. Assise, 216. S. C.

5. In an Assise, if the Tenant pleads the Release of the Plaintiff in Bar, and after makes Default, the Assise shall be taken at large. 26 Ass. 6. 30. adjudged.

6. So if the Tenant pleads in Bar, and the Plaintiff makes Title by Matter in Law, upon which they are adjourned in Bank, and there this depends till the End of the Term, and then the Tenant makes Default, the Assise shall be awarded at large, for the Pleading of the Title and Demurrer waives the Bar. 3 H. 6. Assise 3. Otherways of a Rent.

7. If in an Assise the Title be traversed, and this is found for the Plaintiff by Verdict, the Assise shall be awarded in Right of the Damages only, and not at large. (h) 29 Ass. 1. Fol. 275. (h) Fitz. Assise, 275. S. C. Br. 263. S. C.

8. In an Assise, if the Tenant pleads in Bar, and the Plaintiff makes a Title which he is ready to aver, &c. and the Plaintiff Similiter, as the Entry is, yet this is not any Traverse of the Title, and therefore the Assise ought to be awarded at large, and not upon the Title. (i) 28 Ass. 17. per Curiam contra 32 Ed. 3. Assise 99. per Shard. (i) Br. Assise, 281. S. C.

9. In an Assise, if the Tenant pleads a Fine and Execution in Bar, and the Estate of the Plaintiff, between, &c. if the Plaintiff destroys this Bar by a Fine with Warranty, and so falsifies the Execution, and the Tenant pleads to this null tiel Record, and after the Record is shewn forth, the Assise shall be awarded only in Right of the Damages, for this Issue was upon the Title, and this is found against the Tenant. (k) 29 Ass. 1. adjudged. (k) Fitz. Assise, 275. S. C. Br. 293. S. C.

(L) In what Caſes it ſhall be awarded at large in reſpect of the Perſon.

1. IF an Infant of the Age of 15, brings an Aſſiſe of Gavelkind Land, where, by the Cuſtom, ſuch Infant hath Power to alien as well as a Man of full Age, and the Tenant pleads in Bar, the Aſſiſe ſhall be awarded at large, 32 Aſſ. 4. adjudged.

2. In an Aſſiſe by two, of which one is within Age, the Aſſiſe ſhall be awarded at large. 26 Aſſ. 14. contra (a) 26 Aſſ. 65. adjudged, contra (b) 28 Aſſ. 22.

(a) Fitz. Aſſiſe, 245. S. C. Br. 269. S. C. (b) Fitz. Aſſiſe, 269. S. C. Br. 283. S. C.

(c) Fitz. Aſſiſe 269. S. C. Br. 283. S. C.

3. In an Aſſiſe by Baron and Feme of full Age, the Aſſiſe ſhall not be awarded at large for the Coverture of the Woman. 26 Aſſ. 14. (c) 28 Aſſ. 22.

(M) Upon what Plea.

1. IN an Aſſiſe by an Infant, if a Matter, which is not of Record, is pleaded in Bar, the Infant ſhall not be put to anſwer thereto, but the Aſſiſe ought to be awarded at large.

2. In an Aſſiſe by an Infant, if the Tenant pleads a Partition by Coparceners, &c. in Bar, yet the Aſſiſe ſhall be awarded at large, without having reſpect to the Bar. (a) 30 Aſſ. 7.

(a) Br. Aſſiſe, 309. S. C.

3. So if a Feoffment, with the Warranty of the Anceſtor of the Plaintiff, be pleaded in Bar, the Aſſiſe ſhall be awarded at large. 30 Aſſ. 27. (b) 18 Aſſ. 11. (c) 31 Aſſ. 17. adjudged. (d) 12 H. 4. 22.

(b) Fitz. Proceſs, 24. S. C. Br. Teſtmoigns, 10. S. C. (c) Fitz. Condition, 15. S. C. (d) Br. Office del Court, 3. S. C. Fitz. Aſſiſe 50. S. C.

4. So if a Divorce for a Precontract between the Father and the Mother of the Plaintiff be pleaded in an Aſſiſe, he being an Infant, and ſo the Plaintiff a Baſtard, the Aſſiſe ſhall be awarded at large. (e) 30 Aſſ. 45. adjudged.

(e) Br. Aſſiſe, 316. S. C.

5. So in an Aſſiſe (f) by an Infant, if Baſtardy be pleaded in the Infant, the Aſſiſe ſhall be awarded at large. (g) 39 Aſſ. 14. by all the Juſtices.

(f) In the Original it is againſt an Infant, and therefore I take it to be miſprinted. (g) Br. Aſſiſe, 355. S. C. Br. Verdict, 47. S. C.

6. In an Aſſiſe by an Infant, if the Tenant pleads in Bar the Deviſe of his Anceſtor, according to the Cuſtom of a Will, with Proclamations, the Infant ſhall not be put to anſwer this, but the Aſſiſe ſhall be awarded at large. (h) 37 Aſſ. 5. adjudged.

(h) Br. Aſſiſe, 343. S. C.

7. In an Aſſiſe againſt an Infant, if he pleads in Bar a Matter of Eſtoppel of Record, to eſtop the Plaintiff to claim as Heir, upon which the Plaintiff demurs, and this is adjudged againſt the Infant, yet the Aſſiſe ſhall be awarded at large for the Infancy. (i) 30 Aſſ. 46. 51. adjudged.

(i) Br. Eſtoppel, 138. S. C. Br. Voyt d' Anceſter. 56. S. C.

8. In an Aſſiſe by an Infant, if the Tenant pleads in Bar, and the Plaintiff replies, and the Tenant rejoins, yet the Aſſiſe ſhall be awarded at large, becauſe the Plaintiff is an Infant, for that which is alledged by the Tenant, ſhall not be held, nor denied by him. 31 Aſſ. 15. Dubitatur.

Fol. 276.

9. In an Aſſiſe by an Infant, of Gavelkind Lands, if the Tenant ſays, That the Cuſtom there is, that an Infant of the Age of 15 may alien, and that he was of the Age of 15, and aliened to him, yet the Aſſiſe ſhall be awarded at large, tho' he be of full Age to alien. 32 Aſſ. 4. adjudged.

10. In an Assise by an Infant, if the Tenant pleads in Bar a Matter of Record against the Infant, the Assise shall not be awarded at large, but the Infant shall be put to answer the Record. (k) 12 H. 4. 22. b.

(k) Br. Assise, 59. S. C. Fitz. Assise 50. S. C.

11. As if a Fine be pleaded in Bar against him, he ought to answer it, and the Assise shall not be taken at large. 37 Ass. 5. per Chelre. The same Law if a Recovery be pleaded in Bar. (l) 26 Ass. 6.

(l) Fitz. Assise, 235. S. C.

12. But in an Assise by an Infant, if the Tenant pleads a Matter of Record, as a Fine of his Ancestor, or such like, &c. tho' the Infant ought to answer this, and make a Title, yet the Tenant shall not be received to traverse the Title, but the Assise shall be awarded at large, because if the Infant hath other Title found, he shall have Judgment. (m) 28 Ass. 6. per Curiam, adjudged.

(m) Br. Assise, 277. S. C.

13. In an Assise by two, of which one is within Age, and the Deed of their Ancestor is pleaded against them, the Assise shall be awarded at large, because he that is within Age cannot try the Deed. 26 Ass. 14.

14. But in an Assise by Baron and Feme, if the Release of the Baron be pleaded in Bar, the Assise shall not be awarded at large. 26 Ass. 14. (n) 28 Ass. 22.

(n) Fitz. Assise, 269. S. C.

15. In an Assise by two, of which one is within Age, if the Tenant says that he himself was seised, &c. and leased for Life to the Ancestor of the Plaintiffs, who died, and the Plaintiffs abated claiming his Estate, the Assise shall not be awarded at large as to him who is of full Age, but he ought to answer the Deed. (o) 28 Ass. 22. adjudged.

(o) Fitz. Assise, 269. S. C.

16. In an Assise of a Rent against an Infant, if the Parties join Issue upon a Matter out of the Point of the Assise, and this is tried against the Infant, yet the Assise shall be awarded at large, because the Infant by his Acknowledgment, or nient dedire, shall not be adjudged a Disseisor. (p) 28 Ass. 51, 52. adjudged.

(p) Fitz. Assise, 262. S. C. Br. 291. S. C.

(N) In what Cases it shall be inquired of the Circumstances.

In respect of the Person of the Plaintiff.

1. IN an Assise, if the Plaintiff be an Infant, the Court ex officio ought to inquire of the Circumstances. (a) 12 H. 4. 22. b. 21 Ed. 3. 21. 38 Ass. 2. (b) 31 Ass. 17. 24 Ass. 6.

(a) Br. Office del Court, 3. S. C. Fitz. Assise, 50. S. C. (b) Fitz. Condition, 15. S. C.

2. So in an Assise, if there are two Plaintiffs, and one is an Infant, it ought to be inquired of the Circumstances. (c) 12 H. 4. 22. b. (d) 31 Ass. 17. 32 Ed. 3. Assise, (e) 96. contra (f) 26 Ass. 65. adjudged.

(c) Fitz. Assise, 50. S. C. (d) Fitz. Condition, 15. S. C. (e) This is misprinted in the Original, and I suppose should be 98. (f) Br. Assise, 275. S. C. and Q. if the Plaintiff in that Case was an Infant, for it does not appear by the Year-Book, or the Abridgment thereof.

3. In an Assise against an Infant, it shall be inquired of the Circumstances. 39 Ass. (g) 14. admit.

(g) Br. Assise 355. S. C.

4. In an Assise against Baron and Feme, the Baron being of full Age, and the Feme within Age, it shall be inquired of the Circumstances. 39 Ass. (i) 14. (k) 16.

(i) Br. Assise, 355. S. C. (k) Fitz. Assise, 337. S. C.

5. The same Law in an Assise against Baron and Feme, if the Feme be received upon the Default of the Husband, tho' she be of full Age, because she is a Feme covert. (l) 39 Ass. 16. adjudged.

(l) Fitz. Assise, 337. S. C.

6. If

6. If an Infant brings an Assise of Gavel-kind Land, being above the Age of 15, where the Custom is, that he may alien the Land at that Age, as well as a Man of full Age, and the Tenant pleads in Bar, upon which the Assise is awarded, it shall be inquired of the Bar, and if this be found against the Infant, it shall be inquired whether he hath other Title, altho' he was of full Age to alien. 32 Ass. 4.

Fol. 277.

7. Where an Infant is put to answer to a Plea in Bar, there it shall never be inquired of the Circumstances of the Bar. (m) 22 H. 6. 51. b. Curia.

(m) Fitz. Assise, 12. S. C. Br. 80. S. C.

8. In an Assise by an Infant, if the Defendant pleads a Release of the Ancestor of the Plaintiff, by Fine with Warranty, the Assise shall not be taken to inquire of Circumstances, because this is a Matter of Record, to which the Infant of Necessity ought to answer. (n) 22 H. 6. 51. b. Curia.

(n) Fitz. Assise, 12. S. C. Br. 80. S. C.

9. In an Assise by an Infant, if the Deed of his Ancestor with Warranty be pleaded in Bar, the Assise shall be awarded to inquire of the Circumstances. 32 Ed. 3. Assise 98.

(O) Upon what Issue.

1. If an Infant brings an Assise, and a Bar is pleaded against him, it shall be inquired at large. (a) 12 H. 4. 22. b. 38 Ass. 2. adjudged. 29 Ass. 68. (b) 18 Ass. 11.

(a) Fitz. Assise, 50. S. C. (b) Fitz. Proceſs, 24. S. C. Br. Testmoigns, 10. S. C.

2. (c) So if a Record be pleaded in Bar against an Infant, and the Infant makes Title against it as he ought, yet it shall be inquired whether he hath other Title. (d) 12 H. 4. 22. b. (e) 38 Ass. 11. (f) 28 Ass. 6. Curia. (g) 22 H. 6. 51. b.

(c) Cro. Jac. 465. S. P. arguendo. (d) Fitz. Assise, 50. S. C. (e) This is misprinted in the Original, and perhaps should be 18 Assise 11, which vide Fitz. Proceſs 24. (f) Br. Assise, 277. S. C. (g) Fitz. Assise. 12. S. C. Br. 80. S. C.

3. So if the Warranty of the Ancestor be pleaded in Bar against an Infant, because the Infant cannot answer the Deed, it shall be inquired of the Bar, and if the Bar be found, it shall be inquired of all Things which may avoid or destroy the Warranty, or if he hath other Title. (h) 12 H. 4. 22. (i) 31 Ass. 17. adjudged.

(h) Fitz. Assise, 50. S. C. (i) Fitz. Condition, 15. S. C.

4. So if the Devise of the Ancestor of the Infant be pleaded in Bar. (k) 39 Ass. 2. adjudged.

(k) This is misprinted in the Original, and, I suppose, should be 38 Assise 2.

5. In an Assise by an Infant, and Man of full Age, if the Deed of their Ancestor be pleaded in Bar, yet it shall be inquired of the Circumstances. (l) 31 Ass. 17.

(l) Fitz. Condition, 15. S. C.

6. But if an Infant brings an Assise, and upon null tort, null disseisin pleaded, it is found against the Plaintiff, this, by Intendment, is an Inquiry of the Circumstances, for upon this Issue they may inquire of any Right. (m) 12 H. 4. 22. b.

(m) Fitz. Assise, 50 S. C.

7. In an Assise by an Infant, if a Record be pleaded in Bar, and the Defendant hath Day to bring in the Record, and this is brought accordingly at the Day, yet the Assise shall be taken for the Infant, (semble it is intended) at large, to inquire whether he hath other Title. (n) 29 Ass. 11. but Quere.

(n) Fitz. Mort d'Ancestor, 28. S. C. Br. 36. S. C.

8. So if an Infant, and a Man of full Age, are Plaintiffs in the Case aforesaid, the Assise shall be taken for the Infant. (o) 29 Ass. 11. but Quere.

(o) Fitz. Mort d'Ancestor, 28. S. C. Br. 36. S. C.

9. In an Aſſize by an Infant in B. R. if the Tenant pleads a Matter of Record in Bar, Scil. a Recovery by him againſt the Plaintiff in another Aſſize brought by him in the Common Pleas, to which the Plaintiff replies, That he is yet within Age, and that this Writ was purchaſed, and bore Date before the Writ brought in Banco, upon which the Tenant demurs, and this is adjudged a good Replication, the Aſſize ſhall be taken only in Sight of the Damages, for by the Demurrer, the Ouſter and Diſſeiſin of the Plaintiff is confeſſed. P. 16 Jac. B. R. (p) between Holford and Platt, adjudged, and ſo taken.

(p) Cro. Jac 468. S. C. adjudged, 2 Rol. Rep. 14. 22. S. C. adjudged.

10. If an Infant be Defendant in an Aſſize, and pleads in Bar, and a Title is made againſt him, to which the Tenant anſwers, and takes Iſſue out of the Point of the Aſſize, and it is found againſt him, it ſhall not be inquired of the Circumſtances for the Tort ſuppoſed in the Infant (q) 12 A. 4. 22. b. 28 Aſſ. (r) 50 adjudged.

(q) Fitz. Aſſize, 50. S.C. Fitz. Aſſize,

(r) This is miſprinted in the Original, and, I ſuppoſe, ſhould be 51. which Caſe, vide 262. and Br. 291.

11. In an Aſſize againſt Baron and Feme, the Feme being within Age, if the Defendants, by way of Bar plead that I. was ſeized, and the Feme is Heir to him, if the Plaintiff ſays that the Feme is a Baſtard, this ſhall not be tried by the Ordinary, but by the Aſſize, becauſe the Circumſtances are to be inquired, and becauſe the Feme is not compellable to take Iſſue upon a certain Point. (s) 39 Aſſ. 14.

Fol. 278.

(s) Br. Aſſize, 355. S. C. Br. Verdict, 47. S. C.

12. In an Aſſize (t) by an Infant, if the Deed of the Anceſtor of the Infant with Warranty, bearing Date in another County, be pleaded againſt him, the Aſſize ſhall be adjourned in Bank, and there it ſhall be inquired of the Deed, and if it be found his Deed, the Aſſize ſhall be re-attached, and there ſhall be an Inquiry whether he hath any other Title than by Deſcent of the Inheritance. 39 Aſſ. 14. per Thorp.

(t) This in the Original is againſt being, as I ſuppoſe, miſprinted.

13. In an Aſſize againſt Baron and Feme, if the Feme be received upon the Default of the Husband, and pleads in Bar the Deed of the Anceſtor of the Plaintiff with Warranty, and the other ſaith nothing paſſed by the Deed, upon which they are at Iſſue, which is found againſt the Feme, yet becauſe ſhe is a Feme Covert, it ſhall be inquired of the Seiſin and Diſſeiſin, for ſhe ſhall not be adjudged a Diſſeiſoreſs by this without a finding of it. (u) 39 Aſſ. 16. adjudged.

(u) Fitz. Aſſize, 337. S. C.

14. The ſame Law, altho' the Feme acknowledges an Ouſter by her Plea. 44 Aſſ. 31.

15. In an Aſſize againſt an Infant, if he pleads the Releaſe of the Anceſtor of the Plaintiff with Warranty, to which the Plaintiff ſays, That the ſaid Anceſtor was Tenant for Life, the Remainder in Tail to the Plaintiff, the Remainder to the right Heirs of the Anceſtor, and granted over his Eſtate to him, to whom the Releaſe was made, and after releaſed with Warranty to him, upon which Plea the Parties demur, and after the Aſſize is awarded, the Aſſize ſhall inquire whether he to whom the Releaſe was made, was ſeiſed in Fee at the Time of the Releaſe, becauſe nothing ſhall be taken not denied by the Infant. 44 Aſſ. 28.

16. In an Aſſize of a Rent againſt an Infant, if the Infant ſays not charged by the Deed, and this is found againſt him, yet it ſhall be inquired of the Seiſin and Diſſeiſin. (w) 26 Aſſ. 3. Dubitatur.

(w) Br. Aſſize, 259. S.C.

17. In an Aſſize againſt an Infant, if he pleads a Record, and fails thereof, yet he may plead to the Aſſize afterwards, for he ſhall not be concluded by his Plea. 26 Aſſ. 3.

18. In an Aſſize of a Rent-Charge againſt an Infant, if Iſſue be joined upon a Matter out of the Point of the Aſſize, and this is found againſt the Infant, yet it ſhall be inquired of the Circumſtances for the Benefit of the Infant. (x) 28 Aſſ. 51 agreed. (y) 52. adjudged, becauſe the Infant by his Conuſance, or nien dedire, cannot be adjudged a Diſſeiſor.

(x) Fitz. Aſſize, 262. S.C. Br. 291. S.C. (y) Br. Aſſize, 292. S. C.

19. So in an Assize against Baron and Feme, if the Feme being received upon the Default of her Husband, joins Issue upon a Matter out of the Point of the Assize, and this is found against her, yet it shall be inquired at large. 28 Ass. 52. per Fish.

(P) How the Inquiry shall be.

1. IN an Assize by an Infant, if the Tenant pleads a Matter in Bar, and the Assize is awarded at large to inquire of the Circumstances, because the Plaintiff is an Infant, yet the Assize ought to inquire of the Matter alledged in the Bar by the Tenant, or otherways this is erroneous. (a) 31 Ass. 18. 22. adjudged, 32 A. 4. (b) 18 Ass. 11.

(a) Br. Assize, 324. S. C. Br. Error, 126. S. C. (b) Fitz. Process, 24. S. C.

2. And they ought first to inquire of the Bar. 32 Ass. 4. 18 Ass. 11.

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3. In an Assize by an Infant, if the Tenant pleads in Bar, upon which the Assize is awarded to inquire of the Circumstances, the Assize ought to inquire for the Advantage of the Tenant, as well as for the Plaintiff, of more than he hath comprehended within his Bar, if it be in Fortification of the Bar, because, altho' the Tenant hath not pleaded it in his Bar, yet he might have pleaded it in his Rejoinder, if the Plea had been of the Plaintiff, and so the Assize had not been awarded at large. (c) 31 Ass. 18. 22 adjudged.

(c) Br. Assize, 324. S. C. Br. Error, 126. S. C.

4. But it seems the Jury is not bound to inquire of such a Thing which the Tenant could not have pleaded in his Rejoinder without a Departure.

5. When a Bar is pleaded, in an Assize by an Infant, and the Assize is awarded at large to inquire of the Circumstances, when the Assize hath inquired of the Bar, if they find this against the Plaintiff, they ought to inquire whether he hath other Title. 32 Ass. 4.

6. In an Assize by an Infant, if the Tenant pleads a Fine of the Ancestor of the Plaintiff, or other Matter of Record, and the Plaintiff makes Answer as he ought, this being a Matter of Record, and upon this the Assize is awarded at large, because the Plaintiff is an Infant, the Assize ought to inquire of the Title first. 28 Ass. 2.

7. And if they find the Title against the Infant, they shall inquire whether he hath other Title. 28 Ass. 6. Curia.

(a) (b) Pleading.

The Declaration or Plaint.

Of the Plaint or Declaration in general.

1. IF the Writ of Assize be *de libero tenemento*, the Demandant may make his Plaint both of Land and Estovers, tho' for Land an Assize lies by the Common Law, but for Estovers by the Statute of *West.* 2. *Cap.* 25. 8 *Co.* 47. b.

(a) The Defendant may pray Oyer of the Writ and Count. 2 Bulst. 160. 3 Mod. 273. (b) For the Manner of arraigning an Assize, vide 3 Mod. 273. 1 Keb. 3. Pl. 6.

Of Certainty in the Plaint or Declaration.

1. IT is a common Learning, that in an Assize the Plaint (a) need not be so certain as in other Writs, because the Judgment is to (b) recover *per visum recognitorum*, and if the Plaint be but so (c) certain that the Recogni-

(a) Stil. 30. like Point, per Roll. Ch. Justice. (b) So tho' by Default, and the

cognitors may put the Demandant in Possession, it is sufficient. *Pasch.* 7 *Ed.* 6. *Dier* 84. b.

Damages released, for by Intendment they had the View before the Assizes, Heydon and Godsole, & al' 2 Bulst. 159. Godb. 247. Cro. Jac. 334. (c) But a Plaint de uno tenemento is not good. Stil. 77.

2. For in an Assize the Plaint may be *de annuo redditu unius robæ vel* 20 *s.* Dier 84. b.

3. In an Assize of Rent in *D.* the Tenant cannot plead that in the said County there are (d) two D's without any Addition to distinguish them, because the Plaintiff shall recover per *visum juratorum*. *Jenk. Rep.* 33. by all the Judges of *England*.

(d) So if two D's. and none without Addition, per Dier, 84. b.

4. In an Assize for an Office newly erected and constituted, the Demandant in his Plaint must shew what Fee or Profit is granted for the Exercise thereof; for this Office cannot have a Fee or Profit appurtenant to it as an ancient Office may, and for an Office without Fee or Profit no Assize lies. *Jehu Webb*'s Case. *Mich.* 6. *Jac.* 8 *Co.* 49. b. *per Curiam.*

5. But in an Assize for an ancient Office, the Demandant in his Plaint need not shew what Fee or Profit is belonging to it, for it shall be intended there is some Fee or Profit. *Mich.* 6. *Jac. Jehu Webb*'s Case. 8 *Co.* 49. b. adjudged.

Title therein.

1. (a) IN an Assize for a Rent-Charge or Seck, the Demandant must make a Title in his Plaint. *Jenk. Rep.* 42.

(a) Dier, 85. b. S. P. 6 Co. 56. b. S. P. appears.

2. Otherways in an Assize for Land, for there Possession, without any other Title, is (b) sufficient. *Jenk. Rep.* 42.

(b) Where, in a Writ of Entry, in Nature of an Assize, the Demandant counted of a Gift in Tail to himself, and of his Seisin and Disseisin, but was compelled to declare upon a Seisin and Disseisin only, because the ancient was that Form. vide 2 And. 100.

3. In an Assize for a Portion of Tithes, the Demandant in his Plaint must make a Title, for the Seisin only is not sufficient, no more than in the Case of a Rent, or other Profit in the Soil or Fee of another, which commences against common Right, for in all these Cases of Necessity, the Commencement thereof must be alledged by him who will make Title thereto, whether he be privy or a Stranger, for it is against Reason to charge the Inheritance or Freehold of another, without shewing some substantial Foundation thereof. *Pasch.* 7 *Ed.* 6. *Dier* 85. adjudged.

4. In an Assize for an Office, the Demandant in his Plaint (c) must set forth a Title. *Hill.* 1 *Will.* & *Mar.* between *Savier* and *Lenthal.* 3 *Mod.* 273. *per Curiam*, and the Demandant actually obliged so to do.

(c) Vide Dier, 114. Pl. 63. 149. Pl, 81. 152. Pl. 9. 8 Co. 45. b.

(a) (b) (c) (d) Plea.

(a) Doctrina placitandi. Pl. 15. vid.

(b) For foreign Pleas in an Assize, and the Adjournment thereof, vide 1 Roll. Abr. 131.

What Pleas may be pleaded in an Assize, and the Manner of pleading them.

1. (e) IF in an Assize the Tenant pleads that the Demandant leased for Life to the Tenant, saving the Reversion to himself, this is a good Plea. *Co. Lit.* 228. b. (f) So in an Assize the Tenant may plead that the Demandant leased for Years to the Tenant, saving the Reversion to himself, but here, and in case of a Tenancy, by Statute or Elegit, the Tenant (g) shall not plead *Assisa non, &c.* but justify by Force of the Lease, and so conclude, *& sic sine injuria.* Co. Lit. 228. b. 229. a.

(c) Where if one Defendant pleads, no Tenant of the Freehold named in the Writ, and this is found, the Writ shall abate quoad all. Cro. El. 559.

(d) Where he that

that pleads a Record, and fails, shall be adjudged a Disseisor, and what Punishment he shall have, vide West. 2. Cap. 25. and the Exposition, 2 Inst. 411, 412. &c. (e) Jenk. Rep. 142. S. P. (f) Jenk. Rep. 142. S. P. Dier, 246. Pl. 71. like Matter. (g) Vide Kelw. 103. b. Dier, 207. Pl. 13. S. P.

(h) That this is his proper Plea, vide Dier 207. Pl. 13.

2. And in that Case, if no Tenant of the Freehold be named, the Defendant may plead, (h) no Tenant of the Freehold named in the Writ. *Co. Lit.* 229. a.

3. But in an Assize, if the Tenant pleads that he demised the Land to the Demandant for Years, this is no good Plea, because the Complaint is of the Disseisin of a Freehold, and the Tenant gives the Demandant no Colour to have an Assize, *Incerti temporis.* Kelw. 103. b.

(i) Kelw. 106. a. b. like Point, adjudged.

4. (i) In an Assize the Tenant pleads that he was seised until by *J. S.* disseised, and that he afterwards entred, and the Estate of the Plaintiff was mean between his Disseisin and Entry, this is no good Plea, for the Plaintiff might come to the Land by Descent or Feoffment, from one who was in by Descent, and so the Entry of the Tenant taken away, *Incerti temporis,* Kelw. 103. b.

(k) Kelw. 106. b. like Point.

5. (k) But if the Tenant pleads that he infeoffed *J. S.* upon Condition, and for Breach of the Condition re-entred, and the Estate of the Plaintiff was mean, this is a good Plea, because notwithstanding any Descent, he might enter. *Kelw.* 103. b. *per Curiam.*

(l) Kelw. 106. b. S. P. said.

6. So (l) if the Tenant pleads that his Tenant aliened in *Mortmain*, and that within a Year he entred, and that the Estate of the Demandant was mean between the Alienation in *Mortmain* and his Entry. *Kelw.* 103. b. *per Curiam.*

(a) (b) (c) (d) Pleas by the (e) Bailiff.

(a) Where the Defendant may plead by Bailiff or by Attorney, 1 Rol. Abr. 188.

1. IN an Assize the Bailiff cannot plead any Matter of Record, either in Bar, or to the Writ, for the Bailiff can plead no Matter or Plea out of the Point of the Assize, (f) nor any Thing which is not triable by the Assize, nor any Plea which he cannot conclude, and if it be not found *null Tort null* Disseisin. 2 *Inst.* 414.

(b) For this vide Doctrin. placitand. 48. 72. Lit. Rep. 70. (c) Jointenancy not pleadable by the express Words of the Stat' de Conjunction feoffatis, 34 Ed. 1. (d) Per 12 Ed. 2. Cap. 1. the Tenant may make an Attorney, but yet may plead by Bailiff if he will, as before that Act. (e) Where he may shew Matters generally, because he was not privy thereto. Kelw. 117. b. (f) Kelw. 117. b. S. P.

2. But the Bailiff may plead such Pleas as are triable by the Assize, as well those in Bar, as Dilatory. *Incerti temporis,* Kelw. 117. b. *nota.*

3. He may plead that the Demandant made a Feoffment to *J. S.* whose Estate his Master hath; for of this Feoffment it may be intended he had Notice by the Livery which was made thereupon. *Incerti temporis,* Kelw. 117. b. *nota.*

(g) Hob. 162. S. P.

4. (g) But he cannot plead that the Demandant released to his Master, because it shall not be presumed he had Notice thereof. *Kelw.* 117. b. *nota.*

5. But he may plead an Assignment of this Land to his Mistress in Dower, or that his Master had it in Exchange, for tho' the Assignment, or Exchange, lie not in his Conusance, yet the Entry, by Force of the Assignment or Exchange is notorious. *Kelw.* 117. b. *nota.*

6. Where the Bailiff pleads a Matter Dilatory, he concludes, *and if it be not found* null Tort null Disseisin. *Kelw.* 117. b. *nota.*

(h) Dier, 207. a. like Point.

7. (h) But otherways it is if he shews a Matter which sounds in Bar, for then his Conclusion must be, *and so my Master is* in fine injuria. *Kelw.* 117. b. *nota.*

Replication.

1. If in an Aſſiſe againſt two, they ſeverally take upon themſelves the intire Tenancy, and plead in Bar, and the Demandant ſhews how they are Jointenants, *&c.* yet he muſt anſwer to the Bars, becauſe it appears to the Court, that each of them is Tenant of a Moiety, for which he may well anſwer; then when he hath pleaded for the Whole, his Bar ſhall not be taken as void as to the Whole, but for his own Moiety good, and for the other void, *Incerti temporis*, Kelw. 117. adjudged.

Title.

Where the Demandant muſt ſet forth a Title in his Replication.

1. If in an Aſſiſe, the Tenant pleads in Bar, that his Father was ſeiſed, and died, and that he, as Son and Heir, entred, and gives Colour to the Demandant, and he replies, that he himſelf was ſeized, till by the Father of the Tenant diſſeiſed, and that he made continual Claim, and after the Death of the Father re-entred, and was ſeiſed till, *&c.* this is a good Replication, and yet his Title is founded upon his own Poſſeſſion only, *Incerti temporis.* Kelw. 103. a. adjudged.

2. (a) So if in an Aſſiſe, the Tenant pleads the Feoffment of *A.* the Demandant may reply, That he was ſeiſed, till diſſeiſed by *A.* who infeoffed the Tenant, upon whom he entred, and was ſeiſed till, *&c. Kelw.* 103. a. b. (a) Jenk. Rep. 16. like Point.

3. But if the Tenant pleads the Feoffment of the Demandant, and the Demandant replies, That after this Feoffment a Stranger was ſeiſed in Fee, and infeoffed the Demandant, *per quod* he was ſeiſed till by the Tenant diſſeiſed, this is no good Replication, without ſhewing how the Stranger came to this Land, for it ſtands indifferent to the Court, whether the Stranger came to the Land by Title or Diſſeiſin, and then it muſt be intended moſt ſtrongly againſt the Pleader; for when a Man is in by Right, as it is confeſſed the Tenant was, it ſhall not be intended without ſhewing to be rightfully out of him again, and the Demandant cannot make his Title at large, becauſe the Tenant in his Bar hath conveyed the Land by the Demandant, *Incerti temporis*, Kelw. 112. a. b. adjudged, but ſee the Books there cited *contra.*

4. But if the Demandant replies, That after the Feoffment a Stranger was ſeiſed, and died ſeiſed, and conveyed the Lands to himſelf, this had been a good Title, for the Deſcent binds every Body, and it is not material whether he that died ſeiſed came to the Land by Diſſeiſin or otherways. *Kelw.* 112. a. b. *per Curiam.*

5. So if the Demandant replies, That after the Feoffment, the King was intituled by Office, and conveyed the Lands to the Demandant, for by the Office every one is bound. *Kelw.* 112. a. b. *per Curiam.*

Fol. 280.

(a) (b) (c) Attaint.

(A) Upon what (d) Inqueſt it lies.

(e) No Attaint lies upon an Inqueſt of Office.

1. IN an Action againſt Tenant in Tail, if he makes Default, and he in the Reverſion prays to be received, ſuppoſing him to be Tenant for Life, which is counterpleaded, upon which they are at Iſſue,

(a) For the Original of the Word, vide Co. Lit. 394. b.

(b) Whether an Attaint lay at Common Law, vide 2 Inſt. 130. and whether in a Plea real, becauſe he might

have falsified in an Action of a higher Nature, vide 2 Inst. 237.

Issue, and it is found against him in the Reversion, and the same Inquest taxes the Damages against the Lessee, no Attaint lies upon this Verdict, because the Judgment against the Lessee is given upon the Default, and so this is but an Inquest of Office for the Damages, contra 39 E. 3. 8. b.

(c) Where it lies against the Executors of the Party for whom the Judgment was given, vide Co. Lit. 294. b. Austin and Baker, Moor 17. Pl. 60. N. Bend. Pl. 132. Kelw. 210. a. 1 And. 24, 25. Dier 201. Pl. 65. (d) Yelv. 22. vide. (e) Co. Lit. 355. b. same Rule. Vaugh. 153. same Rule. 10 Co. 119. a. same Rule. 11 Co. 6. a. same Rule.

(f) Co. Lit. 355. a. S.P. by some, 355. b. S.P. by others, contra.

2. (f) An Attaint lies upon a Verdict before the Sheriff in a Writ of Inquiry of Waste, (g) 41 E. 3. 8. because by the Statute the Sheriff is Judge in this. (h) 48 E. 3. 19. (i) 2 H. 4. 3. b. 7 H. 4. 38. b. contra. (k) 3 H. 6. 29.

(g) Br. quod ei deforceat, 2. S. C. (h) Br. Attaint, 21. S. C. (i) Fitz. Attaint. 13. S. C. Br. Enquest, 9. S. C. (k) Br. Attaint. 105. S. C. Fitz. 63. S. C.

(l) Moor 184. Pl. 328. S. P. dubitatur, & vide Reg. 208. b. cited there.

3. (l) An Attaint lies upon an Inquest before the Sheriff in a Disseisin, for the Sheriff is Judge in this, (m) 2 H. 4. 3. b. Dubitatur, (n) 40 Ass. 23.

(m) Br. Enquest 9. S. C. (n) Br. Attaint. 79. S. C. Br. Redisseisin 5. S. C.

4. So if an Issue of nient comprise be tried by the first Jurors, an Attaint lies thereupon. 4 H. 6. 28. b.

(o) Fitz. Attaint, 13. S. C. Br. Enquest 9. S. C. ment 7. S. C.

5. But no Attaint lies upon an Inquest of Office. (o) 2 H. 4. 2. b. (p) 3 H. 6. 29. b. (q) 19 H. 6. 8. 10. b. 21 E. 3. 57. (r) 40 Ass. 23.

(p) Br. Attaint. 105. S. C. Fitz. 63. S. C. (q) Fitz. Damages, 24. S. C. Br. Abridg- (r) Br. Attaint, 79.

(s) Br. Attaint 26. S. C.

6. No Attaint lies upon a Verdict given by 24 Jurors, as it does not lie upon a Verdict in an Attaint. (s) 8 H. 4. 23. b.

(t) This is misprinted in the Original, and should be 6.

7. It does not lie upon a Verdict given in an Attaint for the Thing of which the Jury is attainted. 12 H. 6. (t) b.

8. But if they find any collateral Matter præter the Attaint, it lies thereupon, and they shall be attainted by 48. 12 H. 6. 6.

(u) This is misprinted in the Original, and should be 6.

9. In a Writ of Right, if the grand Assise be taken upon the meer Right, no Attaint lies thereupon. 12 H. 6. (u) b.

10. But if the Issue be taken upon a collateral Matter, and not upon the meer Right, an Attaint lies thereof. 12 H. 6. 6.

(x) Fitz. Attaint. 15. S. C. Br. 27. S. C.

11. In an Assise, if they are at Issue upon the Plea in Bar, and that is found for the Plaintiff, and it is enquired over of the Seisin and Disseisin, if the Disseisin be found by a false Verdict, an Attaint lies thereupon. (x) 11 H. 4. 27.

(y) 10 Co. 119. a. S. P. (z) Br. Attaint, 126. S. C.

12. (y) If a Recovery be in a Quare impedit by Default, and a Writ issues to the Sheriff to inquire of the Damages and Plenarty, no Attaint lies upon this Inquest, for it is but an Inquest of Office. (z) 11 H. 4. 80. b.

13. But it seems it is otherways if the Inquiry be by the same Inquest that inquired of the Issue in the Quare impedit; (for as it seems this is all one with the Inquiry in an Assise) Contra. Co. 10. Cheyny 119.

(a) 2 Inst. 662. S. P. (b) Br. Attaint. 67. S. C.

14. (a) If a Deed with Witnesses be pleaded, and the Inquest passes in the Affirmative, no Attaint lies thereof. 12 H. 6. 6. because the Witnesses have adjudged this to be true. (b) 23 Ass. 11. per Thorpe, 11 E. 3. Attaint 26. per Shard, 3 E. 3. Itinere North. 50 per Clai.

(c) Co. Lit. 6. b. S. P. because Witnesses cannot

15. (c) But otherways it is if it passes in the Negative and Disaffirmance of the Deed. 40 Ass. 23. per Fitzjohn, for the Witnesses ought to

testify a Negative, but an Affirmative. 2 Inst. 662. S. P.

to teſtify nothing but what they know certainly, Scilicet, what they ſaw and heard. (d) 23 Aſſ. 11. per Thorpe, contra 11 E. 3. Attaint 26. per Shard.

(d) Br. Attaint. 67. S. C.

16. If a Man be indicted of a Treſpaſs, and found guilty by another Inqueſt, he ſhall not have an Attaint nor Petition in Nature of an Attaint, becauſe he is in a manner found guilty by 24. 10 H. 4. Attaint 60, 64.

Fol. 281.

17. (e) But if he be acquitted, the King ſhall have an Attaint. (f) 10 H. 4. Attaint 60, 64.

(e) 1 Jon. 16. like Point, per Vaugh.

con. (f) Vaugh. 146. S. C. cited by Vaughan, and ſaid there was no other Caſe or Opinion of ſuch an Attaint in all the Law, and that for this there was no Warrant in Law, but other ſpecious Authority againſt it.

18. If a Man be indicted and found guilty of Felony, and the Execution reſpited for a certain Cauſe, or he is delivered to the Ordinary, he ſhall not have any Attaint, becauſe he is found guilty by 24, contra 10 H. 4. Attaint 60, 64.

19. Where the King is ſole Party againſt the Subject, and the Jury find for the King, no Attaint lies. *Trin.* 32 *Eliz.* 4 *Leon.* 46. By all the Barons of the Exchequer.

20. (g) But it is otherways where the Suit is *tam pro domino Rege quam pro ſeipſo*, *Trin.* 32 *Eliz.* 4 *Leon.* 46. by all the Barons.

(g) Cro. Eliz. 309. S. P. appears to be

admitted, viz. that the King alone may have an Attaint, for he cannot join with the Party. 2 Jon. 14. S. P. cited per Maynard Serjeant, arguendo.

(B) For what Cauſe.

1. An Attaint does not lie for not finding a Divorce, becauſe that does not lie in their Conuſance, being a Record. (a) 7 H. 4. 23. adjudged.

(a) Br. Attaint. 24. S.C.

2. No Attaint lies for Coſts. (b) 12 E. 4. 5. b.

(b) Br. Attaint 90. S. C.

3. In Debt, upon a Contract in one County, where the Contract was made in another, if the Jury do not find this but againſt the Plaintiff, no Attaint lies. 4 H. 6. 2. b.

4. In an Aſſiſe, if the Tenant pleads null tort, &c. if a Releaſe which paſſes the Eſtate be ſhew'd in Evidence by the Plaintiff, if the Jury does not find this, tho' it was not pleaded, yet an Attaint lies. (c) 26 Aſſ. 12.

(c) Br. Attaint. 68. S. C.

(C) (a) (b) In (c) what (d) Court it lies.

(a) In the King's Bench or Common Pleas, upon a falſe Verdict given before the Mayor and Bailiffs

1. If a Man recovers in an Aſſiſe in Oxford, and after the Record is removed in (e) Bank, the Attaint ought to be brought there, and in no other Place, becauſe the Record is there. 21 E. 3. 10. b.

of Lincoln, per 13 Rich. 2. cap. 18. (b) In the Huſtings of London, upon a Verdict given in any of the Courts of the City. 11 H. 7. cap. 21. & per 23 H. 8. cap. 3. an Attaint in this Caſe may be brought upon either of the Acts. But vide 37 H. 8. cap. 5. Citizens ſhall not be compelled to appear out of the City for the Trial of any Attaint, notwithſtanding 23 H. 8. cap. 3. (c) No Conuſance can be granted upon any Attaint, becauſe all Attaints are to be taken either before the King in his Bench, or before the Juſtices of the Common Pleas, and in no other Courts, &c. Co. Lit. 294. b. (d) A Verdict and Judgment given in the Exchequer, was removed by Certiorari into the Common Pleas, and an Attaint brought there, Auſtin and Baker, Dier 201. Pl. 65. Moor 17. Pl. 60. N. Bendl. Pl. 132. Kelw. 210. a. vide Dier 81. Pl. 65. Cro. El. 645, 646. in which Book, becauſe the Record was not removed in Banco, it was adjudged againſt the Plaintiff, and the Court would not grant him a Day to bring in the Record, and ſaid the Plaintiff, at his Peril, ought to have brought it in before, & vid. Cro. El. 371, 372.—How to be removed, vide 1 Rol. Abr. 394. Letter A. Margin.——But if an Attaint is brought upon a Judgment in Banco, and thereupon the Plaintiff aſſigns the falſe Oath, and the Defendant pleads bonum & legale fecerunt ſacramentum, and thereupon they are at Iſſue, and after the firſt Record is removed by a Writ of Error, yet the Proceſs againſt the grand Jury, and the Party, ſhall not be ſtaid, but the Court may proceed. Dier 284. Pl. 35. (e) All Attaints muſt be taken in the King's Bench, or Common Pleas, and not elſewhere, but a Niſi prius may be granted, &c. 23 H. 8. cap. 3.

(D) For (a) what (b) Cauſes it lies.

(a) Where it lies for finding falſly a Matter of Form only, the principal Matter being true. Kelw. 67. b.

1. (c) If a Jury find a ſpecial Matter which is not Part of their Charge, nor pertinent to the Iſſue, no Attaint lies for this. Co. 11. Pridle and Napper, 13.

(a) Where the Evidence of a Witneſs is falſe in an immaterial Part, the Jury need not give him Credit in any other Part. Cro. El. 310. (c) Hob. 53. S. P.

(d) Fitz. Eſtoppel, 1. S. C.

2. An Attaint does not lie for a Thing which is but Surpluſage (d) 40 E. 3. 38. b.

3. In an Aſſiſe of Mort d'Anceſter, if the Defendant pleads a Feoffment in Fee to him and the Anceſtor of the Demandant, and that he ſurvived the Anceſtor, &c. and the Demandant pleads that his Anceſtor died ſole ſeiſed, and traverſes the Feoffment modo & forma, and the Inqueſt finds that the Feoffment was made to them in Fee, tho' the joint Eſtate is ſufficient to abate the Writ, without ſaying it was in Fee, yet he is put to his Attaint, and in this Caſe he may have an Attaint, for this will eſtop him to ſay the Survivor had but for Life. 46 E. 3. 8. F. Eſtoppel 199. per Curiam.

4. An Attaint does not lie for that which was not given in Evidence. (e) 43 Aſſ. 41.

(e) Br. Attaint, 82. S.C. Br. Verdict, 51. S. C.

5. In an Aſſiſe, if the Jury find a Feoffment of Land, if this was upon Condition, they ought to find the Condition, otherways an Attaint lies, tho' it was not pleaded, for this is incident upon the general Iſſue, if it was given in Evidence; but otherways it is, if the Condition was not given in Evidence. 43 Aſſ. 41.

(f) Fol. 282.

(g) Br. Attaint, 82. S. C. Br. Verdict. 51. S. C.

6. If the Diſſeiſee enters upon the Diſſeiſor, and infeoffs the Diſſeiſor, and after brings an Aſſiſe againſt the Diſſeiſor, if the Feoffment be not pleaded, nor given in (f) Evidence, and the Jury does not find it, yet no Attaint lies, contra. (g) 43 Aſſ. 41. becauſe they ought to take Notice of the Livery.

7. In an Aſſiſe againſt a Diſſeiſor, who hath a Releaſe of the Diſſeiſee, if he doth not plead this, nor give it in Evidence, if the Jury do not find it, no Attaint lies. 43 Aſſ. 41.

(E) The Default of the Court.

(a) Cro. El. 309. S. P. per Curiam.

(b) But following the Direction of the Court will not bar an Attaint, for if the Judge declares the Law to the Jury erroniouſly, and they find accordingly, tho' this may excuſe them from the Forfeitures, yet, however, upon the Attaint the Judgment is to be reverſed, and a Man ſhall not loſe his Right by the Judge's Miſtake of the Law. Vaugh. 145. (c) Br. Attaint 82. S. C.

1. (a) In an Aſſiſe, if the Jury find a (b) ſpecial Verdict, and refer it to the Court, whether upon the Matter the Tenant be a Diſſeiſor, and upon the Matter the Court adjudge him to be a Diſſeiſor, tho' in Law he be no Diſſeiſor, yet no Attaint lies againſt the Jury, becauſe it is not their Fault, but the Fault of the Court. (c) 43 Aſſ. 41.

2. But if the material Matter which they found, upon which they refer'd the Matter in Law to the Court, be falſe, an Attaint lies thereupon. 43 Aſſ. 41.

(F) At what Time it lies.

1. AN Attaint lies before Execution sued, for the Danger of the Death of the petit Jury in the mean Time. contra 12 Hen. 6. 6. admit per Issue.

2. As if a Man recovers Land against another, he shall have an Attaint before Execution sued, for the Danger of the Death of the petit Jury. 41. Ass. Attaint 27 per Wich.

3. The Vouchee shall have an Attaint before Execution in Value sued against him, for the Cause aforesaid. 41 Ass. Attaint 27.

4. So if in a Precipe against a Lessee, the Lessee vouches B. in the Reversion, who enters, and vouches C. and the Demandant counterpleads that C. nor any of his Ancestors, &c. and this is found for the Demandant, B. shall have an Attaint before Execution in Value sued against him. 41 Ass. Attaint 27.

5. After the Death of any of the petit 12, no Attaint lies, contra 2 H. 4. 18.

6. If one Man recovers against another in Trespass, the Defendant shall have an Attaint before Execution sued, 41 Ass. Attaint, 27. Tempore, E. 1. Attaint 70. adjudged.

7. If a Deed be pleaded in Bar, in which there are Witnesses, and this is tried to be his Deed, and after the Witnesses die who were joined to the Inquest, the Party shall not have an Attaint after. 26 H. 6. Attaint 3. per Curiam.

(G) Who shall have it, and who not.

1. The King shall have an Attaint upon a false Verdict in a Quare impedit. (a) 42 Ed. 3. 26. b. (a) Br. Attaint, 15. S. C. Fitz. 18. S. C.

2. The Vouchee may have an Attaint. (b) 8 H. 4. 4. b. (b) Br. Attaint, 16. S.C.

3. The Vouchee shall have an Attaint upon a false Verdict given between him and the Tenant upon the Deed of lien denied. (c) 22 Ed. 3, 4. b. (c) Fitz. Brief, 380.

(H) In respect of the Estate.

1. (a) IN a Quare Impedit against two, they make several Titles, and it is found for one Defendant, and that the other disturbed him, the other may have an Attaint upon this, for by this he loses the Presentation. (b) 45 Ed. 3. 14. (a) Vide Godb. 378. (b) Br. Quare Impedit 35. S. C.

2. (c) He who is Party to the Recovery shall have an Attaint, altho' he was not (d) Tenant at the Time, of the first Writ brought, nor when the Judgment was given. 41 Ed. 3. 19. (d) Fol. 283. (c) The Reversioner, (by the Common Law) after the Death of Tenant for Life. Dier, 1 Pl. 5. 3 Co. 4. a. b. —— and during the Life of the particular Tenant. per 9 Rich. 2. Cap. 5.

3. (e) In an Action if Jointenancy be pleaded with a Stranger, and the Stranger joins with the Tenant in the Maintenance thereof, and this is found against them, yet the Stranger shall not have any Attaint, because he is not Party to the Writ. (f) 48 Ed. 3. 17. b. (e) Godb. 378. S. P. arguend. but Jones Justice con. 1. Rol. Rep. 243. S. P.

4. In an Action against A. and B. it is found against them upon several Issues, A. shall not have an Attaint upon a false Verdict against B because he was not Party to this Issue. (g) 11 H. 4. 27. (f) Br. Attaint, 20. S.C.

5. In Trespass against two, if one pleads a Release, upon which they are at Issue, and the other pleads the same Plea, as Servant to him, if it be found against the Master, the Servant shall not have an Attaint thereupon, for he is not Party to his Issue. (h) 11 H. 4 30. b. (g) Fitz. Attaint, 19. S.C. (h) Fitz. Trial, 37. S. C.

6. In Waſte againſt two, if one makes Default, and the other pleads, and it is found againſt him, the other who made Default, ſhall not have an Attaint thereupon, becauſe he is not Party to the Iſſue. (i) 12 H. 4, 5. b.

(i) Br. Attaint, 29. S. C. Br. Waſt. 69. S. C.

7. If the Villein be found free in an homine replegiando againſt the Lord, and after the Lord dies, the Heir ſhall have an Attaint. (k) 19 H. 6. 18. b.

(k) Fitz. Trial, 6. S. C.

8. If the Villein be found free, by a falſe Verdict, in an Action of Treſpaſs brought by him againſt the Lord, and after the Lord dies, his Heir ſhall have an Attaint, tho' the Verdict was in a perſonal Action, and for Damages only, becauſe this takes away his Inheritance in the Villein. Contra (l) 19 H. 6. 18. b.

(l) Fitz. Trial, 6. S. C.

9. But he ſhall not have an Attaint for the Damages.

10. But in this Caſe the Executors of the Lord ſhall have an Attaint for the Damages, becauſe they belong to them. Contra. (m) 19 H. 6. 18. b. becauſe they loſe no Damages.

(m) Fitz. Trial, 6. S.C.

11. (n) If in Treſpaſs againſt two, one pleads not guilty, and this is found againſt him, and exceſſive Damages given, and after the other Defendant comes and pleads not guilty, and this is found againſt him alſo, he may have an Attaint upon the firſt Verdict, becauſe bound by the Damages given thereby, and tho' he is a Stranger to the Iſſue, yet he is privy in Charge. *Trin.* 10. *Jac.* Sir *John Heydon's* Caſe, 11 *Co.* 5. b. reſolved *per Curiam.*

(n) 10 Co. 119. S. P. Hob. 66. S. P. Cro. Jac. 351. bis S. P. 1 Rol. Rep. 31. S. P.

(I) In what Things it may be aſſigned.

1. A Man cannot aſſign ſuch Thing for a falſe Oath, which was admitted true by him in the firſt Action. (a) 11 H. 4. 27.

(a) Fitz. Attaint, 19. S. C. Br. 27. S. C.

2. In an Aſſize againſt two, if one pleads the Releaſe of the Plaintiff in Bar, by which he admits the Plaintiff to be well named, if the other pleads a Miſnomer of the Plaintiff, and all is found for the Plaintiff, if he who pleaded the Releaſe brings an Attaint only, he cannot aſſign the falſe Oath in the Miſnomer, but otherways if both had aſſigned it, and brought the Action. (b) 11 H. 4. 27.

(b) Fitz. Attaint, 19. S. C. Br. 27. S C.

3. So it had been if one Defendant had ſaid that the Plaintiff was a Feme Covert, and the other ut ſupra. 11 H. 4. 27.

4. So if one pleads a Releaſe, and accepts the Tenancy of the whole, and the other ſays, that his Anceſtor died ſeiſed, and they in ſans tort in an Attaint by him who pleaded the Releaſe, he cannot aſſign that the Anceſtor of the other died ſeiſed, and he Tenant againſt his own Acceptance. (c) 11 H. 4. 27.

(c) Fitz. Attaint, 19. S. C.

5. In Treſpaſs, if the Defendant pleads a Miſnomer of the Town, upon which they are at Iſſue, and the Jury finds this for the Plaintiff, and that the Defendant is guilty of the Treſpaſs, and aſſeſs Damages, the Defendant cannot aſſign the falſe Oath, in that he was not guilty of the Treſpaſs, for this was admitted by his Plea. 41 E. 3. Attaint 23. adjudged, and not Part of their Charge.

Fol. 284.

(K) How the falſe Oath is to be aſſigned.

1. IN an Aſſiſe, if the Verdict paſs againſt the Plaintiff, he may have an Attaint, and aſſign the falſe Oath for not finding a Releaſe, or other ſpecial Matter, which proves that he had Title to the Land, and ſo the Tenant a Diſſeiſor, without aſſigning the falſe Oath in the Principal, ſcilicet the Diſſeiſin, tho' all the Matter amounts but to this, that he was diſſeiſed, for he may aſſign it in the particular Cauſes of the Judgment. 26 Aſſ. 12.

2. In an Aſſize, if the Inqueſt find a ſpecial Verdict, and refer it to the Court, and upon the Matter found, the Court gave Judgment againſt the

the Tenant, and he brings an Attaint, he may assign the false Oath severally in every or any Point of the special Verdict, without assigning this in the principal Point, scilicet the Disseisin, for by the Verdict it is not plainly found that the Tenant disseised the Plaintiff, but the Justices adjudge it a Disseisin, so that the Disseisin which is adjudged, is the Act of the Judges, and the Matter found is the Act of the Jury, so that it is more natural to assign it in that which was done by the Jury, than in that which is done by the Justices. (a) 27 Ass. 61. per Curiam adjudged.

(a) Br. Attaint, 69. S. C.

(L) How it may be

1. (a) IF a Verdict be found, that he non dedit, and an Attaint is brought thereupon, the Plaintiff may assign the false Oath in omnibus quæ versus ipsum dixerunt, without assigning it in special, as to say in hoc & hoc, &c. for the Particulars appear by the Record. (b) 9 E. 4, 5. b. adjudged Attaint 7.

(a) Kelw. 204. b. S. P. tho' brought upon the Stat. Dal. 32. S. P. though brought upon the Statute, because the Certainty appears by the first Record. (b) Br. Attaint, 86. S. C.

2. In an Attaint, if the Plaintiff assigns the false Oath in excessive Damages, he ought to assign it in this Manner, Scilicet, that the Goods, for which the Damages were given, were but of the Value of 40 s. and that in the Damages given over this Sum they made a false Oath. (c) 12 E. 4, 5. b.

(c) Br. Attaint, 90. S. C. Fitz. 11. S. C.

(M) What subsequent Act will take away an Attaint.

1. IF a Jury give excessive Damages, and the Court abridge them, and make them reasonable, no Attaint lies against the Jury, tho' they have made a false Oath, for such Abridgment is made upon the Prayer of the Party, ergo, he shall not have an Attaint also, and now also he is not at any Prejudice thereby. (a) 9 H. 6. 2. b.

(a) Fitz. Judgment, 10. S. C.

2. So if the Court increases the Damages, and makes them reasonable, whereas before they were small, for the Smalness before the Increase no Attaint lies for the Cause aforesaid. (b) 9 H. 6. 2. b.

(b) Fitz. Judgment, 10. S. C.

3. So if the Jury give excessive Damages, and after the Plaintiff to whom they are given, releases Part of the Damages, by which the rest of the Damages which remain are reasonable enough, no Attaint lies, for now the Cause of the Grief of the Defendant is taken away. (c) 12 E. 4, 5. (d) 14 H. 7. 5. per Fin.

(c) Fitz. Attaint, 11. S. C. Br. 90. S. C. (d) Br. Attaint, 41. S. C.

(N) What shall be a good Bar.

Fol. 285.

1. (a) IF the Plaintiff in an Attaint after Appearance be nonsuit, this will be a good Bar in a new Attaint. (b) 22 E. 3. 7. (c) 32 Ass. 13. (d) 19 Ass. 13. adjudged. 20 E. 3. Attaint 43.

(a) Vide 23 H. 8 Cap. 3. Par. 2. (b) Fitz. Darrein Presentment, 1. S. C. (c) Br. Attaint, 75. S. C. Br. Nonsuit, 39. S. C. Br. Peremptory, 29. S. C. (d) Br. Attaint, 63. S. C. Br. Peremptory, 29. S. C.

2. If the Process in an Attaint be discontinued after Appearance and Assignment of the Attaint, by which the Writ abates, this will be no Bar of a new Attaint. (e) 32 Ass. 13. adjudged.

(e) Br. Attaint, 75. S. C. Br. Nonsuit, 39. S. C.

3. It

3. It is not any Bar of an Attaint to alledge a Diſcontinuance in the Proceſs of the Recovery, for this is a Record and Judgment in Force till it be reverſed, and the Defendant had Execution thereupon. (f) 32 Aſſ. 12.

(f) Br. Attaint, 74. S. C.

4. In an Attaint brought by the Iſſue in Tail upon a Verdict in a Formedon againſt his Anceſtor, the Releaſe of the Anceſtor is not any Bar, (g) for the Attaint is intailed as well as the Land it ſelf. 14 E. 3. Attaint 41. adjudged.

(g) Co. Lit. 20. a. S. P.

(O) (a) What Pleas the petit Jury may plead.

1. (b) The petit Jury can plead no Plea, but ſuch as may excuſe them of the falſe Oath. (c) 12 H. 6. 6.

(a) Per 23 H. 8 Cap. 3. after the Plaintiff hath aſſigned the falſe Oath, the petit Jury, if they be the ſame Perſons, and the Writ, Proceſs, Return and Aſſignment good, ſhall have no Anſwer, but only that they made a true Oath, unleſs the Plaintiff in an Attaint upon the ſame Verdict, hath before been Nonſuit, Diſcontinued, or had Judgment againſt the petit Jury. (b) Kelw. 130. a. ſame Rule, arguendo. (c) Fitz. Attaint, 61. 65. S. C.

2. The petit Jury cannot plead that the Plaintiff in the Attaint was Tenant after the Attaint purchaſed. 12 H. 6. 6.

3. (d) In an Attaint upon a Verdict in Treſpaſs, one of the petit Jury pleaded an Award between the Plaintiff and Defendant, and whether this was a good Plea. *Incerti temporis, Kelw.* 130. *Dubitatur.*

(d) Vide 6 Co. 44. a. S. P. viz. that it is a good Plea, yet Q. & vide Dier 75. Pl. 27.

(P) (a) Evidence.

1. (b) In an Attaint, more Evidence cannot be given (c) to attaint the firſt Jury, than was given to the firſt Jury, for no Default was in the firſt Jury if it was not ſhewn to them. D. 34 H. 8. 53. 14 4 El. 212. 2 Ma. 129.

(a) Vide where in Ejectment no Evidence was given as to the Damages, nor Regard had thereto by the Jury, and therefore for the exceſſive Damages no Attaint lay. Dier 369. Pl. 55. (b) Godb. 271. per Cur'. arguendo, Hob. 227. S. P. Dier 53. Pl. 14, 15, 16. (c) But the Defendant may give more Evidence in Affirmance of the firſt Verdict. Dier 53. Pl. 14. agreed per Cur'. But then the Plaintiff in the Attaint may have an Anſwer thereto, and diſprove it as well as he can, but he cannot give other Evidence, nor inforce the firſt Evidence with more Matter than was given and diſcloſed before. Dier 212. Pl. 34.

2. (d) In an Attaint the Plaintiff cannot give in Evidence a Record which was not given to the petit Jury, for they were not bound to find it, if it was not ſhewn to them. (e) 7 E. 4. 29. b. per Lit. 8 E. 4. Attaint 9.

(d) Dier 129. Pl. 65. like Point. (e) Br. Attaint, 87. S. C.

(Q) (a) (b) (c) (d) Judgment.

1. (e) If the petit Jury be convicted in an Attaint, the Judgment ſhall be, that they be out of the Law and Teſtimony, and their Goods and Chatels forfeited, and their Wife and Children thrown out of their Houſes, and their Lands and Tenements waſted and deſtroyed, and their Land ſeiſed into the King's Hand. 20 H. 7. 4. (f) 8 H. 4. 23. b. (g) 42 E. 3. 26. b. (h) 46 E. 3. 23. (i) 6 E. 4. 7. (k) 14 H. 7. 13. b Libro Forteſcue 26.

(a) The Puniſhment of Jurors for a falſe Verdict, by the Common Law, was ſo ſevere, that few or no Juries, upon juſt Cauſe, were convicted. 3 Inſt. 163. How this Severity hath been mitigated. vide 23 H. 8. Cap. 3. and Co. Lit. 294. (b) Where the Defendant ſhall be fined and impriſoned, if Party to the firſt Record, or elſe not. 8 Co. 60. a. (c) Coſts and Damages recovered againſt all the Jurors, Tenants and Defendants, per 11 H. 6. Cap. 4. (d) The Judgment upon an Attaint brought in the Huſtings of London. vide 11 H. 7. Cap. 21. (e) 3 Inſt. 163. S. P. 222, 223. (f) Fitz. Attaint, 14. S. C. Br. 26. S. C. (g) Fitz. Judgment, 92. S. C. (h) Br. Attaint, 18. S. C. (i) Br. Attaint, 86. 8. C. (k) Br. Attaint, 42. S. C.

2. Such Judgment in Effect throughout is given in an Attaint, by the Law of Scotland, quod vide Skene Regiam Majeſtatem, 20. b. 2 E. 2. Rot. finium Membrana 9. Fine for a Conviction upon an Attaint, for an Oath in an Aſſiſe of Novel Diſſeiſin, Tempore, E. 1.

3. If a Man recover in an Attaint, he ſhall be (l) reſtored to all that he hath loſt by the Verdict.

(l) If during the Life of the Tenant for Life, the Reverſioner recovers in an Attaint, the Tenant ſhall be reſtored to the Poſſeſſion and meſn Profits, and the Reverſioner to his Arrearages of Rent; but if the Tenant be dead, or of Covin with the Demandant, the Reverſioner ſhall, &c. per 9 Rich. 2. cap. 3.

4. If a Man recovers in an Attaint upon a Verdict in an Action, in which he hath loſt Land, he ſhall be reſtored to the Land again. (m) 50 Aſſ. 4. (n) 41 Aſſ. 18.

(m) Br. Attaint, 84. S. C.
(n) Br. Attaint, 80. S. C. Fitz. 58. S. C.

5. If a Man recovers in an Attaint upon a Verdict, in which he loſt Damages, he ſhall be reſtored to them.

7. (p) If a Man recovers in an Attaint, upon a Verdict in which he loſt Land, he ſhall be reſtored to the mean Profits. (o) 50. Aſſ. 4.

Fol. 286.

8. If a Man brings a Formedon, and the Tenant pleads a Releaſe, and it is found for the Defendant, for which the Demandant brings an Attaint, and the falſe Oath is found, he ſhall have Judgment to recover the Land. 8 E. 4. Attaint 8.

9. So if a Man brings Debt, and is barr'd, and he brings an Attaint, and it is found for him, he ſhall recover his Debt. 8 E. 4. Attaint 8.

10. If the Iſſue in Tail recovers the Land in an Attaint upon a Recovery againſt his Anceſtor, he ſhall recover the Iſſues of the Land from the Death of the Anceſtor. (q) 41 Aſſ. 18.

(o) Br. Attaint, 84. S. C.
(p) This, according to the Courſe of the Numbers, ſhould be 6. but there is no ſuch Number in the Original.
(q) Br. Attaint, 80. S. C.

(a) Attorney or (b) (c) (d) Guardian.

Fol. 287.

(A) What Perſon (e) ought to (f) (g) make a (h) Guardian.

(a) Per 21 Jac. cap. 13. After Verdict given in any Court of Record, Judgment ſhall not be ſtaid or reverſed, by reaſon the Plaintiff, in

1. (i) In an Action real and mixt againſt an Infant, he ought to appear by Guardian, and not by Attorney, P. 15 Car. B. R. between Lewis and Johns adjudged per Curiam in a Writ of Error, and the Judgment in an Ejectione firmæ in Banco, againſt the Infant Defendant, upon a Verdict had againſt him, reverſed for this Cauſe. Intratur, M. 13 Car. B. R. Rot. 266.

Ejectment, or other perſonal Action, being under Age, did appear by Attorney, and the Verdict paſs for him. (b) Muſt be aſſigned by the Court, and therefore if an Infant is ſued, the Plaintiff muſt move the Court to aſſign a Guardian to anſwer, &c. Stil. 369. and vide Bridg. 74. 1 Rol. Rep. 303. Palm. 252. (c) Where in the Common Pleas a Record of Admittance is made, but in the King's Bench it is only recited in the Count. J. S. per A. B. Guardian' ſuum ad hoc per Cur' ſpecialiter admiſſum, queritur, &c. 3 Co. 53. b. and vide 1 Sid. 173. 342. Cro. El. 158. 2 Inſt. 261. 3 Mod. 236. 1 Lev. 224. (d) The Appearance muſt be entred in the Name of the Infant, Scilicet pred' Katherina per J. S. Guardian' venit & dicit quod ipſa, &c. not quod ipſe, &c. 3 Mod. 230. (e) In Replevin, the Defendant being an Infant, appeared for 2 Terms by Attorney, and the 3d Term by Guardian, Ewer and Boyle. Moor 665. Pl. 908. for this Cauſe the Judgment reverſed. Palm. 229. cited. —But an Infant may appear by Guardian, and when he comes to full Age, he may make an Attorney in the ſame Suit, and this ſhall not be Error. Moor 665. ſaid. (f) The Court cannot appoint a Guardian, unleſs the Heir be in Perſon before them. 2 Leon. 189. (g) That the Guardian muſt put in a Warrant, vide 2 Inſt. 261. (h) The Courſe hath been to allow ſome of the Officers of the Court, &c. who by reaſon of their Skill, make the beſt Guardians and prochein Amys for the Advantage of the Infant. 2 Inſt. 261.—but 1 Sid. 424. per Keeling Ch. Juſt. if there be a Guardian appointed by the Father, or ex proviſione legis, as Guardian in Soccage, who acts accordingly, he only ſhall be admitted to ſue for the Infant, unleſs he hath miſdemeaned himſelf. (i) Godb. 382. S. P. admitted. 2 Leon. 189. S. P. adjudged.

2. (k) So in an Action perſonal, (l) againſt an Infant, he ought to appear by Guardian, and not by Attorney, becauſe he hath no Knowledge of his own Matter, or Underſtanding to chuſe a Man to plead

(k) Cro. Jac. 10. S. P. adjudged, and the firſt Judgment rever-

ſed accordingly, Dyd and Ayorton, S. P. admit. Yelv. 211. 1 Bulſt. 129. Cro. Jac. 254. 1 Brownl. 150.

plead well for him, and therefore the Court ſhall elect for him, and also because the Infant ſhall have an (m) **Action againſt his** (n) **Guardian, if he loſes by miſpleading.** M. 15 Jac. B. R. **between** (o) Weſtcot **and** (p) Cottne **adjudged, and a Judgment reverſed for this Cauſe.** Co. 8. Beecher. 58. b. Co. 9. Ab. Strata Mar. 30. (q) 1 H. 5. 6. (r) 22 H. 6. 31. b. Tr. 39. El. B. R. **between** (s) Sydburye **and** Raunt **adjudged in a Writ of Error upon a Judgment in an Action of Debt upon an Obligation.**

(l) But if the Guardian for the Defendant is admitted ad proſequend', this is erroneous, Simpſon and Jackſon. Cro. Jac. 641. Palm. 296. but an Admiſſion quod ſequatur, good in a common Recovery. 1 Sid. 446. 7. 1 Mod. 48. 2 San. 95. (m) Palm. 229. S. P. 2 Leon. 59. Cro. Jac. 641. 1 Mod. 49.— but no Action lies againſt the prochein Amy, for the Infant may reſort to his Action of a higher Nature. Palm. 296. per Dod'. (n) Tho' an Attorney may, yet he cannot plead non ſum informatus. Cro. Jac. 442. (o) Poph. 130. S. C. adjudged. Cro. Jac. 420, 441, 442. S. C. adjudged. 1 Rol. Rep. 380. S. C. and S. P. admit. (p) I ſuppoſe this is miſprinted in the Original, and that it ſhould be **Cotten.** (q) Fitz. Enfant. 3. S. C. (r) Br. Attorney, 46. S. C. Br. Coverture, 27. b. S. C. Br. Error, 79. S. C. Bridg. 74. S. C. cited. (s) Cro. El. 569. S. C. adjudged.

3. (t) **If an Infant brings any Action, real or perſonal, he ought to appear by Guardian, and not by Attorney.** P. 39 El. B. R. 26. between (u) Barton **and** Ditton **adjudged in a Writ of Error upon a Judgment in an Action of falſe Impriſonment brought by the Infant, and the Judgment reverſed accordingly.** P. 1 Ja. B R. **adjudged upon a Writ of Error, in a Judgment in an** Ejectione firmæ.

(t) Cro. Jac. 5. S.P. by all the Judges and Barons upon a Writ of Error in Cam. Scac.

(u) Cro. Eliz. 424. S. C. adjudged, tho' the Judgment was given for the Infant, and that Judgment reverſed accordingly. 2 Sand. 213. S. C. cited. Bridg. 75. S. C. cited.

4. **In an Action againſt** Baron **and** Feme, **the** Feme **being within Age, the** Feme **ought to appear by Guardian,** 26 Aſſ. 40. So done. 24 E. 1. Rotulo clauſorum membrana 6. in Dorſo. **The Tenant in a Writ of Dower had a Guardian aſſigned by the King, and ſo ſignified to the Juſtices,** de Banco.

(x) F. N. B. 27. G. S. P. (y) The Stat. of Weſt. 2. cap. 15. extends not to an Ideot. 2 Inſt. 390.

5. (x) When an Ideot doth ſue or defend, he ſhall not appear by Guardian, (y) prochein Amy, or Attorney, but he muſt be ever in proper Perſon. *Co. Lit.* 135. b.

(z) Palm. 520. S. P. arguendo, for I ſuppoſe by the Word Ideot there, one that becomes non compos is intended, and vide 2 Sand. 335, 336.

6. (z) But otherways of him who becomes *non compos mentis*, for he ſhall appear by Guardian, if within Age, or by Attorney, if of full Age. 4 *Co.* 124. b.

7. If in a Writ of Right, the Demandant ſues by prochein Amy, and Iſſue is joined upon the Plea of *Non-tenure*, and before Trial the Demandant comes of full Age, tho' he was well admitted to ſue by prochein Amy, yet now he ought to appear by Attorney. *Trin.* 18 *Jac.* Between (a) *Stone* and *March. Cro. Jac.* 580, 581. *admit per Cur'*. But the Tenant not having taken Exceptions to the Trial, but admitted him not to be of full Age, whether this could afterwards be aſſigned for Error. *Dubitatur.* tot. Cur'. that it could not be aſſigned for Error, and therefore the firſt Judgment was affirmed.

(a) 1 Bulſt. 24. S. C. and S. P. ſeems to be admitted, but adjudged per

8. (b) In an Ejectment againſt an Infant, the Defendant cannot appear by prochein Amy, for a Guardian and prochein Amy are diſtinct, and the Suit by prochein Amy was not before the Stat' of *Weſtm'* 1. cap. 47, and *Weſt.* 2. cap. 15, and is given in Caſe of Neceſſity, (c) where an Infant is to ſue his Guardian, or is eſloined, or that the Guardian will not ſue for him. *Trin.* 28 *Jac.* between (d) *Simpſon* & al' & *Jackſon. Cro. Jac.* 640. adjudged by 3 Judges againſt 1. upon a Writ of Error; upon a Judgment given in *Durham*, and the firſt Judgment reverſed accordingly.

(b) F.N.B. 27. H. S. P. Stil. 369. S. P. per Rol. Ch. Juſt. (c) But for the Profits received after 14. the Infant was admitted by Guardian to ſue an Accompt againſt his Guardian in Soccage, for he muſt charge him as Bailiff. Cro. Jac. 219. (d) Palm. 295. S. C. and S. P. adjudged by 3 Judges againſt 1. 2 Rol. Rep. 257. S. C. and S. P. adjudged. Hut. 92. S. C. cited.

9. But in all Cases where an Infant is Plaintiff, unless in (e) those special Cases, the Suit shall be by Guardian, and not by prochein Amy. *Trin.* 20 *Jac. Palm.* 296. *per Dod.* who said he had an ancient Reading upon those Statutes whence he took this Learning.

(e) But 2 Inst. 390. it is said whether the Infant be essoined or no, he may sue by prochein Amy; but perhaps in all Cases where he is Plaintiff, except those, he may sue by Guardian, or prochein Amy, and for this vide F. N. B. 27 H. 2 Inst. 261, 390. Co. Lit. 135. b. Cro. Car. 86. Hut. 92. 1 Jon. 177. Hetl. 52. Lit. Rep. 60, 61. Cro. Jac. 161, 641. Bridg. 74.

(B) In what Actions and Cases it ought to be by Guardian.

1. If a Judgment be against an Infant, and the Infant brings a Writ of Error to reverse the Judgment, he ought to assign the Error by Guardian, and not by Attorney. (a) New Entries 289. where the Writ of Error is adjudged to be discontinued.

(a) I suppose Co. Entries are intended,

and vide Cro. Jac. 250. Carre and Barker, which I suppose to be the same Case.

(C) What Person for a collateral respect may make an Attorney.

1. If an Action of Debt be brought against an Infant Executor, he cannot appear by Attorney, but ought to appear by Guardian, else it is Error, because otherways he may be at great Prejudice; for Assets may be found in his Hands, and so Judgment shall be given to recover the Debt, Damages and Costs against him de bonis testatoris, si, &c. si non, the Damages and Costs de bonis propriis, (as it was done in this Case) and perhaps the Infant had a Release or Acquittance to plead, and so he shall be charged de bonis propriis by his (a) ill Pleading, without any Remedy against the Attorney, but if a Guardian mispleads, and loses thereby, an Action lies against him, and therefore his being Executor cannot make him as a Man of full Age. M. 15 Jac. B. R. between (b) Westcot and Cottne adjudged and reversed per Curiam.

(a) Fol. 288.

(b) Poph. 130. S.C. adjudged. Cro. Jac. 420.

S. C. adjudged, and the first Judgment reversed accordingly. 1 Rol. Rep. 380. no Judgment. Palm. 245. S. C. cited.

2. (c) If an Infant Administrator brings an Action of Debt, he may make an Attorney, and this shall not be Error if the Judgment passes against him, for there he is at no Prejudice by this, but only he is barr'd of the Debt of the Testator. Tr. 38 El. (d) Bede and Starche, Rot. 143. But H. 39. El. B. R. adjudged, (But (e) Quere, for the Infant is to be amerced pro falso clamore, and so it is prejudicial to him) Mich. 15 Ja. B. R. between (f) Westcot and Cottne agreed per Curiam. P. 11 Car. B. R. between Powel and Onslowe, per Curiam, in a Writ of Error, upon a Judgment in Villa de Sallop, but the Judgment was reversed for another Cause.

(c) 3 Bulst. 180. S.P. by 2 Judges contra, tho' the first Judgment was given for the Infant, and all the Clerks informed the Court that the usual Course in

such Cases was to sue by Guardian. 1 Vent. 103. (d) Cro. El. 541. S. C. adjudged, but note, the Judgment appears there to have been given for the Infant, and nothing said how it would have been if given against him. 2 Sand. 213. S. C. cited as if Judgment given for the Infant. (e) Palm. 229. but for this vide 1 Rol. Abr. 214. Pl. 1. But if he appears by Attorney, how will it appear that he is under Age? 1 Mod. 47. 298. (f) Poph. 130. S. C. but S. P. does not appear, but it is there said per Curiam, that if an Infant Executor brings an Action as Executor, by Attorney, and hath Judgment to recover, this is not erroneous, because for his Benefit. Cro. Jac. 441, 442. S. C. but S. P. does not appear, but said there is a Difference where an Infant Executor is Plaintiff, and where Defendant, and being Plaintiff where he recovers or not, for if Judgment is given against him where he is Plaintiff, it seems all one as if he were Defendant.

3. (g) If

(g) Forwiſt, & al' & Tremain, S. P. 2 Sand. 212, 213. adjudged per Curiam, contra Twiſden,

3. (g) If an (h) Infant, and a Man of full Age are made Executors, they may (i) bring an Action as Executors, and the Infant may ſue by Attorney, without making any prochein Amy, becauſe he ſues in the Right of the Teſtator, and not in his own Right. Tr. 38 El. B. R. (k) The Counteſs of Rutland's Caſe adjudged, but there the Executors recovered in the Action.

for he that is of full Age may make an Attorney for him that is within Age. 1 Mod. 47, 72, 296, &c. adjudged by 3 Judges againſt Twiſden. 1 Vent. 102. adjudged by 2 Judges againſt 1. 1 Sid. 449. adjudged per Curiam, contra Twiſden. 1 Lev. 300. adjudged contra Twiſden. (h) He muſt be intended above 17. (i) But if an Action is brought againſt them, he that is under Age muſt appear by Guardian, per Stil. 318. adjudged, and vide 3 Mod. 296, 298. ſaid to be agreed. (k) Cro. El. 378. S. C. and S. P. reſolved, but in Ow. 156. and Moor 266. Pl. 416. this Point does not appear. Palm. 285. S. C. cited 1 Mod. 396. S. C. cited.

(l) Yet he cannot give away the Inheritance of his Wife. Bridg. 74, 228.

4. If a common Recovery be ſuffered, and the Baron and Feme, in the Right of the Feme, (the Feme being within Age) are vouched, and they appear by Attorney, and vouch over, and ſo a common Recovery is had, this is Error, (l) for tho' the Baron be of full Age, yet the Feme being within Age, ſhe ought to have appeared by (m) Guardian. H. 13 Jac. B. R. Dubitatur, between (n) Holland and Lee.

(m) The Husband cannot diſavow a Guardian made by the Court for his Wife. 1 Vent. 185. per Hale, 2 Keb. 878. (n) Bridg. 73, 74, 75. S. C. fully argued, but no Judgment, the Writ of Error abating by the Death of one of the Plaintiffs. 1 Rol. Rep. 303. S. P. argued, but no Judgment, the Writ of Error abating by the Death of one of the Plaintiffs. Palm. 224, &c. 244. 250, 252, 256, 257. S. C. and S. P. agreed by all the Judges, and tho' one of the Plaintiffs was dead, there being a ſpecial Rule before made in this Cauſe, that notwithſtanding Death, Judgment ſhould be entred tunc pro nunc, the Court would have cauſed Judgment to be entred, but that they differed in other Points. Vide Cro. El. 739, 774. S. C. but S. P. does not clearly appear.

(o) But if they bring an Action, they may ſue by Attorney, and the Baron ſhall name an Attorney for both.

5. If in an Aſſumpſit (o) againſt Baron and Feme. the Feme being within Age appears by Attorney, and thereupon Judgment is given againſt them, this is Error. *Hill.* 23, and 24 *Car.* 2. between (p) *Freeman* and *Boddington.* 1 *Vent.* 185. adjudged, and the firſt Judgment reverſed accordingly.

2 Sand. 213. per Curiam arguendo. (p) 2 Keb. 878. S. C. adjudged, becauſe the Appearance was per Attornatum of the Husband only, and there ſaid, tho' in a real Action the Wife muſt appear by Guardian, yet perhaps it may be otherways in a perſonal Action, for the Damages will ſurvive. 2 Lev. 38. S. C. adjudged.

(D) The Power of the Guardians (a) over the Infant.

(a) The Infant cannot revoke the Authority of the Guardian. Palm. 252.

(b) A Guardian ordered to acknowledge Satisfaction for ſo much as he had received upon a Judgment. Moor 852. Pl. 1163.

(c) The Court diſcharged one Guardian, and aſſigned another. Stil. 456. —the Juſtices at the Aſſiſe prius aſſign a new Guardian. Noy 49.

1. IN an Appeal by an Infant of the Death of his Father, if the Plaintiff hath Guardians aſſigned him, and after the Infant by the Mediation of his Friends compounds with the Defendant for 1500 l. and thereupon the Infant comes into Court, and ſays he will relinquiſh the Suit againſt the Defendant, and yet notwithſtanding the Guardians will proſecute the Suit, (b) the Court in their Diſcretion may (c) diſcharge the Guardians, and ſo the Suit ſhall be diſcontinued; for it is no Reaſon that the Infant ſhould be bound to continue ſuch a Suit againſt his Will, which Suit demands but Revenge, and will be chargeable to him, and perhaps he will leave the Revenge to God. Tr. 43 El. B. R. between Slanyng and Fitts adjudged per Curiam, and there the Caſe of one Sacheverell and Blackwell was vouched, which was where an Appeal was proſecuted in ſuch Manner by an Infant, and was diſcontinued againſt the Will of the Guardians.

(E) In what Caſes an Anſwer ought to be by (a) Bailiff, and in what by Attorney.

(a) For Pleas by a Bailiff, vide the Diviſions, Title Aſſiſe.

1. AT the Common Law, in an Aſſize, neither the Tenant nor Diſſeiſor could have anſwered by Attorney, but ought to have anſwered by Bailiff. 21 E. 3. 25. b.

2. By the Statute of the 12 E. 2. 1. it is ordained, that he who is Tenant may make an Attorney. 21 E. 3. 25. b.

3. But the Diſſeiſor, in an Aſſize, is not within the Statute, becauſe he is not Tenant as the Statute ſpeaks, and therefore he ought to anſwer by Bailiff. 21 E. 3. 25. b. adjudged.

(F) In (a) what (b) Actions an (c) Attorney may be made.

Fol. 289.

(a) At Common Law, both Plaintiff and Defendant, in all Actions, both real, perſonal and mixt, did appear in Perſon as well in Courts of Record, as not of Record, and the Command of the Writ to appear, was always intended in proper Perſon. 2 Inſt. 249. Co. Lit. 128. a. 8 Co. 58. b. 2 Mod. 83.—but after the Defendants Appearance, the Courts of Chancery, King's Bench, &c. that held Plea by Writ, might admit him by Attorney, but otherways where the Plea was held without Writ, unleſs the King granted a Writ de Attornato faciendo. (b) Vide ſeveral Statutes, by which Plaintiffs and Defendants have been enabled to follow their Suits, by Attorney. 3 Ed. 1. cap. 41. explained. 2 Inſt. 249. 6 Ed. 1. cap. 8. explained. 2 Inſt. 311. 13 Ed. 1. Cap. 10. explained. 2 Inſt. 377, 378. 27 Ed. 1. 7 R. 2. 14. 3 H. 7. 1. in an Appeal.—But where in an Appeal or not, vide 2 Inſt. 312. 313. 3 Mod. 268. 4 Mod. 99. 2 Jon. 210. Br. Appeal, 112.—but in an Appeal of Mayhem, the Plaintiff cannot appear by Attorney, becauſe the Defendant may pray Oyer of the Mayhem. 2 Inſt. 313. 23 H. 8. 3. in an Attaint. 29 El. Cap. 5. Par. 21. that the Defendant, in Actions and Informations. may upon the firſt Proceſs, appear by Attorney, which per 31 El. Cap. 10. is declared to extend only to Subjects born, and Denizens. (c) Of a Reſponſalis, and his Power, and how diſuſed ſince the ſeveral Statutes that have given Power to make Attornies. Co. Lit. 128. a. (d) Jenk. Rep. 91. S. P. (e) For this vide Dier 135. Pl. 15. 1 Leon. 290, 291.

1. (d) IN a (e) quid juris clamat, before any Plea pleaded, the Defendant cannot make an Attorney, becauſe he ought to attorn in Perſon. 15 R. 2. Attorney 59.

2. In a quid juris clamat, if the Tenant ſays he had nothing in the Land the Day of the Note levied, nor ever after, and thereupon they are at Iſſue, the Tenant ſhall be received to make an Attorney. (f) 22 E. 3. 9.

(f) Fitz. Attorney, 80. S. C. 8 Co. 58. b.

3. In an Indiament of (g) Treſpaſs, the Defendant may make an Attorney. 22 Aſſ. 73.

(g) A Traverſe to the Return of a Reſcous tendered by Attorney, otherways if a capi corpus was returned againſt the Reſcuſſers. Kelw. 165. b.——To an Indictment for a high Miſdemeanor, the Defendant, ex gratia Cur' but not ex rigore Juris, may be admitted to plead by Attorney. 1 Lev. 146. and 1 Rol. Rep. 190. 2 Bulſ. 299. 300. a Pardon of a Judgment in a Premunire was allowed without the Defendants appearing in Perſon.

4. So in an Indictment (h) of Extortion, the Defendant may make an Attorney. (i) 22 *Aſſ.* 73. adjudged.

(h) But if an Adminiſtrator brings Error upon an Outlawry of his Inteſtate for Murder, he may appear by Attorney, for tho' the Party himſelf muſt have appeared in Perſon, that he might have ſtood rectus in Cur'. and anſwered the Matter of Fact, yet in this Caſe that Reaſon fails. March 113. per Brampton and Mallet. (i) Br. Attorney, 63. S. C.

5. If the Defendant appears by Attorney, and the Tenant alledges Villeinage in the Demandant, whether the Attorney of the Demandant may confeſs that his Maſter is a Villein to the Tenant, and ſo bind his Maſter, *Incerti temporis, Kelw.* 135. a. *Dubitatur.*

6. In a *Formedon*, the Tenant by Attorney may tender his Law. *Mich.* 7. H. 8. *Kelw.* 175. b. done accordingly, and (k) Day given to the Tenant, *&c.*

(k) Kelw. 135. a.

7. If one be outlawed upon an Indictment, for not repairing a Bridge, and thereupon admitted to bring a Writ of Error, he must appear, and in Person assign his Error. *per Trin.* 19 *Jac.* Sir *William Read*'s Case. *Cro. Jac.* 616. by all the Clerks of the *Crown-Office*, and tho' the Court greatly pitied Sir *William Read*, because he was 90 Years of Age, and very infirm, and had kept his Chamber for a Year and more, yet they held it (l) could (m) not be done by Attorney, being against the Course of the Court, and doubted whether the King's Privy Seal would help him: And he was thereupon brought from his House, 10 Miles from *London*, in an Horse-Litter, upon Mens Shoulders, to the Bar, and came into Court, and assigned his Error, and put in Bail to prosecute, *&c.*

(l) But yet, Cro. Jac. 462. one outlawed, (but does not appear for what) upon an Affidavit made of his Sickness, prayed to appear by Attorney, and the Court, ex gratia speciali, allowed it, but commanded the Clerk to enter quod venit in propria persona. (m) But yet, I suppose, it might be done upon a particular Examination thereof made by one of the Judges, according to the Stat. 7 H. 4. Cap. 13. which vide.

(G) (a) In what Cases.

(a) Per 20 H. 3. Cap. 10. Suit-service may be done by Attorney, but that Stat. extends not to Suit real, vide 2 Inst. 99. but this must be by Letter of Attorney, under the Seal of the Suitor, who may bring his Writ for the Allowance thereof. 2 Inst. 100. & vide 2 Inst. 225.

1. **Upon a capias in Process, upon a** Statute Merchant, **if the Sheriff returns** quod non est inventus, **the Party cannot answer by Attorney.** 26 E. 3. 76.

2. **In Trespass or Account, if the Plaintiff returns** quod non est inventus, **the Party may appear by Attorney.** 26 E. 3. 76.

(b) Cro. Jac. 211. S. C. & S. P. per Fleming and Coke.

3. In Debt, the Plaintiff by Attorney cannot enter a Retraxit, because that is a perpetual Bar, and in Manner of a Release. *Mich.* 6. *Jac.* between (b) *Beecher* and Sir *Thomas Shirly*, 8 *Co.* 58. a. b. adjudged upon a Writ of Error in *Camera Scaccarii*, and the first Judgment reversed accordingly.

(H) (a) What shall be said a (b) good (c) Warrant of Attorney.

(a) Where the Warrant upon the Award of the exigent will be a sufficient Warrant to appear to the Action, vide 1 Jon. 201.

1. **A Executor of C. brings Debt against B. and the Record is,** that B. po. lo. suo I. versus A. in placito debiti, **and does not name A. Executor in the Warrant, this is no good Warrant.** M. 4 Ja. **between** (d) Hilliard **and** Redman, Dubitatur.

(b) A. at 8. in the Morning gives a Warrant to confess a Judgment, and dies at 10 before it is signed, yet it may be done the same Day afterwards. Raym. 18. (c) That an Authority by Parol is sufficient to support a Judgment. Stil. 348. vide. (d) Cro. Jac. 135. S. C. and said that it was amendable, and should be intended a Warrant in this Action, because there was no other depending, wherefore it was awarded to be amended, and the Judgment affirmed.

2. **In an Action of Waste,** querens obtulit se 4 die per attornatum suum, **and does not shew his Name, but after in the Assignment of Waste, the Name of the Attorney is expressed, and after Judgment for the Plaintiff, yet this is erroneous.** D. 1. Ma. 93. b. 25. **adjudged.**

(e) The certain Name of the Attorney must be shewn, because if one appears as my Attorney, without my Authority, an Action lies. Godb. 74. per Clinch. (f) 3 Bulst. 202. S. C. adjudged, and that it was not amendable, because it could not be known what was meant thereby, but said if it had been once right, and the Christian Name omitted, afterwards it should have been amended. 1 Rol. Rep. 381. S. C. adjudged, and vide Cro. El. 153. 1 Leon. 175.

3. **If a Man appears** per Higgens attornatum suum, **without putting his Christian Name, this is not good,** (e) **but as if he had no Attorney named,** M. 31, 32. El. B. R. **between** Mallet **and** Tempest **adjudged.** M. 10 Ja. B. R. **adjudged.** H. 13 Ja. B. R. (f) **Sir** William Howson's **Case,** per Coke & Tr. 14 Ja. B. R. **the same Case.**

4. **In an Action of Waſte, if the Plaintiff** obtulit ſe **againſt the Defendant,** per attornatum ſuum, **and after declares** per attornatum ſuum, **and the Defendant does never appear, but a** Diſtringas **iſſues, according to the Statute, and Judgment, by Default, is had againſt him, without naming the Attorney, yet this is no Error, becauſe it is not the** (g) **Uſe of the** Philizers in Banco, **to enter the Name of the Attorney, before the Appearance of the Defendant.** Mich. 10. Car. B. R. **between** Atkins **and** Higgs, per Curiam, **adjudged upon a Certificate of the** Philizers in Banco, **and the Judgment given** in Banco, **affirmed accordingly.** Intratur, Hill. 8. Car. Rot. 821.

(g) Upon a common Recovery, in the City of Ll. the Warrant of Attorney was entered ſuch an one, po. lo. ſuo. ux. h. but did not write the Name at length, but in the Plea-Roll it was at length, and though it was alledged that all the Records of the City were ſo, yet Godb. 73, 74. Shute and Clench inclined it was Error, ſed adjornatur,——But yet in a Bill of Intruſion in the Exchequer, the Record being entred inter ℞ J. S. preſentem hic in Cur. per J. N. Attornatum ſuum, tho' it was ſaid to be abſurd, for a Man could not be preſent in Court, and by Attorney alſo, yet becauſe there were many Entries ſo, it was held no Error. 1 Leon. 9. adjudged.

5. **In a common Recovery ſuffered in a Writ of Entry brought againſt** Eliz. P. **the Warrant of Attorney for the Defendant is** Alicia Pind po. lo. ſuo A. B. &c. **againſt N. putting** Alicia **for** Elizabeth; **this is not good, for here is no Warrant of Attorney** entred **for** Elizabeth. D. 1, 2. Ma. 105. 16. **but there Quere whether it ſhall be amended.**

(I) At (a) (b) (c) what Time a Warrant of Attorney (d) may be entred.

Fol. 290.

(a) For this vide 2 Rol. Rep. 186. March 122.

1. **The Warrant of Attorney may be entred at any Time before Judgment.** (e) 41 E. 3. 1. b.

(b) Per 32. H. 8. Cap. 30. every Attorney muſt deliver in his Warrant in the ſame Term, when the Iſſue is entred of Record, or before, under the Penalty of 10l. to be forfeited to the King, and per 18 El. Cap. 14. it muſt be delivered in as by the Laws and Statutes it ought, under the Penalty of 10l. (one Moiety to be forfeited to the King, the other to ſuch Officer in whoſe Office the ſame ought to be delivered, entered or filed) and ſuch Impriſonment as the Court ſhall think fit. (c.) Per 18 H. 6. Cap. 9. in ſuch Actions wherein Proceſs of Capias & exigent are awardable, the Warrant muſt be entred in the ſame Term in which the Exigent is awarded, under the Penalty of 40 s. (d) After Verdict in any Court of Record, Judgment ſhall not be ſtaid or reverſed for want of a Warrant of Attorney. 18 El. Cap. 14. (e) Br. Attorney, 14. S. C. Br. Amendment, 95. S. C. Fitz. Judgment, 86. S. C.

2. **So a Warrant of Attorney may be entred** (f) **at any Time after Judgment, before any Writ of Error brought.** D. 2 Eliz. 180. 48. **admit and adjuded.** D. 5. Eliz. 225. 34. **admit. and adjudged.**

(f) 12 Years after the Party making Oath he had retain'd an Attorney, and that it was his Neglect, &c. Goulſ. 91.——and for a Diverſity where it appears there was a Warrant, and where not, vide March 121.

3. **So after Judgment, and a** (g) **Writ of Error brought returnable in** Michaelmas Term, **and nothing done thereupon, nor proſecuted, and therefore in** Eaſter Term **after a Warrant of Attorney may be entred, by reaſon of the** (h) Laches **aforeſaid.** D. 2 Eliz. 180, 48.

(g) For this vide 1 Brownl. 46. 2 Rol. Rep. 186. March 93. Pl. 160. 103. Pl. 177. 121. Pl. 201. 133. Pl. 209.— after the Record removed. Hetl. 59. (h) Upon a Writ of Error, the Plaintiff aſſigns for Error, that no Warrant of Attorney was entred in ſuch a Term, and this was certified accordingly, and after 2 Sci. facias's & Nichils thereupon returned, it was ruled quod judicium revocetur, but becauſe the Reverſal was not entred of Record, a new Certiorari was prayed to inform the Court, whether there was any Warrant at all entred, for it was ſaid not to be material in what Term it is entred, ſo that it be entred at all; and therefore a new Certiorari was after awarded, and the Parties after agreed. Smith and Skipwith. Cro. Jac. 277. 1 Bulſt. 21. & vide 2 Rol. Rep. 186.

4. (i) **So after Judgment** in Banco, **if the Defendant againſt whom the Judgment is given brings a Writ of Error returnable the firſt Day of Trin. Term. but the Writ is not delivered to the Clerk of the Treaſury, till 6 Days after the Day of the Return, in this Caſe the Defen-**

(i) March 122. like Point agreed per Cur' 134. like Point per Cur' argu endo

Defendant in the Writ of Error may put in a Warrant of Attorney for the Plaintiff in the Writ of Error, by Leave of the Court, and this shall be entred accordingly. D. 5. Eliz. 225. 34.

(k) March, 122. like Point, agreed per Cur.

5. (k) If a Man recovers by Judgment against J. S. who brings a Writ of Error the same Term the Judgment was given, tho' the same Term the Record is in the Breast of the Judges, yet the Plaintiff shall not be received after to put in a Warrant of Attorney for himself. D. 6. 7. Eliz. 230. 58. adjudged.

6. In a common Recovery, if the Original be returnable Octabis Michaelis, which is the 9. October, and the Dedimus potestatem for the Defendant, de Attornato faciendo, bears Date 11. October, and the Mittimus thereof in Banco, bears Date the 30th of October, which is after the Relation of the Judgment, which is Octabis Michaelis, and so the Warrant was dated after the Judgment given, contrary to the Supposal of the Writ of Dedimus potestatem, which is cum breve nostrum, pendeat coram, &c. and this does not depend after Judgment, D. 5. Eliz. 220. 13. per Curiam, Error.

(K) For whom he may be Attorney.

(a) In the Original it is per Attorney, and therefore appears there to be misprinted.

1. IN an Action by the Commonalty of a Town, one of the Commonalty cannot appear (a) as Attorney for the Commonalty, for he is Party to the Action. (b) 3 H. 6. 43.

(a) Br. Attorney, 5. S. C. Br. Corporation 4. S. C.

(L) What shall be said to be a Removal in Law.

1. IF the Tenant makes an Attorney in Banco, and after Conusance of this Plea is demanded by a Franchise, and granted, the Attorney shall continue Attorney for him in the Franchise also, without other making, and he is his Attorney there in facto before other Removal, for the Conusance is granted to hold Plea as the Justices ought, if this had not been granted. (a) 21 Ed. 3. 45. b. 61.

(a) Fitz. Resceit, 133. S.C.

21. Ass. Pl. 17. adjudged.

2. So if after the Conusance granted, a Resummons be sued for the Failure of Right there in the Court where this was granted, he continues Attorney for him there also upon the first Retainer. (b) 21 Ass. Pl. 17. 21. Ed. 3. 61. b.

(b) Fitz. Resceit, 133. S.C.

3. If Judgment be given in Banco against the Demandant, and this is reversed in B. R. for Error in the Process, the Attorney which the Tenant had in the first Plea shall continue his Attorney now in B. R. to answer to the Original. (c) 21 Ass. Pl. 17. 21 Ed. 3. 61. b.

(c) Fitz. Resceit, 133. S.C.

Fol. 291.

(M) What shall be said an Expiration, or Determination of the Letter.

1. IN Debt, if the Defendant wage his Law by Attorney, at the Day that he hath to make his Law, the Attorney may plead the Release of the Plaintiff after the last Continuance. 22 Ed. 3. Attorney 92. for his Warrant was not determined, tho' his Master ought to make his Law in Person.

2. In Debt, after Judgment given, the Attorney of the Plaintiff cannot release the Damages, because his Power after the Judgment is determined. 4 Ed. 3. Itinere Darb. titulo Attorney 18. adjudged.

3. If a Man recovers Damages in Treſpaſs, and the Defendant comes upon the Exigent, and ſays he hath agreed with the Plaintiff, the Attorney of the Plaintiff ſhall not be received to acknowledge this, (a) becauſe his Power is ended by the Judgment given. 34 Ed. 3. Attorney 95. adjudged.

(a) Vide 2 Inſt. 378.

4. But if the Attorney after Judgment given for his Maſter, (b) receives the Money levied upon the Execution, he may acknowledge Satisfaction. P. (c) 14 Ja. B. R. per Coke.

(b) The Sheriff may pay the Money, or deliver the Goods taken in Execution, to the Plaintiff's Attorney. Godb. 217. (c) 1 Rol. Rep. 366. S. C. and S. P. per Coke.

5. (d) So after Judgment the Attorney of the Plaintiff may acknow ge Satisfaction, altho' he receives none of the Money, P. (e) 14 Jac. B. R. ſaid by the Clerks that it is the common Courſe.

(d) That the Authority of the Attorney is not determined by the Judgment, vide Stil. 426. (e) 1 Rol. Rep. 366. S. C. and S. P. per Clericos, to whom Doo' agreed, but Coke ſeemed contra, vide 1 Rol. Abr. 16. Pl. 1.

6. If one Man makes another his general Attorney in all Pleas, to hold till a certain Time, and after before the Time expired he appears in an Action for him, and after pending this Plea, the Time paſſes, yet his Warrant is not determined, (f) for he who is Attorney at one Time, is Attorney at all Times pending the Plea, if he be not removed. 15 Ed. 3. Attorney 70.

(f) For this Rule vide 2 Rol. Rep. 456.

(N) What ſhall be ſaid to be a Removal in Fact.

1. If the Court record that the Attorney is removed, this is ſufficient without an Entry of the Removal. (a) 24 Ed. 3. 37.

(a) Fitz. Attorney, 79, S. C.

(O) Who may remove him.

1. IN a Writ of Ward brought by Baron and Feme by Attorney, the Feme may remove the Attorney without the Conſent of the Huſband. (a) 21 Ed. 3. 12. adjudged.

(a) Fitz. Attorney, 91. S. C.

(P) The Power of an Attorney.

1. If A. acknowledges a Recognizance to B. of 100 l. to be paid at a certain Day, at which Day A. comes and proffers the Money in Court, and becauſe B. was in the King's Service, C. his general Attorney, comes ready to receive the Money, and ſhews his Warrant to the Court, which was, that he ſhould be his Attorney in Pleas and Quarrels, and this Recognizance is a Thing determined, which is no Plea nor Quarrel, therefore his Warrant does not extend to it. 18 Ed. 2. Execution, 245. adjudged.

2. And upon ſuch a Recognizance within the Year, ſuch general Attorney ſhall not have any Fieri facias againſt the Conuſor, but only a Scire facias, in which the Defendant may have his Plea. 18 Ed. 2. Execution. 245.

(a) Attornment.

Fol. 292.

(a) For the Meaning of the Word, vide Co. Lit. 309. a.

(A) In what Cases an Attornment is (b) necessary (c) to pass the Estate.

(d) Where there is no Attendancy.

(b) Where the Grant is by Deed, nothing passes before Attornment but where by Fine, the Thing granted passeth as to the Estate, but not to distrain, &c. Co. Lit. 314. b. (c) Not where the Estate is executed by the Statute of Uses, vide 1 Rol. Abr. 294. Letter F. (d) Where there is no Tenure, Attendance, Remainder, or Payment of Rent out of Land, there needs no Attornment. Co. Lit. 312. a.

1. Where the Grantee can have no Action of Waste, nor there shall be any Attendancy between the Tenant and him, there the Reversion shall pass without Attornment, for an Attornment is not necessary but to have an Avowry, or Action of Waste. 31 H. 8. 151. 2 Ed. 6. 379.

(e) 3 Leon. 279. S. P. per totam Cur'.

2. (e) If Lessee for 20 Years, leases for 10 Years rendring Rent, and after grants over the Reversion, the Estate shall not pass without Attornment, because of the Attendancy of the Rent. 2 Ed. 6. 379.

3. But otherways it is if no Rent be reserved upon the Lease for 10 Years, for then there is no Attendancy to be made. 2 Ed. 6. 379.

(f) Co. Lit. 312. a. S. P. agreed.

4. (f) If a Man that hath Common of Pasture, or Common of Estovers to a certain Number, grants them to another, they shall pass without Attornment, because they are not to be taken by the Hands of the Grantee, but by the Mouth of his Cattle. 31 H. 8. 151.

5. If a Man seised in Fee of a Rent-charge, leases it for Life, with Attornment, and after grants the Reversion to another, this shall pass by the Attornment of the Tenant of the Land, without any Attornment of the (g) Tenant for Life, because there is no Attendancy or Action between them.

(g) In this Case the Grantee for Life may attorn, and the Quid jur' clamat lies against him, per Co. Lit. 311. b. where the Opinion of Dier and Mounson is cited for the Warrant thereof.

6. If a Man leases a Manor for Life or Years with Attornment, and after grants the Reversion of the Manor, the Services will not pass by the Attornment of the Tenants of the Manor, without the Attornment of the Lessee, because there is and shall be an Attendancy between them, and Privity of an Action of Waste.

(h) Co. Lit. 311. a. S. P. because by their former Attornment, they have put the Attornment into the Mouth of the Lessee.

7. (h) But in this Case the Attornment of the Lessee for Life or Years of the Manor, will be sufficient to pass the Reversion, without the Attornment of the Tenants. Trin. 40 Eliz. B. between Shephard and Grey, per Curiam.

8. If an Abbot holds of another by Frankalmoign, and the Lord grants over the Seigniory, the Tenant ought to attorn, (for he shall hold of the Grantee by Fealty) 42 Ass. 6.

(i) Lit. Sect. 553. S. P.

9. (i) If a Man leases Land at Will, and after grants the Land to another, this shall not pass by the Attornment of the Lessee at Will, because he hath no Reversion, nor can it pass as a Reversion. 26 Ass. 2. adjudged.

(k) Hitchins and Stephens, S.P. admitted, and seems to be between the same Parties, but in another Action. 2 Jon. 232. Raym. 487. 1 Jon. 243, 244. S. P. per Cur'.

10. (k) If at this Day Lessee for 90 Years, leases for 20 Years rendring Rent, and after for a valuable Consideration grants over the Reversion, nothing passes without Attornment; for tho' the Grant of the Reversion was upon a valuable Consideration, yet it is not executed by the Statute of Uses, for that extends only where one is seised to an Use, but here the Grantor is possessed only for a Term of Years. *Trin.* 34 *Car.* 2. between *Stephens* and *Hitchens*. 2 *Jon.* 217. adjudged.

(B) In what Caſes an Attornment is neceſſary to paſs the Eſtate.

In reſpect of the Grantor.

1. D. 8 Eliz. 251. 91. **The Reverſion of a Leaſe for Years is granted to one for Life, the Remainder in Fee, and an Attornment pleaded, and after he in Remainder grants his Remainder, admitted there ought to be an Attornment.**

2. A Grant to or by the King is good without Attornment. *Co. Lit.* 309. b.

3. (a) If a Reverſion be granted by Fine, and the Conuſee before Attornment diſſeiſes the Tenant for Life, and makes a Feoffment in Fee, and the Leſſee re-enters, the Feoffee ſhall not diſtrain without Attornment, becauſe the Feoffor himſelf could not. *Co. Lit.* 322. b.

(a) Bach and Oneſly, S. P. Cro. El. 264, 354. adjudged, Ow. 23. adjudged. 5 Co. 113. a. cited.

(C) Grantee.

1. **THE ſame Law where Leſſee for Life, the Remainder for Life, and the Reverſioner in Fee releaſes to the Remainder Man for Life.** 48 Ed. 3. 16. Fol. 293.

2. **If a Reverſion is granted** (a) **to the King, it is not good without Attornment.** 49 Ed. 3. 5.

(a) A Grant to or by the King, is good without Attornment by his Prerogative. Co. Lit. 309. b. — but for Grants to the King, vide 1 Rol. Abr. 394. Pl. 1.

3. **The ſame Law is of a Seigniory granted to the King.** (b) 50 Aſſ. 1. per Belknap. 49 Ed. 3. 5.

(b) Br. Grants 82. S. C.

4. If one Jointenant of a Reverſion releaſes to another, there needs no Attornment, becauſe of the Privity. *Co. Lit.* 318. *a.*

(D) The Thing granted.

1. **THE Grant of an Advowſon is good without the Attornment of the Incumbent.** 21 Ed. 4. 1. b.

(E) The Eſtate.

1. **IF a Man grants a** (a) **Reverſion for Years, this will not paſs without Attornment, becauſe there ought to be an Attendance thereupon,** contra 19 H. 6. 24.

(a) But note, there is a Difference between a Leaſe of the Reverſion, and a Leaſe in Reverſion, or a future Intereſt, and if a Grant for Years of the Reverſion, for want of Attornment, cannot take Effect as a Grant of the Reverſion, yet it ſhall take Effect as a good Leaſe in Reverſion, and begin after the firſt Leaſe ended. Dal. 89. 1 Brownl. 30. Goulſ. 39. 4 Co. 53. a.

2. **So if the Lord grants his Seigniory for Years, this will not paſs without Attornment.** Lit. Sect. 551.

3. **So if a Lord of a Manor leaſes for Years, the Services do not paſs without Attornment.** (b) 9 Ed. 4. 33. b. per Curiam, contra (c) 20 H. 6. 7. b.

(b) Fitz. Attornment, 4. S. C. Br. 53. S. C. (c) Br. Attornment, 2. S. C.

(d) Neither in Poſſeſſion nor Right, Co. Lit. 310. b. at the Bottom. 2 Leon. 221. 3 Leon. 123. where it muſt be proved in Evidence, vide 3 Mod. 36. (e) Br. Attornment, 2. S. C.

4. **By the Feoffment of a Manor, the Services** (d) **do not paſs without Attornment.** (e) 20 Hen. 6. 7. b. Lit. 125. Co. 6. Bracebridge 69. **adjudged.** 30 Ed. 3. 4.

(f) So if upon a Statute Staple or Elegit, they muſt alſo attorn, and if the Reverſion be granted by Fine, they ſhall in a quid juris clamat, be compelled to attorn, Co. Lit. 315. b. & vide Co. Lit. 318. b. 6 Co. 69. b. — So where Executors have Lands till Debts paid, they muſt attorn upon the Grant of the Reverſion. Co. Lit. 315. b.

5. **If Land be extended upon a** (f) **Statute-merchant, and the Reverſion is granted, there ought to be an Attornment, otherways nothing will paſs, admitted** 7 H. 4. 19. b.

6. **If there be Leſſee for Life, the Remainder in Fee, and he in the Remainder grants it over, the Leſſee ought to attorn, otherways nothing paſſes, admitted** 25 Ed. 3. 40. b.

(g) Lit. Sect. 586. S. P.

7. (g) **If a Reverſion be deviſed to another, the Eſtate paſſes without Attornment.** 8 H. 6. 26. 19 H. 6. 24.

(h) Wherever the Reverſion, &c. paſſes by Will, there needs no Attornment. Lit. Sect. 585, 586. (i) For the Vendee ſhall be in by the Deviſe. Co. Lit. 113. a. Cro. Car. 336. 1 Leon. 31.

8. **So if a Man** (h) **deviſes that his Executor ſhall ſell a Reverſion, and his Executor ſells it accordingly,** (i) **this is good, and ſhall paſs without Attornment.** 19 H. 6. 24.

(k) Co. Lit. 311. a. (l) I ſuppoſe this is miſprinted in the Original, and ſhould be a little r. viz. Br. Attornment. 44.

9. (k) **So if a Man makes a Feoffment of a Manor, in which there are Tenants at Will, according to Cuſtom, their Services paſs by the Feoffment, without Attornment.** Lit. 125. B. (l) R. Attornment 44.

(F) In what Caſes an Attornment is (a) neceſſary (b) to make an Avowry.

(a) By the Common Law there ought to be Privity between the Diſtrainer, and the Diſtrained, that the Tenant may know to whom the Rent, or other Duty, ought to be paid, and may know a lawful Diſtreſs from a tortious taking of his Cattle. Vaugh. 39. (b) Tho' the Grant be by Fine, yet the Conuſee cannot diſtrain without Attornment, becauſe an Avowry is in lieu of an Action, whereunto Privity is requiſite. Co. Lit. 320. a. Vaugh. 39. (c) Jenk. Rep. 91. ſame Rule. (d) If at this Day A. levies a Fine to B. to the Uſe of C. and his Heirs, or by Deed indented and inrolled according to the Statute, bargains and ſells, &c. to another, there needs no Attornment, becauſe he is in by the Statute of 27 H. 8. cap. 10. by transferring of the Eſtate to the Uſe, ſo he is in by Act of Law. Co. Lit. 309. b. and he hath no Remedy to compel the Leſſee, &c. to attorn. Co. Lit. 321. b. & vide 1 And. 15 Cro. El. 285, 673. 3 Leon. 103, 104. 4 Leon. 34. 50. Vaugh. 36, &c. 49, 50. this Matter fully explained. 6 Co. 68. b. Jenk. Rep. 91. — but if the Conuſee of a Fine, before Attornment, by Deed indented and inrolled, bargains and ſells to another, the Bargainee ſhall not diſtrain, becauſe the Bargainor himſelf could not. Co. Lit. 309. b. 321. b. Cro. El. 264. 5 Co. 113. a. (e) But the Heir of the Conuſee, who claims meerly by Deſcent, ſhall be in no better Caſe than his Anceſtor. Co. Lit. 321. b.

1. (c) **He who comes to his Eſtate** (d) **by** (e) **Act in Law, may avow without an Attornment.** 37 H. 6. 33.

As Tenant in Dower, 37 H. 6. 33. 39 H. 6. 24. **Tenant by the Curteſy,** 37 H. 6. 33. 39 H. 6. 24. **Tenant by Elegit.** 20 H. 6. 7. b.

(f) But upon a common Recovery, becauſe ſuch Recoverors come in merely under the Eſtate of the Lord, &c. it was otherways till 7 H. 8. cap. 4. & vide 21 H. 8. cap. 15. Co. Lit. 104. b. Vaugh. 48. (g) Fitz. Bar. 308. S. C. Br. Judgment, 51. S. C. Br. Seiſin, 14. (h) Fitz. Bar. 308. S. C.

2. **He who comes in by Recovery, upon an** (f) **eigne Title.** (g) 37 H. 6. 33. (h) 39 H. 6. 23. b. **adjudged.**

3. **So an Avowry ſhall be made upon him who comes to the Tenancy by Act in Law, without an Attornment.** 37 H. 6. 33.

4. As upon a Tenant by Curteſy. 37. H. 6. 23. (i) upon Tenant in Dower. 37 H. 6. 33. upon the Heir of the Diſſeiſor, who is in by Deſcent. 37 H. 6. 33. upon the Recoverer of the Tenancy. 37 H. 6. 33.

(i) Fol. 294.

5. (k) If the Conuſee of a Statute Merchant (l) extends a Seigniory or Rent, he may diſtrain without Attornment. *Co. Lit.* 321. b.

(k) Dier 106. Pl. 8. S. P. Dal. 34. Pl. 27. S. P. (l) So if a Reverſion and Rent be extended upon an Elegit. Moor. 68. Pl. 182. 1 Brownl. 33. Dal. 69. Pl. 37.

(G) To have Actions.

1. If the (a) King grants a Reverſion or Services by his Letters Patents, the Patentee ſhall have the Services, and avow without any Attornment, becauſe he cannot ſue a Per quæ ſervitia, nor hath any (b) Means to inforce an Attornment, the Eſtate being in him by a Matter of Record. 6 Ed. 3. 17.

(a) A Grant to or by the King is good without Attornment by his Prerogative. Co. Lit. 309. b.—but where the Grant is of Dutchy Lands, vide Co. Lit. 314. 4 Inſt. 206. 209, 210. Carpenter and Marſhal. Raym. 90. 1 Sid. 189. 1 Keb. 37. 643. 713. 1 Lev. 29.—and for Grants to the King, vide 1 Rol. Abr. 293. Pl. 2, 3. (b) But where the Grant is under the Dutchy-Seal, a Writ in Engliſh is uſually granted under the ſame Seal, reciting the Grant, and commanding the particular Tenant or Tenants to attorn. 4 Inſt. 210. 1 Sid. 189. Raym. 91.

2. (c) The Lord by Eſcheat of a Reverſion, ſhall have an Action of Waſte, without Attornment. Quære 45 Ed. 3. 3.

(c) Lit. Sect. 583. like Matter, 584.

S. P. Cro. El. 954. S. P. agreed per Curiam. 1 Co. 113. a. 6 Co. 68. a.

(H) (a) In what Caſes it is neceſſary (b) to have (c) Actions or Services againſt the Tenant.

(a) Where the old Privity will ſerve notwithſtanding the Alteration of the Reverſion Vaugh. 36, &c. 45, 46, 47.

1. If there be Leſſee for Life, the Reverſion for Life, the Reverſion in Fee, and the Reverſioner in Fee releaſes to the Reverſioner for Life, he ſhall have no Action of Waſte, for Waſte done before the Releaſe. 48 Ed. 3. 16.

(b) Where the Grant is by Fine the Conuſee can have no Action of Waſte, Writ of Entry ad communem legem, caſu conſimili, caſu proviſo, Writ of Cuſtoms and Services, or Writ of Ward, &c. before Attornment, but of ſuch Things as may be ſeiſed, or entred into without bringing an Action, the Conuſee before Attornment may take Benefit thereof, as to ſeiſe a Ward or Heriot, or enter into the Lands and Tenements of a Ward, or to enter for an Alienation of Tenant for Life, &c. Co. Lit. 320. a. (c) Where an Aſſignee of a Reverſion by Fine, ſhall not without Attornment take Advantage of a Condition or Covenant. per 32 H. 8 Cap. 34. vide 5 Co. 112. b.

2. (d) If a Man grants a Reverſion by Fine, the Grantee ſhall have no Action of Waſte, for Waſte done (e) between the Fine levied and the Attornment, nor ſhall he have any Rent or Service incurred in the mean time. (f) Ed. 3. 15. b.

(d) But it is otherways where in a quid juris clamat, the Attornment is delayed for the Nonage of the Demandant. 8 Co. 85. b. but vide Co. Lit. 315. a. and Q. if it would not be otherways admitting by Law, the Attornment could be delayed for the Nonage of the Tenant. (e) Whereupon a Grant of the Eſtate after Attornment paſſes ab initio, but not with regard to collateral Matters, as to charge the Tenants with mean Arrearages, Waſte, &c. Co. Lit. 310. b. 1 Leon. 222. (f) Br. Attornment, 13. S. C. Fitz. Waſte 94. S. C. Br. 50. S. C.

3. The ſame Law is for Services in caſe of a Grant of a Seigniory by Fine, (g) 48 Ed. 3. 16.

(g) Fitz. Waſte, 94. S. C.

4. If a Man leaſes for Life, the Remainder for Life, and after releaſes in Fee to the Leſſee, he ſhall have no Action of Waſte, for Waſte done after his Attornment. 48 Ed. 3. 16.

5. But if there be Leſſee for Life, the Reverſion for Life, and the Reverſioner in Fee releaſes in Fee to the Reverſioner for Life, he ſhall have an Action for Waſte done after without Attornment, becauſe there was an Attornment once before to the Reverſioner for Life. 48 Ed. 3. 16.

6. If a Man leaſes for Life, and after grants a Leaſe for Years thereof, to begin after the Death of the Leſſee rendring Rent, and after levies a Fine of the Reverſion, which is limited to remain to himſelf and Wife, and after dies, and after the Leſſee for Life dies, the Feme in Reverſion ſhall have an Action of Debt againſt Leſſee for Years, for Rent incurred after the Death of the Leſſee, tho' the Leſſee for Life or Years did never attorn, for the Leſſee for Years could never attorn, becauſe he had but a future Intereſt at the Time of the Fine levied, and the Leſſee for Life is now dead, and ſo the Reverſioner without Remedy, if the Law does not ſupply it. Mich. 42. and 43 Eliz. B. R. between Brierton and Evans adjudged per Curiam.

(h) Co. Lit. 320. a. S. P. becauſe againſt a Stranger where there needs no Privity.

7. (h) If a Reverſion upon a Leaſe for Years be granted by Fine, and the Leſſee ouſted before Attornment, the Reverſioner may have an Aſſize without Attornment. (i) 48 Ed. 3. 16. for there needs no Privity.

(i) Br. Attornment, 13. S. C. Br. Aſſiſe, 35. S. C.

(k) 1 Leon. 297. S. P. adjudged, 3 Leon. 197. S. P. adjudged, 4 Leon. 25. S. P. Bluck and Mole, S. P. 1 Lev. 40. adjudged, Raym. 18. adjudged.

8. (k) If a Copyholder by Licenſe of the Lord makes a Leaſe for Years by Indenture, rendring Rent, and after ſurrenders the Reverſion to another, who is admitted, he may diſtrain for the Rent, without Attornment, for the Eſtate paſſes by the Surrender and Admittance, and there is not any Means by Law to compel the Leſſee to attorn. Hobart's Reports, 239. between (l) Swinnerton and Miller, per Curiam.

(l) Hob. Fol. 177, 178. S. C.

(m) Vaugh. 45. S. P.

9. (m) If two Joint-Tenants in Fee leaſe for Life, reſerving a Rent to them and their Heirs, and after one of them releaſes to the other and his Heirs, this is good, and he only to whom it was made ſhall have the Rent, and a Writ of Waſte without Attornment, becauſe of that Privity that was one between the Tenant for Life, and them in Reverſion. *Lit.* Sect. 574. (n)

(n) Ante. 613. Pl. 1. vide, and the Caſes there cited.

10. In the Caſe of the King, the Thing granted paſſes both in Eſtate and Privity to diſtrain, *&c.* without Attornment, unleſs it be of Lands or Tenements that are Parcel of the Dutchy of *Lancaſter*, and lie out of the County Palatine. *Co. Lit.* 314. b.

(o) Carpenter and Marſhal, S. P. 1 Lev. 28, 29. S. P. adjudged, Raym. 90. adjudged, 1 Sid. 189. adjudged, 1 Keb. 37. 643. 713.

11. (o) If the King by Letters Patents under the Dutchy Seal, grants a Reverſion expectant upon an Eſtate for Life or Years Parcel of the Dutchy, lying out of the County Palatine, (p) the Reverſion paſſes maintainant to the Patentee, by Force of the Letters Patents, which are as high a Matter of Record as a Fine; but he ſhall not have Waſte or Diſtrain before Attornment. 4 *Inſt.* 209, 210. and ſaid, That where a Reverſion is granted under the Dutchy Seal, it is the continual Practice of the Dutchy Courts to iſſue out a (q) Writ in *Engliſh*, in the King's Name, under the Dutchy Seal, reciting the Grant, and commanding the particular Tenants to attorn.

(p) But if the King makes a Feoffment of ſuch Lands, they paſs not without Livery, for the King may make it by Attorny, Carpenter and Marſhal. 1. Lev. 29. per Cur'. Raym. 91. Twiſden ſaid, if it was res integra, there could be no Reaſon why Attornment ſhould not be as well as Livery, but the Precedents are contrary. (q) 1 Sid. 189. Raym. 91.

(r) Becauſe the County of Lancaſter was a County Palatine,

12. But ſuch Lands as lie in the County Palatine, paſs by Letters Patents under the Seal of the County Palatine, (r) both for Eſtate and Privity of Action and Diſtreſs. 4 *Inſt.* 210.

and the Duke had jura regalia, 4 Inſt. 206.

(I) To whom it may be to pass the Estate.

Fol. 295.

1. If an Estate be granted to A. to the Use of B. the Attornment ought to be to A. and not to B. Mich. 5. Jac. B. between Eulin and Sare, per Curiam.

2. (a) If a Man makes a Feoffment of a Manor to A. to the Use of B. and the Tenants of the Manor pay their Rent to B. this is no good Attornment, because the Attornment ought to be to A. Mich. 5. Jac. between Eulin and Sare, per Curiam, upon which the Plaintiff is nonsuited.

3. If a Grant be made to A. to the Use of B. an Attornment made to B. who is the cestuy que use (b) is sufficient. Hill. 11. Car. B. R. in Hilton and Bambrick's Case, per Curiam, and Barkly then said, That this had been often ruled upon Evidence. Hill. 15. Car. B. R. in Shephard and Woodard's Case, per Curiam.

4. If a Grant be made of a Reversion to B. and after the Tenant having Notice of the Grant, says to a Stranger that he attorns, or consents to this Grant, this is a good Attornment in Law, tho' it is made (c) to a Stranger, for by this he consents to the Grant, and it is not material to whom he shews his Consent. Hill. 11 Car. B. R. in (d) Hilton and Bambrick's Case, per Curiam, held.

(a) 1 Leon. 58. like Point, adjudged, where the Tenant did not know who the Feoffee was.

(b) For this is an implied Attornment to the Grantee. Co. Lit. 310. a.

(c) An Attornment may be made in the Absence of the Grantee, for an Agreement to the Grant, either in his Presence or Absence, is sufficient. Co. Lit. 310. a Diversity between an Agreement and a Disagreement, being made in the Absence of the Party. 2 Co. 69. a. 1 Rol. Abr. 301. Pl. 1.

(d) 1 Jon. 376, 377. S. C. S. P. adjudged. Cro. Car. 440. S. C. adjudged, and the Case Br. Attornment 40. that an Attornment to a Servant is not good, was there denied to be Law.

(K) To make an Avowry.

1. If the Lord levies a Fine of his Seigniory to one, who levies a Fine to another, who levies a Fine over to a third Person, an Attornment (a) to him is good to avow. (b) 20 H. 6, 7. b.

(a) 5 Co. 113. b. like Point.

(b) Fitz. Avowry. 11. S. C.

(L) What Persons may attorn, and to whom.

What Persons.

1 D. 8 Eliz. 251. 91. The Reversion of a Lease for Years is granted for Life, the Remainder in Fee, the Lessee for Years attorns to the Grantee for Life, and admitted good for the Remainder.

2. An Infant Tenant may attorn upon the Alienation of a Manor by Feoffment or Reversion. Co 9. (a) Conny 85. b. 18 H. 6. 1. 12 Ed. 4. 4. per Brian.

(a) 1 Brownl. 47. S. C. adjudged, 2 Brownl. 84. S. C. adjudged.

3. If the Husband attorns to a Grant in Pais by Deed, this shall bind the Wife. Co. 9. 85. b.

4. The Attornment of a Feme Covert without her Husband is not good, contra 18 H. 6. 2.

5. A Feme Covert and her Husband Lessees for Life of the Feme in right of the Feme may in Court attorn upon a Fine levied of the Reversion without Process against them. 43 E. 3. Attornment 7. adjudged.

6. (b) A Baron and Feme seised in the right of the Feme may attorn to the Grant of the Reversion or Seigniory. 15 Ed. 3. Attornment 11. 3 Ed. 3. 42. 4 E. 3. Attornment 12.

(b) 9 Co. 85. b. S. P.

(M) (a) Who

(M) (a) Who in reſpect of Eſtate.

(a) It is a Maxim in Law, That no Man ſhall attorn to any Grant of any Seigniory, Rent-Service, Reverſion, or Remainder, but he that is immediately privy to the Grantor. Co. Lit. 311. a.—but upon the Grant of a Rent-Charge or Seck, the Tenant of the Freehold doth attorn, without Reſpect of any Privity. Co. Lit. 311. b. (b) Co. Lit. 315. a. S. P.

1. (b) A Seigniory is granted by Deed, and after the Tenant aliens the Tenancy, the Feoffee may attorn. 18 E. 4. 10. b. 20 H. 6. 10.

(c) 2 Co. 67. a. S. P. (d) So if the Lord recites that the Diſſeiſor holds of him, and grants the Services. Kelw. 123. b.

2. (c) So if (d) after the Grant the Tenant is diſſeiſed, the Diſſeiſor may attorn. 18 E. 4. 10. b.

Fol. 296.

(e) And therefore 'tis otherways where the Grant is by Deed, as Co. Lit. 316. a. muſt be intended.

3. If a Reverſion be granted by Fine, and before Attornment the Leſſee grants over his Eſtate, yet he may attorn after (e) becauſe the quid juris clamat ought to be brought againſt him who was Tenant at the Time of the Fine levied. 21 H. 6. 54.

(f) Co. Lit. 315. a. S. P.

4. (f) If there be Tenant in Tail, and the Remainder in Fee, and the Seigniory is alienes, and Tenant in Tail dies before Attornment, yet the Iſſue may well attorn, and the Eſtate ſhall paſs. 20 H. 6. 9. b.

5. If Tenant in Tail attorns to a Grant of the Reverſion by the Donor, this is a good Attornment. 12 E. 4. 3.

(g) Co. Lit. 316. a. S. P.

6. (g) If Tenant in Dower grants over his Eſtate, and after the Reverſion is granted, the Attornment of the Tenant in Dower notwithſtanding her Grant is good for the Privity of Waſte and Avowry. 11 H. 4. 19.

(h) Co. Lit. 316. a. S. P.

7. (h) So if a Tenant by the Curteſy grants over his Eſtate, yet he may attorn to the Grant of the Reverſion for the Privity of the Action of Waſte. 18 E. 3. 3.

(i) But ſome hold the contrary, becauſe he muſt be Attendant and Subject to the Action of Waſte. Co. Lit. 316. a.

8. But the Grantee of Tenant by the Curteſy (i) cannot attorn to the Grant of the Reverſion. 18 E. 3. 3.

9. If a Diſſeiſor attorns to a Grant by Fine, this ſhall bind the Diſſeiſee when he re-enters. 18 H. 6. 2. b.

(k) Co. Lit. 316. a. S. P. (l) But in this Caſe the Attornment of the Aſſignee of the Tenant for Life is good, becauſe he is Tenant of the Land. Co. Lit. 316. a.

10. (k) If Tenant for Life grants over his Eſtate upon Condition, and after the Reverſion is granted, the Attornment of the firſt Leſſee to this Grant is not good, becauſe he hath (l) nothing but a Condition. 8 H. 5. 10. per Hill.

11. If there be Leſſee for Years, the Reverſion for Life, and the Reverſion in Fee is granted, the Leſſee for Years cannot attorn thereto, but the Reverſioner for Life ought to attorn. P. El. B. R. between Eedes and Knotſpoole, per Curiam.

(m) Co. Lit. 317. a. at the top, S. C. for being the Eſtate for Years is able to ſupport the Eſtate for Life, the Attornment of the Leſſee for Years, ſhall bind the Remainder for Life, becauſe of the Privity, & vide All. 59. 1 Leon 265. (n) And if ſo, yet the Attornment of him in the Remainder would have been good, for where a Reverſion depends upon an Eſtate of Freehold, it is ſufficient if the Tenant of the Freehold doth attorn. Lit. Sect. 571.

12. (m) But otherways it had been, if it had been a (n) Remainder, and not a Reverſion for Life. ibidem.

(o) 1 Rol. Abr. 303. Pl. 3. vide.

13. (o) An Attornment in Pais by one Jointenant is good for (p) his Moiety, without doubt. 9 H. 6. 22.

(p) But if there be two Joint-Tenants of a Seigniory, and the Lord grants the Services of one of them, perhaps this cannot be made good by Attornment, for the Lord by his own Act cannot divide the Seigniory for this, vide Kelw. 123. b. Quære, & vide 2. Co. 67. b.

14. And

14. And if he ſurvives the other Jointenant, it ſhall be a good Attornment for the Whole. 9 H. 6. 22.

15. (q) If the Tenant is diſſeiſed, and the Lord grants over his Seigniory to another, the Diſſeiſee in reſpect of the Privity may attorn. *Co. Lit.* 311. b. (q) Kelw. 123. b. S. P.

16. But if the Lord grants over his Rent only, it paſſes as a Rent-Seck, and conſequently the Diſſeiſor being the Tenant of the Land muſt attorn. *Co. Lit.* 311. b.

17. If he that hath a Rent-charge in Fee, grants it over for Life, and the Tenant of the Land attorns thereto, and after he grants the Reverſion of the Rent-charge, the Grantee for Life may attorn alone. *Co. Lit.* 311. b. *per Dier* and *Mounſon*, and 'tis ſaid, that therewith agreeth 46 *Ed.* 3. where it appears, that in that Caſe, the *quid juris clamat* lay againſt the Grantee for Life.

18. If a Man leaſes for Life, and after grants to *A.* a Rent-charge out of the Reverſion, and *A.* grants over the Rent, he in the Reverſion muſt attorn, and not the Tenant of the Freehold, for the Freehold is not charged with the Rent, and a Releaſe made to him by the Grantee doth not extinguiſh it. *Co. Lit.* 311. b.

(N) What Perſons are compellable.

1. (a) If a Fine be levied of a Manor, an Infant being a Tenant, he is compellable to attorn within Age, by a (b) per quæ ſervitia, Co. 9 (c) Conny's Caſe, reſolved. 85. (d) 12 E. 4. 4. (a) Co. Lit. 315. a. S. P. and this can be no Miſchief to the Infant, for when he comes to full Age, he may diſclaim to hold of him, or he may ſay that he holds by leſſer Services, and the Miſchief would be greater if the Attornment of an Infant ſhould not be good, for the Conuſee ſhould loſe his Services in the mean Time. (b) So in a quid juris clamat, upon a Grant of a Reverſion by Fine. Co. Lit. 315. a. (c) 2 Brownl. 84. S. C. (d) Fitz. Attornment. 5. S. C.

2. An Infant is not compellable to attorn upon a Feoffment in Pais, Co. 9. 85. b.

3. Leſſee without Impeachment of Waſte, or Tenant by Homage Anceſtrel, are not compellable to attorn before the Advantage and Warranty ſaved. 39 H. 6. 25.

4. A Feme covert is compellable to attorn. (e) 9 E. 4. 4. (e) I ſuppoſe this is miſprinted, and ſhould be 12 Ed. 4. 4. which vide Fitz. Attornment, 5.

5. A deaf or dumb Man ſhall not attorn in a per quæ ſervitia, if he (f) cannot ſhew his Conſent by Signs. 32 E. 3. Age 80. per Mowbray. (f) Otherways if he can ſhew his Conſent by Signs. Co. Lit. 315. a.

6. (g) One that is non compos mentis, ſhall not attorn in a per quæ ſervitia. 32 E. 3. Age 80. per Mowb. (g) Co. Lit. 315. a. S. P. 6 Co. 69. a. S. P. yet vide there where his Re-entry amounts to an Attornment.

7. (h) Tenant after Poſſibility of Iſſue extinct, is not compellable to attorn to the Grant of a Reverſion for the Inheritance which was (i) once in him. 39 E. 3. 16. (h) Co. Lit. 316. a. S. P. 1 Leon. 290, 291. S. P. 2 Leon. 40. S. P. 3 Leon 241. S. P. (i) But his Aſſignee ſhall be compelled to attorn, becauſe he never had more than a bare Eſtate for Life. Co. Lit. 316. a. 1 Leon. 291. 2 Leon. 40. 3 Leon. 241.

(O) What Perſons in reſpect of their Eſtate.

Fol. 297.

1. (a) Tenant in Tail is (b) not, &c. upon a Grant of the Reverſion, (c) 12 E. 4. 3. (d) 48 Ed. 3. 9. b. 29 Ed. 3. 1. b. admit per Iſſue. (e) 5 H. 5. 12 (f) 43 Ed. 3. 1. (g) 46 Ed. 3. 13. 27. 10 H. 6. 1. (a) Co. Lit. 316. a. S. P. (b) He is not compellable, but if he will attorn gratis, it is good. Lit. Sect. 570. (c) Fitz. Attornment, 5. S. C. (d) Br. Attornment,

tornment, 49. S. C. (e) Fitz. Attornment. 17. S. C. (f) Br. Attornment, 10. S. C. Br. Quid juris clamat, 1. S. C. (g) Br. Attornment, 11. S. C. Fitz. Quid juris clamat, 19. S. C. Br. 6.

(h) Co. Lit. 316. b. S. P.

2. (h) But if there be Tenant in Tail, the Remainder over, and the Lord grants the Services, he is compellable to attorn. 12 Ed. 4. 3.

(i) For an Attornment by Tenant in Tail, where a Rent with which the Land is charged, is granted over, vide Co. Lit. 316. b.

3. If a Man makes a Gift in Tail, reserving Rent, and after grants over the Rent by Fine, the Donee is compellable to attorn to this Grant, for this passes as a (i) Rent-seck. 5 H. 5. Attornment 17.

(P) To what Persons.

1. After the Death of my Ancestor, if I grant the Services of my Tenant who never attorned to me, yet he is compellable to attorn, for I my self might have avowed without Attornment. 2 Ed. 2. Attornment 15.

(a) Br. Attornment, 14. S. C. Fitz. Per que servitia, 6. S. C. Br. 2. S. C.

2. The Tenant of a Manor is not compellable to attorn to a Grant of Tenant in Tail of the Manor by Fine, because it may be defeated by the Issue. (a) 48 Ed. 3. 23. b.

(Q) (a) To whom in respect of the Estate.

(a) It is a general Rule, That when the Grant by Fine is defeasible, the Tenant shall not be compelled to attorn. Co. Lit. 318. a. (b) Co. Lit. 318. a. S. P. (c) Br. Attornment, 28. S. C. (d) Br. Attornment. 49. S. C.

1. (b) The Tenant is not compellable to attorn to the Grant of a Reversion or Services by Tenant in Tail. (c) 12 Ed 4. 3 Co. 3. Justice Windham 86. this was the Common Law. 24 Ed. 3. 25. b. Curia contra. (d) 48 Ed. 3. 9. b. 2 Ed. 3. 51.

(c) Co. Lit. 318. S. P. because the King may seise the Reversion and Rent, and so the Tenant should be Attendant to another. 2 Inst. 67. S. P. (f) Fitz. Attornment. 5. S. C.

2. (e) The King's Tenant leases for Life, and after grants the Reversion, the Lessee is not compellable to attorn before Licence to alien. (f) 12 Ed. 4. 3. b.

(g) Co. Lit. 318. a. S. P. (h) 2 And. 112. S. C. cited Goulf. 4. 5. S. C. adjudged.

3. (g) But now the Tenant is compellable to attorn to the Grant of the Reversion or Services by Tenant in Tail by Fine, because this is a lawful Bar by the Statute. Co. 3. (h) Justice Windham, 86.

(i) For this vide 3 Leon. 6. N. Bendl. 88. Pl. 135. (k) Br. Attornment, 10. S. C.

4. If a Reversion in Fee descends upon Lessee for Life of a Manor, and two other Coparceners, and after (i) one of the Coparceners grants her Part of the Reversion, the Lessee ought to attorn thereto. (k) 43 Ed. 3. 1.

(l) Co. Lit. 318. a. con. because the Lord may defeat it. (m) Fitz. Quid juris clamat, 25. S. C.

5. (l) Tenant for Life is compellable to attorn to a Grant by Fine in mortmain. (m) 17 Ed. 3. 7. Curia contra. Ed. 3. Fines 86.

6. If an Infant levies a Fine, the Tenant shall not be compelled to attorn, because the Fine is defeasible by Writ of Error during his Minority. *Co. Lit.* 318. a.

7. So if a Fine be levied at Common Law, of the Reversion of Lands in ancient Demesn, the Tenant shall not be compellable to attorn, because reversable in a Writ of Disceit. *Co. Lit.* 318. a.

(R) Of what Things compellable.

At what Time.

1. (a) If he attorn in a per quæ ſervitia to the Grantee for Life of a Meſnalty, upon the Grant of his Acquittal, yet after his Death the Grantee of the Remainder ſhall not diſtrain (b) till he hath granted the Acquittal. (c) 18 Ed. 4. 7.

(a) Co. Lit. 312. b. S. P. (b) Co. Lit. 320. b. S. P. and ſaid, that it muſt be in a per que ſervitia brought by him againſt the Tenant. (c) Br. Attornment, 38. S. C. Br. per que ſervitia. 12. S. C.

(S) An Attornment where not compellable, yet good.

1. The Alience of the Tenancy, after a Fine levied of the Seigniory is not compellable, yet if he does attorn it is good. (a) 18 Ed. 4. 10. b.

(a) Br. Attornment, 39. S. C. Br. per que ſervitia, 9. S. C.

2. (b) Tho' an Infant is not compellable to attorn to a Grant by Deed, yet if he doth attorn, it ſhall bind him, becauſe it is a lawful Act. *Co. Lit.* 315. a.

(b) Conny's Caſe, S. P. 9 Co. 84, 85. adjudged 1 Brownl. 47. adjudged 2 Brownl. 84. adjudged.

3. (c) So altho' Tenant in Tail is not bound to attorn, yet if he will attorn *gratis*, this is good, (d) *Lit.* Sect. 570.

(c) 9 Co. 86. a. (d) Co. Lit. 316. b. this is ſaid to have been an Addition to Lit. yet is allowed to be Law.

Fol. 298.

(T) Who ought to attorn.

1. If the Lord alien his Seigniory by Fine, and after the Tenant aliens the Tenancy, and dies, tho' the Heir hath nothing, yet he is compellable to attorn, becauſe he is privy to the Note. (a) 25 Ed. 3. 50. (b) 26 Ed. 3. 56. but there a Scire facias is granted againſt the Tertenants alſo.

(a) Fitz. Per que ſervitia, 13. S. C. (b) Fitz. Per que ſervitia, 24. S. C.

2. So if after the Fine levied of the Seigniory, the Tenant in Tail, who is Tenant by the Manor, dies without Heir general or ſpecial, per quod the Land comes to another in Reverſion or Remainder, he is compellable to attorn, becauſe there is no other to attorn. 18 Ed. 4. 10. b.

(c) Br. Attornment, 39. S. C. Br. Per que ſervitia 9. S. C.

3. But if a Lord levies a Fine, and the very Tenant after aliens, the Alienee is not compellable to attorn, but the Alienor, becauſe the per quæ ſervitia ought to be brought againſt him who was Tenant at the Time of the Fine levied. (c) 18 Ed. 4. 10. b. (d) 8 H. 6. 17. b.

(d) Fitz. Per que ſervitia, 1. S. C. Br. 5. S. C.

(U) In what Caſes he is (a) bound to attorn.

(a) If the Grantee of a Rent-charge of 20 l. a Year, grants 5 l. a Year of it to a Stranger by Fine, the Tenant is not bound to attorn; for a Man ſhall not be liable to ſeveral Diſtreſſes, where his Grant made and meant but one. Hob. 25.—but in this Caſe he may attorn if he will, and the Grant ſhall be good. Co. Lit. 148. a.

1. If the Leſſor, and another who hath nothing in the Reverſion, recite in the Grant of their Reverſion, that the Leſſee holds for Life, the Reverſion to them, the Leſſee is not bound to attorn to this Grant, becauſe of his Warranty. 18 H. 6. 1. b.

2. So

2. So if the Grantor recites, that two hold for Life where there is but one Leſſee, he is not bound to attorn to this Grant, becauſe of his Warranty. 18 H. 6. 1. b.

3. So if the Reverſion of Tenant in Dower be granted by Fine, it is no Plea for her in Bar of the Attornment, that the Grantor was bound to warrant to her becauſe of the Reverſion, and hath Aſſets, and the Grantee hath not Aſſets, for perhaps before any impleading the Grantor will alien his Aſſets. Dubitatur 21 Ed. 3. 48.

(b) Fitz. Quid juris clamat, 34. S. C.

4. A Leſſee is not bound to attorn to a Grant by Fine by him who hath nothing in the Reverſion, becauſe this would be a Forfeiture. (b) 27 Ed. 3. 77.

(c) This is miſprinted, and I ſuppoſe, ſhould be 27 Ed. 3. 77. which vide Fitz. Quid juris clamat, 34.

5. If there be Leſſee for Life, the Reverſion to Baron and Feme, and the Baron only levies a Fine, the Leſſee in a quid juris clamat by the Conuſee, is not bound to attorn, becauſe this would be an Acknowledgment that the Baron only might grant the Reverſion, which would be a Forfeiture to the Feme after the Death of the Baron. (c) 23 Ed. 3. 77.

(X) At what Time.

(a) Co. Lit. 320. b. S. P. (b) 9 Co. 85. b. S. P.

1. (a) He who holds by Homage Anceſtrel, is not bound to attorn before his Acquittal is acknowledged by the other. 18 H. 6. 2. b.

2. (b) If in a *quid juris clamat*, the Leſſee ſhews his Eſtate and Privilege not to be impeachable for Waſte, and ſays, he is ready, ſaving to him his Privilege, *&c.* to attorn, if the Plaintiff be within Age, ſo as he cannot acknowledge the Privilege, the Tenant ſhall not be compelled to attorn until his full Age, when he may acknowledge it. *Co. Lit.* 320. b.

3. But if a *quid juris clamat* be brought by *Baron* and *Feme*, his Privilege ſhall be entered in the Roll, notwithſtanding ſhe is a *Feme covert*. *Co. Lit.* 320. b. by ſome.

(Y) (a) (b) How.

(a) No Attornment ſhall be entred upon any Fine, unleſs the Party attorning ſhall in a quid juris, &c. appear in Court, or by Attorney warranted under the Hand of a Judge of one of the Benches, or of Aſſiſe, per 22 El. cap. 3. (b) Where an Attornment may be upon a Condition precedent, but not upon a Condition ſubſequent. Co. Lit. 274. b. 2 Co. 68. a. 9 Co. 85. b. (c) The Entry is, that he did attorn, & fecit fidelitatem. Hut. 89.

1. When (c) he attorns, he makes an Oath in Court to pay the Services to the Lord. 18 H. 6. 2. b.

Fol. 299. (Z) At (a) what (b) Time it is to be made.

(a) Where the Attornment being alledged the ſame Day the Rent grew due, ſhall be intended before, and the rather, being after Verdict. All. 34. (b) If the Grant be by Fine, the Eſtate immediately paſſes to the Conuſee, and his Heirs, and albeit the Conuſor or Conuſee dies, the Attornment to make a Privity, may at any Time be made to the Conuſee or his Heirs. Co. Lit. 309. b. (c) 2 Co. 68. b. S. P. (d) Fitz. Quid juris clamat, 13. S. C. Br. 10. S. C. Br. Attornment, 50. S. C.

1. (c) In a quid juris clamat, if the Defendant for Part claims a Fee, and for the Reſidue is ready to attorn, he ſhall attorn preſently for this, becauſe for the other he ſhall never attorn if it be found againſt him. (d) 11 H. 4. 57. adjudged. 11 R. 2. Attornment 9. adjudged.

(e) 2 Co. 68. b. S. P. (f) Fitz. Quid juris clamat, 13. S. C. Br. 10. S. C.

2. (e) But if he had pleaded ſuch Plea upon which he ſhould have attorned, if it had been found againſt him, there he ſhould have ſaid as to the other till it was found, and then have attorned for the Whole together. (f) 11 H. 4. 57. b.

3. If

3. If there be Lord and Tenant, and the Lord grants the Services of his Tenant for Years, for Life, in Tail or in Fee, the Tenant ought to attorn thereto in the Life of the Grantor, or otherways the Grant is void. Lit. Fol. 124. Sect. 551.

4. If there be Leſſee for Life, the Reverſion in Fee, and the Reverſioner grants over the Reverſion, the Leſſee ought to attorn during the Life of the Leſſee, otherways the Grant will be void. 23 Aſſ. 18. admit per Iſſue.

5. (g) If a Rent be granted, if the Tenant does not attorn (h) during the Life of the Grantor, the Grant will be void, and cannot be made good by Attornment after. 40 Aſſ 19. adjudged.

(g) Co. Lit. 309. a. S. P. because every Grant, as to the Subſtance thereof, muſt take Effect in the Life both of the Grantor and Grantee, and by the Death of the Grantor, the Rent deſcends to his Heir. Co. Lit. 315. a. (h) But if the Leſſor enters upon his Leſſee, and makes a Feoffment, and dies, and the Leſſee re-enters, this is a good Attornment notwithſtanding. Lit. Rep. 270. arguendo.

6. (i) If a Reverſion be granted by (k) Deed, and the (l) Grantee dies before Attornment, it cannot be made to his Heir, for then he ſhould be in as a Purchaſor, when by the Grant he ought to be in by Deſcent. 34 H. 6. 7. b.

(i) Co. Lit. 309. a. b. S. P. 315. a. S. P. Car. 5. S. P. per Bridg. Ch. Juſtice. 1 Co. 105. a. 2 Co. 35. b. (k) But if by Fine an Attornment may at any Time be made to the Conuſee or his Heirs, to make a Privity to diſtrain. Co. Lit. 309. b. — a quid juris, &c. brought by the Heir of the Conuſee. N. Bendl. 88. Pl. 135. (l) But if there be two Grantees, and one dies, an Attornment may be made to the Survivor. Co. Lit. 310. a. near the top. Cart. 5. per Bridgman Ch. Juſt. 2 Co. 67. b. at the bottom.

7. (m) If there be a Grant of a Reverſion to one for Life, the Remainder in Fee to another, an Attornment to him in Remainder after the Death of the Leſſee is void. (n) 20 H. 6. 7.

(m) Co. Lit. 310. like Point, becauſe if otherways he ſhould have a Remainder without a particular Eſtate. 2 Co. 67. b. S. P. (n) Br. Attornment, 2. S. C.

8. If a Man leaſes Land rendring Rent, and after grants the Reverſion, and before Attornment the Leſſor gets the Rent, yet the Leſſee may attorn after to the Grantee, and the Reverſion ſhall paſs to him. 2 R. 2. Attornment. 8.

9. (o) If A. a Woman leaſes for Life or Years, and after grants the Reverſion to B. and after takes C. to Husband, (p) this is a good Revocation of the Grant, ſo that nothing paſſes to B. by the Attornment of the Leſſee after, becauſe by the Intermarriage C. is ſeiſed in the Right of his Wife, and had a Poſſibility to be Tenant by the Curteſy. 2 R. 2. Attornment 8. per Perſy.

(o) Co. Lit. 310. b. at the top. 4 Co. 61. a. S. P. Cro. El. 240. S. P. agreed per Curiam. (p) So where a Biſhop granted a Reverſion, and before Attornment was tranſlated to another Biſhoprick. 3 Leon. 17. 4. Leon. 23.

10. (q) But if A. the Woman, after Grant of the Reverſion to B had took B. to Husband, this had not been any Revocation of the Grant, but that the Leſſee might well ſettle the Reverſion in him by Attornment after, becauſe the Husband could not have a better Eſtate by the Intermarriage than he had by the Grant. 2 R. 2. Attornment 8.

(q) Co. Lit. 310. a. S. P. 4 Co. 61. a. S. P.

11. If a Man makes a Feoffment of a Manor, and before Attornment of the Tenants diſſeiſes the Feoffee, yet the Services paſs by the Attornment of the Tenants after. Tempore Ed. 1. Attornment 20. adjudged.

12. If a Man for Money bargains and ſells Land for Years, and after grants the Reverſion, the Bargainee may well attorn before Entry, for the Bargain and Sale amounts to a Waiver of the Poſſeſſion, and ſo the Bargainee, tho' he hath no actual Poſſeſſion of the Land, yet he hath an Eſtate for Years divided from the Reverſion, and ſo may attorn. Mic. 18. Jac. in Curia Wardorum, between (r) Lutwich and Mitton, by three Judges, & per Curiam overruled, and ſaid it was a common Conveyance. Hill. 12 Car. between Snape and Turton adjudged upon a ſpecial Verdict, and the Court would not ſuffer it to be argued, but ſaid that this was the common Aſſurance of the Land, and (s) that the Poſſeſſion was in the Bargainee before Entry.

(r) 1 Jon. 7. 9. S. C. and the Opinion of the 3 Chiefs delivered accordingly. (s) Vide All. 39.

13. If there be Lord Meſne and Tenant, and the Meſne by Deed grants over his Meſnalty, and after the Lord releaſes to the Tenant, whereby the Meſnalty is extinct, and there is a Rent-Seck by Surpluſage, an Attornment to the Grant is good, altho' the Quality of the Rent is altered, becauſe it is altered by Act in Law. *Co. Lit.* 309. b.

14. If a Reverſion of two Acres be granted by Deed, and the Leſſor before Attornment levies a Fine of one of them, and after the Tenant attorns to the Grantee by Deed, this is good for the other Acre. *Co. Lit.* 309. b.

15. If the Lord grants the Services of his Tenant to *A.* in Fee, and before Attornment (t) grants the ſame Services to *B.* (u) for Life, and the Tenant attorns to *B.* he cannot afterwards attorn to *A.* for they cannot paſs according to the Grant. *Co. Lit.* 310. a.

(t) By the ſecond Grant the Attornment to the firſt is countermanded. Lit. Sect. 552. Cro. Car. 284. 1 Co. 122. a. (u) So if for Years. Cro. El. 354. at the Bottom.

16. So if a Reverſion expectant upon an Eſtate for Life be granted in Fee, and before Attornment the Grantor confirms the Eſtate of the Leſſee to hold in Tail, the Attornment after for the Fee ſimple is void. *Co. Lit.* 310. a.

17. So if a Reverſion upon a Leaſe for Years be granted, and the Leſſor before Attornment confirms the Eſtate of the Leſſee to hold for Life, *&c. Co. Lit.* 310. a.

18. If *A.* being ſeiſed in Fee of a Manor, leaſes a Cloſe, Part thereof to *B.* for 21 Years, and after leaſes the ſame Cloſe to *C.* for 26 Years, to commence after the End of the firſt Leaſe, and after *A.* makes a Feoffment of the ſaid Manor to *D.* to the Uſe of *D.* and his Heirs, upon Condition that if within 15 Days he paid not 10000 *l.* to *A.* or his Aſſigns, it ſhould be to the Uſe of *A.* and his Wife, the Remainder, *&c.* and Livery is made in the Lands in Poſſeſſion, and not in this Cloſe, and the Money is not paid whereby the firſt Uſe is determined, yet after by the Attornment of the firſt Leſſee, the Reverſion of this Cloſe will paſs to the laſt contingent Uſe. *Hill.* 14 *Eliz.* between (w) *Hanvel* and *Lucas. Moor* 99. *Pl.* 243. adjudged.

(w) 1 Leon. 264, 265. S.C. adjudged, 2 Leon. 222. S. C. adjudged, Vaugh. 52. S. C. adjudged.

Fol. 300.

(A) (a) What ſhall be ſaid a good Attornment.

What ſhall be ſaid a (b) good (c) Conuſance of a Grant.

(a) An Attornment may be void for the Uncertainty to which of the Grants it is made, as if a Reverſion be granted for Life, and after granted to the ſame Grantee for Years, and Leſſee attorns to both Grants. Co. Lit. 310. b. —but upon a Grant of the Reverſion of Bl. Acre, or Wh. Acre, if the Leſſee attorns; the Grantee may after make his Election, for here is but one Grant, to which the Tenant attorned in ſuch ſort as it was made. Co. Lit. 310. b. (b) Where the Law intends Notice. 2 Co. 68. b. (c) Whether the Attornment be expreſs or implicit, the Tenant muſt have Notice of the Grant, for he cannot agree to what he knows not. Co. Lit. 309. b.——and if he hath not true Notice both of the Thing and of the Eſtate granted, his Attornment will be void, vide 2 Co. 68. a. (d) 1 Leon. 58. like Point adjudged.

1. (d) If a Man be ſeiſed of a Reverſion expectant upon a Leaſe for Years, and after makes a Feoffment with Words of Grant of theſe Lands to A. and B. to the Uſe of himſelf for Life, the Remainder to others, and after the Feoffor ſays to the Leſſee that he had conveyed the Lands, That he holds in Leaſe to the Uſes aforeſaid, to which the Leſſee ſays, (I like it well) and after pays his Rent to the Feoffor generally, this is no good Attornment, becauſe the Attornment ought to be to the Feoffees, and this can be no Attornment to them, becauſe the Leſſee had not Notice who were the Feoffees, in Camera Scaccarii. Between Arden and Darcy adjudged, cited Tr. 8 Jac. in Camera Scaccarii.

2. If a Man grants a Manor to A. to the Use of B. and the Tenants pay their Rents to B. this is no good Attornment. M. 5 Jac. B. per Curiam, upon which the Plaintiff is Nonsuit.

3. If a Lessee pays the Rent to the Grantee of the Reversion, having no Conusance of the Grant, this is no good Attornment. P. 7. Ja. B. between Leeke and Pipp, per Curiam.

(B) And (a) what (b) Words, and to whom, will make an Attornment.

1. If there be Tenant for Life, the Remainder in Tail, and he in Remainder grants his Remainder to J. S. upon which the Tenant for Life having Conusance of this Grant, says to a Stranger, I am well pleased that the Grant is made to him, (naming the Grantee) being my Kinsman, this is a good Attornment, tho' it be spoke to a Stranger, for this is but a Manifestation of his Agreement, which may be made to a Stranger as well as to the Grantee, (c) and in the Absence of the Grantee, for the Consent is to the Grantor as the Pleading is, which is sufficient. Hill. 11 Car. B. R. between (d) Hilton and Bambriche, per Curiam, adjudged upon a special Verdict. Intratur, Hill. 10 Car. Rot. 1105. tho' it was objected, that it does not appear that he intended by this to attorn, being spoke to a Stranger.

(a) Any Words which import an Agreement or Assent to the Grant, do amount to an Attornment. Co. Lit. 310. a.

(b) Where the Tenant seeing the Grantee coming towards him, says to a Stranger. See my Landlord, this is a good Attornment. 3 Leon. 17. per totam Cur'. 4 Leon. 23. per totam Cur'. (c) 1 Rol. Abr. 295. Pl. 4. vide and the Notes there Margine. (d) 1 Jon. 376, 377. S. C. and S. P. adjudged. Cro. Car. 440. S. C. and S. P. adjudged.

2. If the Purchasor of a Reversion writes to the Tenant, acquainting him with the Purchase, with a Request for his Good Will, and Assent to the Attornment, without Compulsion of Law, to which Answer is made by Letter, subscribed by the Hand of the Tenant, That (the (e) Grantor, by Name, not having it himself) I am glad I have so good an Heir as you, this is a good Attornment in Law. D. 13 El. 298. Pl. 27.

(e) In the Original this and the following Words are misprinted, for there it is a Grantee per nosm ne oiant lye mesme, &c.

(C) What (a) Act or Thing shall be said to be an Attornment.

1. NOn refert an quis assensum suum præbet (b) verbis an rebus ipsis & factis, and an Attornment is but an Assent. Co. 10. Lampet 52.

(a) Where the Tenant offers to contract with the Grantee for a new Lease. 3 Leon. 17. 4 Leon. 23.

(b) An Attornment may be either in Deed or in Law, viz. expres or implicit. Co. Lit. 309. b.

2. If Lessee for Life surrenders to the Grantee of the Reversion, this is a good Attornment. 23 Ass. 18. admit.

3. If a Man leases a Manor for Life, and after makes a Deed of Feoffment to another, and makes Livery in the Demesnes by the Assent of the Lessee, tho' this be a temporary Surrender, yet it seems this will be a sufficient Attornment to pass the Services. Tr. 40 Eliz. between Shephard and Gray, Dubitatur.

4. If the Tenant subscribes his Name as a Witness to the Ensealing of the Deed, by which the Reversion is granted, yet this is no Attornment, if it be not averr'd and proved that he had Notice of the Contents of the Grant comprised in the Deed, for he might put his Hand as a Witness to the Ensealing of a Deed, without knowing it contained a Grant of the Reversion, Hill. 11 Car. B. R. in (c) Hilton and Bambrick's Case, held per Curiam.

Fol. 301.

(c) Cro. Car. 441. S. C. and S. P. per Cur'.

5. But

(d) Cro. Car. 441. S. C. & S. P. per Cur'.

5. But in the ſaid Caſe, if it be averr'd and proved, that he knew the Effect of the Grant, the putting his Hand as a Witneſs to the Enſealing of the Deed, will make an Attornment in Law. Hill. 11 Car. B. R. in the ſaid Caſe of (d) Hilton and Bambricke, per Curiam held.

6. If A. a Woman grants a Reverſion to B. and after takes B. to Husband, and after the Leſſee pays to the Husband the Rent reſerved upon the Leaſe, without ſaying any Thing of an Attornment, this ſhall not be any Attornment, for the Husband had Cauſe to have the Rent in the Right of his Wife. 2 R. 2. Attornment 8. per Curiam.

7. If one Man grants a Reverſion to another, and the Leſſee after pays the Rent to the Grantee, this will be an Attornment in Law, for he had no Colour to have the Rent but as Grantee. 2 R. 2. Attornment.

8. If there be Leſſee for Years, the Reverſion in Fee to B. and B. grants the Reverſion to C. and before Attornment the Leſſee grants his Eſtate to B. this Acceptance of this Grant is not Attornment by him. H. 8. Ja. B. reſolved per Curiam.

9. If a Bailiff of a Manor, who uſed to receive the Rents of the Tenants, purchaſes the Manor, and the Tenants having no Notice of the Purchaſe, continue the Payment of the Rents to him, this is no Attornment. Co. *Lit.* 309. b.

10. So if the Lord levies a Fine of the Seigniory, and by Fine takes back an Eſtate in Fee, and the Tenant continues the Payment of the Rent to the firſt Conuſor, without Notice of the Fines, this is no Attornment. *Co. Lit.* 309. b.

11. If the Grandfather, being Tenant for Life, perſwades the Father to grant his Reverſion to the Son in Fee, and in Conſideration thereof, the Grandfather promiſes to pay the Debts of the Father, and thereupon the Father grants his Reverſion accordingly, and the Grandfather pays the Debts, now this Payment, and precedent Perſwaſion amounts to an Attornment in Law. *Trin.* 17 *Jac.* between *Atwell* and *Hains*, 2 *Rol. Rep.* 91. Ruled upon Evidence by three Judges, *Crooke abſente.*

(D) What Act or Thing ſhall be ſaid to be an Attornment.

(a) Acceptance.

(a) Of the Deed by him who ought to attorn. Co. Lit. 312. b. 313. 1 Rol. Rep. 187. 10 Stranger. 3 Leon. 279. Co. Lit. 313. a.

1. If the Lord grants the (b) Seigniory to the Tenant and another, this Acceptance of the Grant by the Tenant, is a good Attornment (c) for the whole. (d) 34 H. 6. 41. b.

Co. 52. b. Moor 823. Pl. 1112. (b) So if a Reverſion be granted to the Tenant and a (c) To extinguiſh one Moiety, and to veſt the other Moiety in the Stranger. (d) Br. Attornment 7. S. C. Fitz. 3. S. C. Br. Grants, 11. S. C.

(e) Br. Attornment 7. S. C. Fitz. 3. S. C. Br. Grants 11. S. C.

2. So if a Man be ſeiſed of a Rent iſſuing out of Land, and grants this to the Tenant of the Land, and a Stranger, this Acceptance of the joint Grant by the Tenant, is an Attornment for the whole. (e) 34 H. 6. 41. b.

(f) Fitz. Meſne 32. S. C.

3. If there be Leſſee pur auter vie of a Seigniory, and after the Leſſor confirms it for his own Life, this paſſes without any Attornment. (f) 17 Ed. 3. 31. b.

4. If there be Leſſee for Life, the Reverſion for Life, and he in the Reverſion in Fee, releaſes to the Reverſioner for Life in Fee, this is good, and paſſes the Eſtate, for his Acceptance of the Releaſe is an Attornment. 48. Ed. 3. 16.

(g) Lit. Sect. 575. S. P. Vaugh. 45. S. P. cited.

5. (g) So if there be Leſſee for Life, the Remainder for Life, the Reverſion in Fee, and the Reverſioner in Fee releaſes to the remainder Man for Life, this is good without any Attornment, for the Cauſe aforeſaid. 48 Ed. 3. 16.

6. If

6. If A. be ſeiſed of Land in Fee, and leaſes it for 1000 Years to B. and after grants the Reverſion in Fee to D. and after B. aſſigns his Term to D. and D. accepts it, this extinguiſhes his Term, for tho' the Reverſion in Fee was not any Way executed, either by Attornment, or otherways, before the aſſignment of the Term to him, yet when the Term is aſſigned to him, the Law ſettles the Reverſion in Fee in him, without any Attornment, becauſe he is the ſame Perſon that ought to attorn to the Grant of the Reverſion, and in as much as he cannot attorn to himſelf, the Law will ſay, that it is in him without Attornment. P. 16 Car. B. R. between (h) Shephard and Woodard adjudged (i) per Curiam, upon a ſpecial Verdict, Intratur Hill. 14 Car. Rot. 1045. Oxon. where the Caſe was ſtronger, for there the Grant of the Fee was not by the Name of a Reverſion, nor of the Land in particular, but by the Name of all his Lands, Tenements, and Hereditaments, which were the Lands, Tenements and Hereditaments of Margery Mayne, his Mother, which general Words comprehended theſe Lands; and I. urged that it did not appear that the Grantee of the Fee, (who was Sir Lawrence Tanfield chief Baron) had any knowledge that it comprehended theſe Lands, and therefore it ſhould be no Attornment in Law. But the Court ſaid it was all one, becauſe this did not paſs as an Attornment in Law, but becauſe no other could attorn, and ſo the Law executed it without Attornment.

(h) 1 Jon. 455. S.C adjudged.

(i) Fol. 302.

7. If the Grandfather be Tenant for Life, the Remainder in Fee to the Father, and the Grandfather in Conſideration of the Payment of the Father's Debts by him, procures the Father to make a Deed of Feoffment by ſuch Words, give, grant, enfeoff and confirm the Lands, and all his Tenements, Rents, Reverſions, &c. and in the End of the Deed there is a Letter of Attorney made to J. S. to make Livery according to the Form of the Charter, this Procurement of this Deed by the Leſſee is an Attornment in Law; for if no Livery be ever made, it ſhall be intended that he intended to have it as a Grant of the Reverſion Ardern's Caſe, adjudged per Curiam, cited Tr. 8 Jac.

(E) In what Caſes an Attornment to one ſhall ſerve for others.

1. If a Reverſion be granted by Fine to two, and the Heirs of one, and he who hath the Fee dies, if the Leſſee attorns after to the Reverſioner for Life, this will ſerve for the Heir of him who had the Fee. 48 Ed. 3. 32.

2. In a quid juris clamat by two, if one be nonſuit, yet the Tenant ought to attorn to the other, and this will ſerve for both. (a) 48 Ed. 3. 32.

(a) Br. Attornment, 15. S.C.

3. (b) If a Man grants a Seigniory to one for Life, the Remainder to another in Fee, and the Tenant attorns to the Leſſee, this is a good Attornment for the Remainder alſo, Tempore Ed. 1. Attornment 22. and Avowry 251. 9 Ed. 2. Attornment 18. per Stone.

(b) Co. Lit. 310. a. S. P. tho' the Tenant ſay, I attorn to the Grantee for Life, but intend not it ſhould benefit him in Remainder; for having attorned to the Tenant for Life, the Law (which he cannot controul) doth veſt the Remainder, 312. b. S. P. 2 Co. 67. b. S. P.

4. (c) If a Reverſion be granted to two by Deed, and the Leſſee attorns but to (d) one of them, this is a good Attornment for both, and cannot veſt the Reverſion in him only to whom the Attornment was made. *Co. Lit.* 310. a.

(c) 2 Co. 67. b. S. P.

(d) So upon the Grant of a Reverſion of three Acres, if the Leſſee attorns for one Acre, or ſurrenders one Acre to the Grantee, this will be a good Attornment for the whole Reverſion of the three Acres, according to the Grant. Co. Lit. 309. and vide Co. Lit. 314. a. 1 Leon. 129, 130. Cro. El. 80. 2 Co. 67. b.

5. (e) So if two joint Leſſees for Years or Life, are ouſted or diſſeiſed by the Leſſor, and he infeoffs another, if one of the Leſſees re-enter, this is a good Attornment, and ſhall bind both. *Co. Lit.* 319. a.

(c) 2 Co. 67. a. S. P. Cro. El. 802. S. P.

(F) In what Cases an Attornment by one shall serve for others.

1. If one Man leases a Mano; to another for Life, to whom the Tenants attorn, and after grants the Reversion of the Mano; to another, to whom the Lessee of the Mano; attorns, this is sufficient for the Grantee to avow upon the Tenants, after the Death of the Lessee without any Attornment of the Tenants to him, for by their Attornment to the Lessee, they have impliedly given the Power to him to attorn to the Grant of the Reversion, and the Grantee cannot have any quid juris clamat against the Tenants, but only against the Lessee. 9 Ed. 2. Attornment 18. 19 Ed. 2. Attornment 19. contra 20 H. 6. 7. b.

2. If there be Lessee for Life, with several Remainders over, and the Reversion in Fee is granted, the Attornment of the Lessee shall bind all the rest. 12 Ed. 4. 4. per Brian.

(a) Lit. Sect. 566. S. P.
(b) Fitz. Attornment, 1. S. C. Br. 1. S. C.
(c) Cro. El. 737, 802. S. C. adjudged per tot'. Curiam, preter Clinch.

3. (a) If one Jointenant attorn in pais, this will bind his Companion, because it is no prejudice to him. (b) Co. 2. Tooker 67. contra (c) 9 H. 6. 22. admitted.

(d) Cro. El. 737, 802. S. P. per Fenner.

4. (d) But in *quid juris, &c. quem redditum, &c. per quæ servitia, &c.* one Jointenant shall not be permitted to attorn without his Companion, because the Attornment must be according to the Grant upon Record, and according to the Demand of the Plaintiff; and if one should attorn alone, he might prejudice his Companion, by not claiming their Privilege to be dispunishable for Waste, *&c.* 2 Co. 87. *per Curiam.*

Fol. 303.

(G) What Thing shall be an Attornment, and what not, in Law.

(a) This in the Original is misprinted, for there it is cestuy in Reversion release tout, &c. vide Dier.
(b) This also is misprinted in the Original, for there it is & cestuy in Reversion release arere, &c. vide Dier.

1. D. 8 El. 251, 91. The Reversion upon a Lease for Years is granted to one for Life, the Remainder to another in Fee, the Lessee attorns; after the (a) Grantee for Life releases all his Right to him in the Remainder, and he in Remainder grants his Remainder to a Stranger, and the (b) Grantee for Life releases again all his Right to the Grantee, and the Lessee pays the Rent to the Grantee, it was moved whether this was an Attornment.

(c) But vide Jenk. Rep. 91. S. P. con.
(d) Br. Attornment, 27. S. C. Br. Quid juris clamat. 18. S. C. Hut. 89. S. C. cited.

2. (c) In a quid juris clamat, quem reddit. or per quæ servitia, if the Defendant be committed to Prison for not attorning, this countervails an Attornment, Dubitatur, (d) 37 H. 6. 14. b.

3. If the Baron accepts a Grant of the Reversion, this is tantamount to an Attornment, Lit. Co. 10. Lampet's Case, 52. b.

4. Non refert an quis assensum suum præbet verbis an rebus ipsis & factis, Co. 10. 52.

(e) Fitz. Estoppel 207. S. C. Br. 49. S. C.

5. If a Man delivers to the Grantee of the Reversion, a Deed which comprehends an Attornment, tho' he says nothing of an Attornment, yet this is an Attornment in Law. (e) 49 Ed. 3. 15.

6. If the Lord by Fine grants the Services of his Tenant to another; and the Grantee sues a *Scire facias* out of the same Fine, for any Part of the Services, and hath Judgment to recover, this Judgment is a good Attornment in Law for all the Services. *Lit.* Sect. 564.

7. If the Leſſor (f) ouſt the Leſſee for Years, and makes a Feoffment, and the Leſſee re-enters, this amounts to an Attornment, becauſe (g) he ſhall not be intended ignorant of the Feoffment made upon the Land, &c. and by his Re-entry he cauſes a Reverſion to be in the Feoffee. *Lit.* Sect. 576.

(f) So if the Leſſee dies inteſtate, and the Leſſor enters and makes a Feoffment, and after Adminiſtration is granted, and the Adminiſtrator re-enters, tho' at the Time of the Feoffment there was no Adminiſtrator in eſſe, Adams and Cummin, Moor 875. Pl. 1224. adjudged. (g) 2 Co. 68. b. S. P. but this muſt be intended as to make a Privity to diſtrain or bring Debt, but not as to the Demand of Rent, to take Advantage of a Condition, for in that Caſe expreſs Notice muſt be given. 5 Co. 113. b. ſo explained.

8. So in Caſe of a Leaſe for Life. *Lit.* Sect 577.

9. (h) So if the Leſſor diſſeiſes Leſſee for Life, and makes a Feoffment, &c. and the Leſſee recovers in an Aſſiſe. *Co. Lit.* 319. a. the better Opinion; tho' it is there ſaid, that ſome have held the contrary, becauſe the Leſſee comes to the Land again by Courſe of Law.

(h) 2 Co. 68. b. at the bottom. S. P.

10. But if a Man makes a Leaſe for Life, and then grants the Reverſion for Life, and the Leſſee attorns, and after the Leſſor diſſeiſes the Leſſee for Life, and makes a Feoffment in Fee, and the Leſſee re-enters, this will leave a Reverſion in the Grantee for Life, and another Reverſion in the Feoffee, and yet this is no Attornment in Law of the Grantee for Life, becauſe he doth no Act, nor aſſent to any which might amount to an Attornment in Law, and (i) he may be ignorant of the Feoffment made upon the Land. *Co. Lit.* 319. a.

(i) So if the Leſſor diſſeiſe his Leſſee, and infeoffs B. who infeoffs C. and the Leſſee re-enters, tho' this is an Attornment to the firſt Feoffee, yet it is not to the other, for he may be ignorant thereof, becauſe he was outed by the Leſſor, Ow. 24. ſaid, ſeems per Cur'.

11. (k) But if the Leſſee for 50 Years leaſes for 10 Years, and the Leſſor ouſts the ſecond Leſſee, and makes a Feoffment, and the ſecond Leſſee re-enters, this is a good Attornment to ſettle the Reverſion in the Feoffee, and to charge the firſt Leſſee with Waſte, &c. for the firſt Leſſee hath put this Power of making a Re-entry in the ſecond Leſſee. *Mich.* 6 *Jac.* Sir *Moil Finch's* Caſe. 6 *Co.* 69. adjudged.

(k) Lit. Rep. 270. S. C. cited.

(H) What Words will be an Attornment.

1. D. 13 El. 298. 27. per Catlin, and ſeveral Serjeants, that where the Purchaſor of a Reverſion by Fine, writes to the Tenant, acquainting him therewith, and praying him to attorn, who anſwers him by his Letter, in theſe Words, The Conuſor, by Name, not having it, I am glad I have ſo good an Heir as your Lordſhip, this is a good Attornment; but Quere.

Pleading.

The (a) Manner of (b) Pleading an Attornment, and when and where it muſt be pleaded.

1. (c) IF a Man pleads a (d) Feoffment of a Manor, (e) he need not plead an Attornment of the Tenants, but (if material it muſt be denied or pleaded of the other Side. *Co. Lit.* 310. b.

(a) In pleading an Attornment, the Place where it was made need not be alledged, for it ſhall be intended upon the Land. Lit. Rep. 31. per Crooke. (b) Where it muſt be proved in Evidence, vide 3 Mod. 36. ——but per Lit. Rep. 167. there is a Diverſity between an Eſtetment and an Aſſiſe. (c) Lit. Rep. 167. S. P. per Curiam. (d) But if one pleads the Grant of a Reverſion, an Attornment ought to be ſhewn. Lit. Rep. 167. per Richardſon. 8 Co. 82. b. March 63. 1 Lev. 40. Raym. 18. ——but where the Want thereof is helpt by Verdict, vide Hitchens and Stevens, Raym. 487. 2 Jon. 232. and vide 2 Rol. Rep. 489. Lit. Rep. 167. (e) For this being a neceſſary Circumſtance is implied in the Plea. Co. Lit. 303. b.

2. (f) If

(f) Cro. Jac. 637. S. P. adjudged.

2. (f) If in Treſpaſs for taking an Ox, the Defendant as Servant to *J. S.* juſtifies and ſays, That *J. D.* was ſeiſed in Fee of the Manor of *A.* and thereof infeoffed *B.* and *C.* to the Uſe of *J. S.* and his Heirs, and lays a Cuſtom within the Manor, to have a Heriot upon the Death of every Tenant, and that the Lord might ſeiſe it, and ſays, that *J. N.* being a Tenant, died poſſeſſed of this Ox, and the Defendant as Servant to *J. S.* ſeiſed it, *&c.* This is a good Plea, altho' no Attornment is ſhewed, for it ſhall be intended. *Trin.* 37 *Eliz.* between Sir *Humphry Ferrers* and *Wignal*, *Cro. Eliz.* 401. adjudged, notwithſtanding it was objected, That where a Man will intitle himſelf to the Services of a particular Tenant, the Attornment of that Tenant ought to be expreſly ſhew'd.

3. But yet in an Action of Debt by an Executor, for the Arrearages of ſeveral Free Rents, of which the Teſtator died ſeiſed, the Plaintiff did not ſhew that the Defendant did attorn to the Teſtator in his Life-time, and therefore *Mich.* 6 *Jac.* between *Appleton* and *Doily*, *Yelv.* 135. it was adjudged for the Defendant, for tho' in Pleading a Feoffment of a Manor, an Attornment need not be alledged, yet when the Rent of any Freeholder comes in Queſtion, the Owner of the Manor, or his Executor who demands it, ought to convey a Privity between the Lord and Tenant by Attornment.

Fol. 304.

(a) (b) (c) Audita Querela.

(a) F. N. B. 102, 103. &c. Reg. 149, 150. Fitz. Audita Querela. Br. Audita Querela. (b) No Audita Querela to be allowed, or Bail taken thereupon, but in open Court. 1 Bulſt. 140. But for Bail in an Audita Querela, vide under Title Bail.

(A) In what Caſes a Thing may be avoided without an *Audita Querela*.

1. If a Man leaſes for Years, reſerving a Rent, and after acknowledges one Statute to J. S. and another Statute to J. D. and after J. S. accepts a Leaſe for Years of the Reverſion of the Conuſor, and after J. D. who hath the puiſne Statute, extends the Reverſion and Rent, and after J. S. extends it alſo upon his Statute, and for the Rent arere brings an Action of Debt againſt the Leſſee, the Leſſee without an Audita Querela, may avoid his Extent, by pleading that his Statute was (d) ſuſpended by Acceptance of the Leaſe of the Reverſion. Paſch. 16 Jac. B. R. between (e) Sir J. Harrington and Garroway, adjudged upon a ſpecial Verdict.

(c) This is only an equitable Action, and may be brought by a Reverſioner, or him that has but intereſſe termini, or might have been by a ceſtuy que uſe before the Stat. per March 71. per Barkly. (d) 1 Rol. Abr. 938. Pl. 7. S. C. 2 Rol. Abr. 470. Pl. 1. S. C. (e) Cro. Jac. 424, 477. S. C. adjudged, but note the Action appears there to have been brought by him that had the puiſne Statute, and the Defendant pleaded the former Statute, and the Extent thereupon, and the Plaintiff replied the ſpecial Matter by which the firſt Statute was ſuſpended, &c. and ſo the ſecond Extent not lawful.

(f) Cro. Jac. 424, 477. S.C. but S. P. does not appear.

2. If a Diſſeiſor acknowledges a Statute, and after the Diſſeiſee enters, and the Conuſee extends the Statute, the Diſſeiſee, without an Audita Querela, may avoid it, becauſe there is no Right of an Extent. Paſch. 16 Jac. B. R. in (f) Sir J. Harrington and Garroway's Caſe, per Houghton.

(g) Poſt. Pl. 9. S. P. which vide, and the Notes there Margin. Br. Audita Querela 17.

3. (g) If Tenant in Tail acknowledges a Statute and dies, and the Conuſee ſues Execution againſt the Iſſue, the Iſſue may avoid it in an Aſſiſe, without any Audita Querela. 18 Ed. 3. Aſſiſe 77. adjudged.

(h) Poſt. Pl. 11. S. C. and S. P. Raym. 20 S. C. cited 1 Keb. 112. S. C. cited 1 Sid. 55. S. C. cited Fitz. Audita Querela, 6. S. C.

4. If a Writ comes to the Sheriff, to deliver to J. S. the Conuſee of a Statute, all the Lands of J. S. the Conuſor, which he had the Day of the Statute made, or after, and the Sheriff by Force thereof delivers to him the Land of a Stranger, not ſubject to the Extent, the Stranger ſhall not have an Audita Querela, but he may avoid it in an Aſſiſe, for the Sheriff had no Colour to deliver this Land. (h) 6 R. 2. Aſſiſe 69. Audita Querela 6.

5. If A. recovers against B. Debt of Damages, and thereupon an Elegit is granted to the Sheriff, to extend the Moiety of all the Land of B. and thereupon the Sheriff delivers the Moiety of the Land of B. which is ancient Demesne, tho' it be admitted that this is not extendible, yet B. cannot avoid it by Entry, without an Audita Querela, because the Sheriff had a Warrant to deliver the Moiety of all his Land, and this was his Land, ergo not void, Hobart's Reports, 66. between (k) Coxe and Barneby.

(k) Hob. Fol. 48. at the bottom, S. C. and S. P. by the Ch. Justice

6. If a Man sues an Elegit for a Debt recovered, and hath certain Lands in Extent upon the Elegit, and after he suggests that the Recoveree hath other Lands in the County, and thereupon hath a new Elegit, and upon this the other Land is extended, this last Extent, at the most, is but voidable by (l) Error, and not void. Mich. 37 El. B. B. R. between (m) Hanger and Frie adjudged, Which intratur Hill. 35 El. Rot. 246.

(l) Where such a 2d Extent was avoided by Audita Querela. vide Stil. 454, 455.

(m) Cro. El. 310. S. C. and S. P. per Poph. Ch. Justice con. who said, That in such Case it was wholly void, and not only voidable and erroneous; for by the Acceptance of the Lands upon the first Extent, the Record is ended, and the Attornies of both Sides out of Court, and the new Elegit is as a Writ without Original, which is meerly void; but in the principal Case there, it does not appear but that the new Extent was prayed immediately upon the Return of the first, super quo, &c. and before the Party had accepted of the Lands found upon the first, and therefore it was there adjudged that the new Extent was good. Moor 341. Pl. 462. S. C. but S. P. does not appear, and the Report of the Case differs much from that by Cro. vide.

7. If A. acknowledges a Recognizance in Nature of a Statute Staple to B. and after B. dies, and C. his Executor sues an Extent out of Chancery, and before this is executed, C. dies, and after Administration of Goods of B. not administred by C. is granted to D. and after and before the Return-Day of the Writ of Execution, the Writ is executed, and the Land of A. extended, and seized into the King's Hand, according to the Command of the Writ, and after B. sues a Writ of Liberate, and thereupon the Land is delivered to him in Extent, this is all void, without suing an Audita Querela, and so shall be adjudged in an Ejectione firmæ brought by A. without suing an Audita (n) Querela, for by the Death of C. the Executor, before the Inquisition taken, the Writ of Extent was de facto abated, in as much as it was the Writ of C. the Writ commanding the Sheriff to extend and seise into the King's Hand ut ea præfato executori quousq; &c. liberari faciat, &c. and then this which was done upon this Foundation was all void, the Administrator not being privy thereto, but coming in paramount thereto. P. 11 Car. B. R. between (o) Vere and Cleve, per totam Curiam præter Crooke, Who seemed econtra adjudged upon a solemn Argument upon a special Verdict. Intratur, Tr. 11 Car. Rot. 1378.

(n) Fol. 305.

(o) Cro. Car. 450. 457, 458. S. C. adjudged per totam Cur'. con. Croke. 1 Jon. 385, 386. S. C. adjudged by Barkly and Jones contra Croke, Brampston Ch. Justice absente, and his Opinion not appearing in this Book, as it does in Cro.) and Sanders, Clerk of the Petty Bag, an experienced Practiser in the Manner of extending Statutes, certified his Opinion to be according to that of the 3 Justices.

8. If upon an Elegit, the Sheriff takes an Inquisition, and there are several Lands found subject to the Extent, and several Values found, and the Sheriff returns, that he has delivered some of the Lands in particular for the Moiety, where it appears according to the Values found, that an equal Moiety is not delivered to the Party who recovered, but more than a Moiety, yet this is not void, nor is it a Disseisin by the Entry, but only voidable by Audita Querela. Trin. 15 Car. B. R. between Rowe and Weeks, per Curiam adjudged upon Demurrer.

(p) Antea Pl. 3. S. P. 1 Sid. 55. S. P. per Cur'. agreed to have been often adjudged con. but note this was intended after a Scire feci returned against the Issue, so that it was his own Folly he came not in and pleaded. (q) I suppose this a Mistake of the Printer, and but Surplusage only. (r) Cro. Jac. 85. S. C. and S. P. per Curiam.

9. (p) If Tenant in Tail acknowledges a Statute, and dies, and the Conusee sues Execution against the Issue, the Issue may have an Assise, and therein avoid the Statute, and is not put to his Audita Querela. Mich. 3 Jac. B. R. (q) 10. (r) between Ashburnham and St. John agreed.

10. But in this Case, the Issue, at his Election may have an Audita Querela, if he will. Mich. 3 Jac. B. R. between (s) Ashburnham and St. John, adjudged per Admittance.

(s) Cro. Jac. 85. S. C. and S. P. seems to be admitted.

(t) Antea Pl. 4. S. C. and S. P. which vide with the References in the Margin. Fitz. Audita Querela 6. S. C.

11. Upon a Writ of Extent upon a Statute, if the Sheriff delivers in Extent the Land of a Stranger, the Stranger may have an Affise, and is not put to an Audita Querela, (t) 6 R. 2. Aff. 69. adjudged, and there an Audita Querela brought in this Case was abated by Judgment.

(u) Harrison and Murly, S. P. 1 And. 25. adjudged N. Bendl. 80. Pl. 123. adjudged. Dier 232. Pl. 9. adjudged. Moor 75. Pl. 206. adjudged, notwithstanding F. N. B. 104. K. S. P. con. 1 And. 228. S. P. per Cur'. arguendo. 2 And. 158. S. P. per Curiam arguendo. 10 Co. 43. a. S. P. & vide Randal and Male. Moor 460. Pl. 64. Noy 16. Yelv. 88. Cro. Jac. 59. N. Dier 232. b. Margin, & vide Reg. 149. a. 2 Bulst. 320. (x) The Writ says, Si constare poterit quod tempore &c. infra ætatem & adhuc existit, &c. Reg. 150. b F. N. B. 105. D. and so indeed are all the Precedents. (y) For this vide 2 Rol. Abr. 572. Pl. 7.

12. If an Infant acknowledges a Recognizance, Statute-merchant, or Staple, or Recognizance in Nature of a Statute-Staple, he cannot avoid this without an Audita Querela brought (u) before (x) his full Age, because his Nonage ought to be tried (y) by Inspection. Co. Magna Charta, 673.

(z) Moor 77. S. P. per Brown and Weston, because nothing passes by the Inrolment but by the Deed, & vide Kelw. 10. a.

13. But if an Infant bargains and sells Lands by Deed inrolled according to 27 H. 8. he may avoid it (z) when he will, without an Audita Querela, because this is real. Co. Magna Charta, 673.

14. If a Judgment be given in an inferior Court against B. and a Writ of Error is brought thereupon at Westminster, and there the Judgment is reversed for Error, and upon the Record it appears that J. S. was Pledge for B. in the Base-Court for the Debt, a special Writ may be awarded to deliver him, (a) 1 H. 7. 12. b.

(a) Br. Error 134. S.C.

15. If *A.* be Tenant for Life, the Remainder to *B.* his Son in Tail, and *A.* enters into a Recognizance in *Chancery* to *C.* and dies, and *C.* thereupon bring a *Scire facias*, and *B.* is returned Heir and Ter-Tenant, and warned, but makes Default, and thereupon Judgment is given, *&c.* he shall never avoid this by *Audita Querela*, or otherways, because it was his own Folly, that he would not appear when he was warned. *Mich.* 13 *Car.* 2. between (b) *Day* and *Guilford*. *Raym.* 19. adjudged upon a special Verdict in an Ejectment brought by the Lessee of *C.*

(b) 1 Sid. 54. S. C. adjudged per totam Curiam, upon an Ejectment brought by B. but seems per Windham, he may falsifie in an Action of a higher Nature, but Twisden doubted, because only a Term was recovered. 1 Keb. 112. 141. S. C. adjudged, 1 Lev. 41, 42. S. C. adjudged, but Windham dubitabat.

(B) At (a) what Time it lies.

(a) Before Execution sued quia timet. Co. Lit. 100. a.

1. (b) A Stranger to the Statute, who is a Purchaser of the Land shall not have an Audita Querela before Execution against him. (c) 17 Ed. 3. 43. contra 25 Ed. 3. 37. per Hill.

(b) Cro. Jac. 507. S. P. per Houghton, arguendo. Winch. 20. 23. S. P. seems to be admitted, 2 Bulst. 17. S. P. arguendo, F. N. B. 104. o. S. P. (c) Fitz. Audita Querela, 21. S. C. 3 Co. 13. b. S. C. cited.

(e) Fitz. Audita Querela, 21. S. C.

2. If one Man acknowledges a Statute-merchant to another, who after releases it, and the Conusor aliens his Land to a Stranger, the Stranger shall not have an Audita Querela against the Conusee, before he hath sued Execution against him, for perhaps he is not Tenant of the Land, and then he may hinder Execution against another. (e) 17 Ed. 3. 27. b. adjudged.

(f) Fitz. Audita Querela, 21. S. C.

3. So the Feoffee of Part of the Land shall not have an Audita Querela before Execution sued against him, tho' the Conusee hath sued Execution of the Residue against the Conusor. (f) 17 Ed. 3. 27. b. adjudged.

Fol. 306.

(g) Fitz. Audita Querela, 21. S. C.

4. But if he hath sued Execution of Part of the Land in the Hands of the Feoffee, tho' not of all, he shall have an Audita Querela presently. (g) 17 Ed. 3. 28.

5. If

5. If the Conuſor being Leſſee for Life, upon an Execution awarded (h) againſt him, be returned dead by the Sheriff, he in the Remainder, who is not ſubject to the Extent, ſhall not have an Audita Querela before Execution prayed again him. 18 Ed. 3. 26. b.

(h) In the Original it is fur, and ſo plainly appears to be miſprinted.

6. (i) The Conuſor of a Statute ſhall have an Audita Querela before Execution ſued. (k) 17 Ed. 3. 43.

(i) Winch. 23. S. P. agreed per Cur'. (k) Fitz. Audita Querela, 8. S. C. 3 Co. 13. b. S. C. cited.

7. So his Heir ſhall have it before Execution ſued. (l) 17 Ed. 3. 43. adjudged.

(l) Fitz. Audita Querela, 8. S. C. 3 Co. 13. b. S. C. cited.

8. The Conuſor or his Heir, ſhall have an Audita Querela before that the Suit upon the Statute is commenced. (m) 17 Ed. 3. 43.

(m) Fitz. Audita Querela 8. S. C.

9. If the Conuſee of a Statute ſues Execution, the Conuſor ſhall have an Audita Querela after the Day of the Return, altho' the Writ be not returned, if he aver that Execution is done. 39 Ed. 3. 30. b. adjudged.

10. If in Treſpaſs it be found for the Plaintiff by Niſi prius, and after before the Day in Bank he releaſes to the Defendant, the Defendant (n) before Judgment ſhall not have an Audita Querela upon this Releaſe, for perhaps he will not have Judgment thereupon. (o) 9 H. 5. 1.

(n) It may be brought after the Day in Bank, and before the Judgment entred up, for the Court will force the Plaintiff to enter up his Judgment, as of that Day, ſo that he ſhall not plead Null tiel Record. Lampier and Wered. 9. 1 Mod. 111. per Hales. 3 Keb. 291. (o) Fitz. Audita Querela, 13. S. C. Br. 16. S. C. 1 Mod. 111. S. C. cited.

11. A Writ of Execution, with an extendi facias, iſſues upon a Statute-merchant, and the Writ is not returned, the Conuſor ſhall have an Audita Querela upon a Surmiſe that the Term is incurred notwithanding the (p) Non-return. (q) 39 Ed. 3. 30.

(p) So a Man in Execution may have an Audita Querela, notwithſtanding the Writ of Execution is not returned. Moor 57. Pl. 163. Dal. 58. b. (q) Br. Audita Querela, 26. S. C.

12. If *A. B.* and *C.* commit a Battery upon *D.* and *D.* ſues *A. in Banco*, and recovers, and after ſues *B.* and *C.* in B. R. and there hath Judgment againſt them, and *A.* pays the Damages recovered agninſt him, and thereupon Satisfaction is acknowledged upon the Judgment *in Banco*, and after *B.* is taken in Execution, upon this ſpecial Matter both *B.* and *C.* may join in an *Audita Querela*, for tho' *C.* is not yet grieved, yet is he privy to the Judgment. *Hill.* 11 *Car.* between (r) *Corbet* and *Barns*, 1 *Jon.* 377, 378. adjudged, tho' it was objected, That *C.* could not have an *Audita Querela* till he was grieved.

(r) Cro. Car. 443. S. C. adjudged.

(C) In what Caſes.

At what Time.

1. (a) Where the Party (b) might (c) have pleaded the Diſcharge, and hath ſurceaſed his Time, he ſhall never be helpt by Audita Querela, (d) 48 Ed. 3. 20. Tr. 3 Ja. B. K. between (e) Randal and Ognell, admit.

(a) For this Rule vide 2. Rol. Rep. 128. Kelw. 24. a. 25. a. 157. a. Cro. El. 4. 25. Godb. 257. 2 Sid. 108, 109. F. N. B. 104. I. (b) And therefore if one in Execution in the Fleet, eſcapes with the Conſent of the Goaler, and after is taken in Execution again upon a new Writ, and committed to the Fleet, he ſhall not have an Audita Querela, becauſe before any Commitment to the Fleet, the Priſoner is always brought to the Bar, and asked, What he has to ſay, why, &c. 1 Sid. 43. per Bridgman and vide Vidian Ent. 107. Rob. Ent. 162. (c) After a Releaſe to one Obligor, Debt was brought againſt the other, who had no Notice of this Releaſe, and ſo ſuffered Jndgment to paſs againſt him, but afterwards hearing thereof, and getting it into his Cuſtody, he brought an Audita Querela, and whether it lay, Rob. Ent. 155. Dubitatur. (d) Br. Audita Querela, 12. S. C. (e) Cro. Jac. 29. S. C. but S. P. does not appear.

2. If

(f) Br. Audita Querela 12. S. C. (g) Fitz. Audita Querela, 25. S. C. (h) Goulsb. 171. S. P. made a Quere Godb. 257. like Point, per Curiam. Co. Lit. 290. b. S. P. (i) Br. Audita Querela, 12. S. C.

2. If upon a Scire facias upon a Recognizance, the Party is returned Warned, and he makes Default, he shall never after avoid it by Audita Querela, because this Recognizance was upon Condition which he hath performed, or for other Matter, because he had Day to answer. (f) 48 Ed. 3. 20. (g) 21 Ed. 3. 13. b.

3. (h) But after a Fieri facias, or Elegit, an Audita Querela lies in the Case aforesaid, because he had no Day to answer. (i) 48 Ed. 3. 20.

(k) Kelw. 23. b. S. P. per Frowick arguendo. Cro. El. 4. S. P. per Curiam arguendo. Cro. El. 25. like Point, adjudged, Cro. Car. 528. like Point, per Croke. Godb. 155. seems to be S. P. per Cur'. But where the Book speaks of an Appearance upon the 2 Nihil's, I take it to be the Mistake of either the Reporter or Printer. Cro. Jac. 507. like Point. 1 Sid. 55. like Point, per Curiam. (l) So upon a Scire facias against Bail, &c. Hobs and Tadcastle, Moor 432, 433. Pl. 607. (m) But yet notwithstanding he may have an Audita Querela for Contribution, for that goes not in Bar or Discharge of the Execution. Moor 536. per totam Curiam. (n) Hob. Fol. 283. S. C. and S. P. moved, and S. P. cited accordingly.

4. (k) If upon a (l) Scire facias to have Execution of Damages recovered, the Defendant is returned warned, and he does not come, he shall never (m) avoid it by Audita Querela, for that the Plaintiff hath released; because if he was warned, he hath surceased his Time, and if he was not warned, he hath his Remedy against the Sheriff. 21 Ed. 3. 13. b. Hobart's Reports, Case 361. in (n) Hanner and Moss's Case.

(o) 2 Rol. Rep. 128. S. P. cited con. but Q. if it is not misprinted, for I think the Book cited does not warrant it, Kelw. 23. b. 24. a. S. P. per Frowick, arguendo. Hob. Fol. 283. S. P. cited, but no Judgment appears there to have been given in the principal Case, being the S. P. Cro. El. 4. S. P. per Curiam arguendo. Godb. 155. S. P. per Curiam, as I apprehend it, tho' not clearly stated. Stil. 372. like Rule, per Rol. (p) So upon a Scire facias against Bail, &c. Hobs and Tadcastle. Moor 432, 433. Pl. 607. adjudged. Goulf. 174, 175. adjudged. Cro. El. 597. adjudged. (q) Br. Audita Querela, 19. S. C.

5. (o) But in a (p) Scire facias, to have Execution of Damages recovered, or of a Recognizance, if upon a Return of the Sheriff, that he hath nothing by which he may be summoned, Execution be granted, yet an Audita Querela lies upon the Release of the Plaintiff made before, for upon the Return he had no Day in Court to plead it, and there is no Default in the Sheriff upon which he may have his Remedy against him. (q) 21 Ed. 3. 13. b. adjudged, 48. b. 27 Ed. 3. 82. b.

(r) Fol. 307. (s) Br. Audita Querela 31. S. C. 1 Rol. Abr. 313. Pl. 5. S. C. Fitz. Assise, 351. S. C.

6. If the Conusee makes an Agreement with the Conusor, and delivers to him the Statute in lieu of an Acquittance, and after gets the Statute, and extends the Land, (r) and thereupon the Conusor prays a Re-extent, because it is extended too low, and this is granted, and the Land re-extended to deliver to the Conusee, the Conusor shall not have an Audita Querela upon this Matter afterwards, because this is contrary to his Prayer before to have it re-extended, by which he admits it extendible. Dubitatur, (s) 43 Ass. 18.

7. (t) If Execution be sued upon a Statute-merchant or Staple, an Audita Querela lies upon the Release of the Plaintiff before, because he had no Day in Court before to plead it. 21 Ed. 3. 13. b.

(t) Fitz. Audita Querela 23. S. P. (u) Noy 26. S. P. per Hob. Cro. Jac. 646. S. P. per Cur'. Hob. 162. S. P. Yelv. 125. like Point adjudged, and S. P. admitted, F. N. B. 104. A. S. P. Br. Audita Querela, 27. S. P. 45 like Point. (w) But if it had been in the Case of the King, the Defendant at the Day in Bank, might have pleaded it, because no Audita Querela lies against the King, Noy 26. per Hobart 41. (x) For this vide 1 Rol. Abr. 768. Pl. 3. 5. 6. and the Notes thereupon.

8. (u) In Trespass, or other Action, if it be found for the Plaintiff by Nisi prius, and after, before the Day in Bank, the Plaintiff releases to the Defendant, and after Judgment is given for the Plaintiff, the Defendant shall have an Audita Querela upon this Matter, because he (w) could not plead the Release at (x) the Day in Bank. 9 R. 2. Audita Querela 7.

9 If *A.* hath Judgment against *B.* for Costs and Damages, and after releases to *B.* all Executions, and after *B.* brings a Writ of Error, and thereupon the Judgment is affirmed, and further Costs given for the Delay of the Execution, and *A.* takes *B.* in Execution for the whole, *B.* may have an *Audita Querela*, and be relieved against the first Judgment and

and Coſts, becauſe upon the Writ of Error he had no Day to plead the Releaſe. *Hill.* 11 *Jac.* Between (y) *Child* and *Durant. Cro. Jac.* 337. adjudged.

(y) 1 Rol. Rep. 11. S. C. adjudged. (as the Reporter believes) accordingly, notwithſtanding it was there brought to be relieved againſt the Whole; for, per Curiam, the Sums are ſeverally ſet forth in the Audita Querela.

10. (z) If after Judgment upon an Information upon the Statute of Recuſancy, the Defendant had conformed, (admitting this Conformity would have excuſed him) he might have pleaded it againſt the King, becauſe he could have no Action againſt him, but againſt the Informer he ſhould have had an *Audita Querela. Mich.* 12 *Jac.* Between (a) *Shoyne qui tam, &c.* and Dr. *Foſter.* 1 *Rol. Rep.* 95. *per Curiam.*

(z) Jenk. Rep. 109. like Point. Noy 26. like Point, per Hobart. (a) 2 Bulſt. 325. S. C. and S. P. per Curiam.

11. But if after his Conformity he had been taken in Execution for the King, he ſhould then have been without Remedy, becauſe it was his great Negligence he did not plead it before he was taken in Execution. *Mich.* 12 *Jac.* Between (b) *Shoyne qui tam,* and Dr. *Foſter.* 1 *Rol. Rep.* 95. the Court ſeemed to incline accordingly.

(b) 2 Bulſt. 325. S. C. and S. P. per Curiam.

12. If *A.* be Tenant for Life, the Remainder to *B.* his Son in Tail, and *A.* enters into a Recognizance in *Chancery* to C. and dies, and C. thereupon brings a *Scire facias,* and *B.* is returned Heir and Tertenant, and warned, but makes Default, and thereupon Judgment is given, *&c.* he ſhall never avoid this by *Audita Querela,* or otherways, becauſe it was his own Folly he would not appear when he was warned. *Mich.* 13 *Car.* 2. Between (c) *Day* and *Guilford. Raym.* 19. adjudged upon a ſpecial Verdict in an Ejectment brought by the Leſſee of C.

(c) 1 Sid. 54. S. C. adjudged per tot. Cur. upon an Ejectment brought by B. but it ſeems per Windham, he may falſify in an Action of a higher Nature, but Twiſden doubted, becauſe a Term only was recovered. 1 Keb. 112, 141. S. C. adjudged. 1 Lev. 41, 42. S. C. adjudged, and Windham dubitabat.

(D) (a) (b) (c) In (d) what (e) Caſes it lies.

(a) When a Statute is erroniouſly acknowledged, as before one that has no Authority, or if a Statute-merchant hath but one Seal, &c. an Audita Querela lies, and not a Writ of Error, for this is no Record, but if a Statute is well acknowledged, and the Execution erroneous, a Writ of Error lies, Aſcue and Foliamb. Cro. El. 233, 319. 1 Leon. 229. Foreſt and Ballard. Cro. El. 810. Ow. 142. Dier 35. Pl. 27. (b) A Judgment in a Copyhold Court reverſed upon Petition to the Lord, and the Party reſtored to his Damages by Audita Querela, 4 Co. 30. b. If A. brings one Action of Treſpaſs againſt B. and another Action againſt C. for the ſame taking of the ſame Goods, and B. pleads not guilty, and C. pleads a Gift thereof to himſelf, and the Iſſue is found againſt B. but for C. tho' A. ſhall have his Judgment againſt B. yet perhaps he may be relieved by Audita Querela. Hob. 54. tamen Quere, vide Br. Audita Querela 32. — Where A. in his own Hands attached a Debt due to B. by Recognizance, and yet B. ſued Execution, &c. 1 Leon. 297. (c) It lies where a Man ought not to be charged, and yet without any Default in himſelf, hath no other Way of avoiding it. Kelw. 25. a. (d) It muſt be founded upon a Suggeſtion not contrary to, but admitting the Verdict. Sav. 69, 70. (e) Where after Judgment the Treſpaſs was diſcharged by an Act of Indemnity. 2 Mod. 37. Raym. 89. 1 Keb. 634, &c. (f) Br. Audita Querela 4. S. C.

1. If the Conuſee of a Statute ſues Execution before the Day given by the Defeaſance for the Performance of the Condition, altho' the Condition be after broke, yet an Audita Querela lies, becauſe he ſhall avoid it, for he hath extended the Land before his Time, and ſo it is a Prejudice to the Conuſor. (f) 46 Ed. 3. 27. b.

2. If a Man recovers a Debt, and before Execution releaſes to the Recoveree, and after ſues ſuch an Execution in which the Releaſe is not pleadable, an Audita Querela lies. 7 H. 6. 7.

3. But it had been otherways if the Releaſe had been after Execution. 7 H. 6. 7.

4. (g) If A. be in Execution at the Suit of B. and after A. eſcapes with the Conſent of the Sheriff, which is a voluntary Eſcape, and after A. returns to the Priſon, and the Sheriff (h) keeps him in Priſon upon the ſaid Execution, and thereupon A. brings an Audita Querela

(g) Cro El. 555. S. P. cited to have been adjudged, and vide Hob. 60.

Hob. 202. S.P. in conſequence ruled per Hob. con. 1 Mod. 194. S. P. admitted per Curiam.

rela againſt B. (i) he ſhall not be diſcharged thereupon, becauſe it is at the Election of B. whether he ſhall be in Execution at his Suit or not, for it is no Diſcharge of the Sheriff that he hath retaken him before the Action brought (k) by B. if he will bring his Action againſt him, but A. ſhall not put B. to his Action againſt the Sheriff againſt his Will, for perhaps the Sheriff is not able to give a Recompence to B. and ſo A. ſhall take Advantage of his own Wrong. Hill. 10 Car. B. Rot. 1622. between (l) Trevillian and the Lord Roberts adjudged in an Audita Querela in Arreſt of Judgment, after a Verdict for the Plaintiff, by which it was found that the Sheriff voluntarily ſuffered him to eſcape; vide Co. 3. (m) Rigeway 52. b. ſeems to be the contrary.

(h) Vide Cro. El. 44. 102. Moor 57. Pl. 163. 2 Leon. 118, 119.

(i) So upon a Recognizance, &c. the Execution againſt his Goods ſhall not be diſcharged, becauſe the Sheriff hath voluntarily ſuffered the Conuſor to eſcape, Lynacre and Rodes. 1 And. 266. adjudged. 1 Leon. 230. per Anderſon. 2 Leon. 96. 5. Co. 86. cited. (k) In the Original it is vers B. and ſo plainly appears to be miſprinted. (l) 1 Rol. Abr. 902. Pl. 8. S. C. (m) Moor 660. Pl. 902. S. C. but S. P. does not appear.

5. If a (n) Man in Execution upon a Judgment for Debt or Damages, be (o) delivered out of Execution by the Sheriff or Gaoler, who hath him in Execution with the Aſſent of him (p) who hath him in Execution, and after by Colour of this Judgment, he takes him again, and puts him in Priſon, an Audita Querela lies upon this Matter, and thereupon he ſhall be delivered. Trin. 24 Car. B. R. between Welby and Andrews adjudged. Intratur Trin. 23 Car. Rot. 1706.

(n) So if the Plaintiff conſents that one Defendant only ſhall be delivered out of Execution. Stil. 387.— So if that one of the Bail ſhall be delivered out of Execution, he ſhall not take the other. 3 Leon. 260. (o) Where the Conſent was only, that he ſhould come to a Tavern out of the Rules. Stil. 117. (p) So is the literal Tranſlation, but the Senſe would be more clear, if the Words had been, with the Aſſent of him at whoſe Suit he is in Execution.

6. If A. hath a Judgment againſt B. for Debt or Damages, and after A. extends the Land of B. for this Debt, and after aſſigns over the Land extended to C. for all his Eſtate therein, and after A. releaſes to B. the Judgment, in this Caſe B. upon this Releaſe, ſhall have an Audita Querela againſt C. the Aſſignee, and therein avoid the Extent, (q) becauſe A. notwithſtanding the Aſſignment, continues privy to the Judgment, and after the Aſſignment might have acknowledged Satisfaction of the Judgment, and ſo have defeated the Eſtate of the (r) Aſſignee, and this Releaſe is all one as if he had acknowledged Satisfaction of the Judgment. Paſch. 7 Car. B. R. between (s) Flower and Elger, adjudged upon Demurrer.

(q) And may releaſe it. 2 Rol. Rep. 399.

(r) Fol. 308.

(s) 1 Jon. 238, 239. S. C. adjudged. Cro. Car. 214 S. C. adjudged, the Audita Querela being brought againſt A. tho' it was objected, that it ought to have been brought againſt C. —but it may be brought againſt the Aſſignee alone, per F. N. B. 104. E.

(t) 1 Rol Abr. 310. Pl. 15. vide.

7. (t) If A. the Conuſee of a Statute-ſtaple, brings a Detinue againſt B. for the Statute, who prays Garniſhment againſt C. the Conuſor, who comes and pleads, and the Plaintiff recovers by Judgment, and C. the Garniſhee brings a Writ of Error, and pending the Writ of Error, B. the Defendant, either voluntarily, or by Award of the Court, delivers the Statute to A. who ſues Execution upon the Statute in Chancery, and the Body of C. is taken in Execution thereupon, (u) it ſeems before the Judgment is reverſed upon the Writ of Error, C. upon this Matter cannot have an Audita Querela in Chancery, becauſe the Execution in Chancery is collateral to the Proceedings in Banco, altho' the Delivery of the Statute to the Plaintiff was Error, if by Award of the Court, and if it was by the voluntary Delivery of the Defendant, a Writ of Diſceit lies againſt him; vide 7 H. 6. 41, 42. bid by the Court to ſhew this Matter in Chancery.

(u) In the Original it is ſemble, &c.

(x) 8 Co. 142. b. S. P. per Coke. (y) Tho' by the Reverſal of the 1ſt Judgment, collateral Things executed are not avoided, yet the Party grieved may have Remedy by Audita Querela. 8 Co. 143. b.

8. (x) But in the ſaid Caſe, if upon the Writ of Error, the Judgment in the Detinue be reverſed, it ſeems the Conuſee ſhall be aided upon an Audita Querela in Chancery upon this Matter, altho' by the Reverſal of the Judgment the Execution is not avoided, being (y) collateral to the firſt Judgment. Co. 5. Hoe's Caſe, 90. b. held upon the Book of 7 H. 6. 41, 42.

9. But if a Statute be delivered to B. to be kept in an indifferent Hand upon certain Conditions between the Conuſor and Conuſee, if B. before the Conditions perform'd, delivers it to the Conuſee, and he ſues Execution, (z) Quere, whether the Conuſor may have an Audita Querela upon this Matter, or whether he be put to his Writ of Diſceit againſt B. for the Delivery of the Statute before the Conditions perform'd. (a) 12 H. 4. 6. 15. Audita Querela lies.

(z) He may have an Audita Querela per F.N.B. 104. D.

(a) Br. Audita Querela, 15. S. C. Fitz. 15. S. C.

10. If the Principal be taken in Execution upon a Judgment, and after a Scire facias returned, according to the Courſe, Judgment is given againſt the Bail, and thereupon he is taken in Execution, and after the Principal is delivered upon an Audita Querela, becauſe the Recoveror hath acknowledged Satisfaction, &c. in this Caſe, tho' the Recognizance was forfeited by the Bail, by not bringing in the Principal at the Time appointed by Law, yet in as much as the Judgment and Execution againſt the Bail, depends upon the Judgment againſt the Principal, and he was but a Security for the Payment of the Money, of which the Recoveror is ſatisfied, the Bail ſhall be diſcharged by conſequence. Paſch. 15 Car. B. R. between Hill and Barnes adjudged upon a Demurrer, Intratur Trin. 13 Car. B. R. Rot. 476.

11. (b) If A. and B. are bound in an Obligation jointly and ſeverally, and Judgment given againſt each upon ſeveral Actions brought, and both taken in Execution, and after A. eſcapes, yet B. ſhall not be delivered upon an Audita Querela, for tho' the Obligee may have an Action againſt the Sheriff for the Eſcape, yet till he is (c) actually ſatisfied, the other ſhall not have an Audita Querela, for perhaps the Sheriff is worth nothing. Co. 5. (d) Blomfield, 86. b.

(b) Co. Ent. 86, 87. like Point, where one of the Bail eſcaped, and the Principal brought an Audita Querela. (c) There is a Diverſity where the Plaintiff recovers againſt the Sheriff in Debt, and where in Caſe; for if in Caſe tho' he had the Damages paid, yet no Audita Querela lies. 1 Mod. 170. per Curiam. (d) Moor 459. Pl. 634. S. C. adjudged con. Cro. El. 478, 479, 555. ſaid to be adjudged, but 573, 574. being moved again, adjourned. Co. Ent. 85, 86. S. C.

12. If two are bound in an Obligation jointly and ſeverally, and Judgment given againſt each, in two ſeveral Actions, (e) one in Banco, the other in Banco Regis; and after one is taken in Execution in Banco Regis, and after an Execution is taken in Banco againſt the other by Elegit, and Land and Goods delivered in Execution thereupon, he that is in Execution by his Body in Banco Regis, ſhall be delivered upon an Audita Querela, becauſe the Execution upon the Elegit is a Satisfaction. Hobart's Reports, (f) 3.

(e) But if after the Execution by Elegit, the Judgment in Banco is reverſed, perhaps the other ſhall not have an Audita Querela. 2 Bulſt. 100. per Croke, but Dod' contra, and Fol. 101. Coke, Ch. Juſtice, ſaid, That if upon an Audita Querela the other be once diſcharged, altho' afterwards the Judgment in Banco be reverſed, yet he ſhall not be taken in Execution again, and ſo 1 Rol. Rep. 10. it is ſaid per Coke. (f) Hob. Rep. Fol. 2. S. C. Crowly and Lidgeat, Cro. Jac. 338. S. C. adjudged per totam Curiam. 2 Bulſt. 97, 98, &c. adjudged per totam Curiam, who, ſeriatim, delivered their Opinions. Godb. 257, 258. S. C. adjudged per totam Curiam. 1 Rol. Rep. 8, 9. S. C. adjudged per totam Curiam.

13. (g) If A. be Bail for B. in an Action in Banco, or B. R. and after Judgment (h) is given againſt B. and after a Scire facias is ſued againſt A. the (*) Bail, and upon two Nihils, returned in Banco, Judgment is given againſt A. in this Caſe A. (i) may have an Audita Querela upon a Surmiſe that B. died before any Capias ad ſatisfaciendum ſued out againſt him, by which he was diſcharged in Law, and thereupon A. is to be diſcharged, becauſe the Recognizance of A. (which is, that B. ſhall render his Body, or pay the Condemnation) is not forfeited (k) till a Capias be returned againſt the Principal, for he is not bound to render his Body, till a Capias be returned; and tho' two Nihils be returned, and thereupon a Judgment given againſt the Bail, ſo that the Judgment is not erroneous, yet becauſe the Bail had no Summons, he ſhall be received to aver this in an Audita Querela, he not having any other Remedy, Paſch. 1652. between (l) Tompſon and Barcock, Intratur Mich. 1651. Rot. 472.

(*) Fol. 309.

(g) Hobbs and Tadcaſtle, S. P. Moor 432. Pl. 607. adjudged. Cro. El. 597. adjudged. Goulſ. 174, 175. adjudged. 1 Rol. Abr. 336. Pl. 2. 1 Rol. Abr. 333. Pl. 1. vid. (h) In the Original it is done, &c. and ſo appears plainly to be miſprinted. (i) In this Caſe the Bail are put to their Writ of Error, per 4 Leon. 36. per Wray, who in B. R. ſaid, For Error in Proceſs we may reverſe our own Judgment.

Judgment. vide Cro. El. 730, 733. (k) For this vide 1 Rol. Abr. 336. Pl. 2. (l) Stil. 281, 288. upon a Writ of Error between the ſame Parties, ſaid, per Roll. Stil. 323. S. C. adjudged by Roll and Nicholas, con. German, (Aſtue abſente) Raym. 19. S. C. cited.

14. If *A.* hath Lands in ſeveral Counties, and enters into a Recognizance to *B.* and after acknowledges a Statute to *C.* upon which *C.* extends the Lands in one County, and after *B.* ſues Execution upon the Recognizance, and hath the Moiety of the ſame Lands delivered to him, but ſued no Execution of the Moiety of the Lands in the other County, *A.* hath no Reaſon to complain, becauſe *B.* hath taken in Execution only a Moiety of his Lands, but *C.* may have an *Audita Querela* againſt *B.* becauſe it is prejudicial to him. *Trin.* 42 *Eliz.* between (m) *Dean* and *Hind.* 2 *And.* 170. adjudged.

(m) Cro. El. 797. S. C. adjudged, becauſe if B. had ſued Execution of the Lands in both Counties, his Money would the ſooner have been ſatisfied, Yelv. 12. S. C. adjudged, becauſe the Land in the Poſſeſſion of C. ought to have been extended but pro rata, but if C. had been in Poſſeſſion, without Title, he ſhould not have been relieved by Audita Querela, Noy 47, 48. vide Aſhton's Ent. 132, &c.

15. (n) If *A.* and *B.* become Bail for *C. in Banco*, &c. and after Judgment againſt the Bail, the principal Judgment is reverſed, the Bail may have an *Audita Querela*, for the Ground of the Charge being taken away, (o) it is but reaſonable the Bail ſhould be diſcharged. *Mich.* 29 *Jac.* between (p) Sir *John Appeſly*, and Sir *John Key*. *Cro. Jac.* 645, 646. adjudged.

(n) 2 Rol. Rep. 254. S. P. adjudged. (o) Where after the reverſal of a Judgment out of an inferior Court, a ſpecial Writ may be awarded to deliver the Bail in Execution there. 1 Rol. Abr. 305. Pl. 14. vide. (p) Palm. 187, 301, 302. S. C. adjudged. Brown. Ent. 2 Part 45.

16. (q) *A.* being within Age, enters into a Bond to *B.* who procures C. without any Warrant to (r) appear for *A.* and confeſs a Judgment thereupon; yet *A.* ſhall not have an *Audita Querela*, but muſt take his Remedy by Writ of *Deceit* againſt the Attorney. *Mich.* 22 *Jac.* between *Allely* and *Colly*. *Cro. Jac.* 694, 695. adjudged.

(q) F. N. B. 103. A. like Point, con. where an Attorney appeared without Authority, and confeſſed a Judgment in a Writ of Right. (r) But if A. in the Name of B. by Covin, acknowledges a Statute to C. and thereupon B. is taken in Execution, he may have an Audita Querela, Reg. 114. b. F. N. B. 102. H.

17. (s) If *A.* being within Age, becomes Bail for *B. &c.* and after 2 *Scire fac' & Nihil* returned, Judgment is given againſt *A. &c.* he may have an *Audita Querela*, and avoid the Recognizance, and ſo the (t) Judgment thereupon of Conſequence ſhall be avoided. *Trin.* 7 *Jac.* between *Markham* and *Turner*. *Yelv.* 155. *per totam Curiam, præter Williams*, and the *Audita Querela* was allowed *de bene eſſe*.

(s) Cro. Jac. 646. S. P. ſaid Co. Ent. 87, 88. S. P. (t) The Form of the Entry of the Judgment is, Ideo conſideratum eſt quod recognitio, &c. adnulletur, &c. & quod A. ab executione, &c. penitus deliberetur, & exoneretur, &c. Co. Ent. 88. a.

18. If the Conuſor is taken in Execution upon a Statute, and the Conuſee (u) covenants to diſcharge him from the Statute, the Conuſor ſhall not thereupon have an *Audita Querela*, but muſt take his Remedy by Action of Covenant. *Hill.* 6 *Jac.* between *Beſton* and *Robinſon*, *Cro. Jac.* 218. adjudged.

(u) So upon a Promiſe to diſcharge, &c. an Action upon the Caſe only lies. 1 Bulſt. 152.

19. (x) If *A.* as Adminiſtrator, recovers Damages in *Trover* againſt *B.* and (y) after his Adminiſtration is (z) repealed, and granted to another, upon a Surmiſe that *A.* intends and endeavours to ſue Execution, *B.* may have an *Audita Querela*, for by the Repeal of the Adminiſtration, the Power of *A.* is abſolutely determined. *Paſch.* 22 *Car.* 2. between (a) *Turner* and *Davis*. 2 *Sand.* 148, 149. adjudged.

(x) Vide 1 Brownl. 29, 91. Yelv. 125. Noy 15. Stil. 417. Dier 203. Pl. 75. like Point. Cro. Jac. 394. & vide Co. Ent. 90, 91. & vide Rob. Ent. 160, 161. (y) Vide 17 Car. 2. cap. 8. revived and made perpetual. 1 Jac. 2. cap. 17. by which the Adminiſtrator de bonis non, is enabled to take out Execution upon a Judgment obtained by the Executor, or former Adminiſtrator; and note, this Audita Querela was brought only againſt the firſt Adminiſtrator, and does not diſcharge the Judgment, but the Execution at his Suit only; vide Co. Ent. 91. a. And note, this Statute is omitted out of the late Edition of the Statutes, tho' revived and made perpetual by 1 Jac. 2. cap. 17. as before. (z) An Executor, durante minori ætate, obtains Judgment, and the Infant comes of Age, &c. perhaps an Audita Querela lies. 3 Leon. 278. per Windham, Godb. 104. per Windham. (a) 1 Mod. 62, 63. S. C. adjudged. 2 Keb. 668. S. C. adjudged.

(E) Upon what Thing it lies.

Upon a Specialty.

1. IF the Party in Execution upon a Judgment ſhews to the Court a Releaſe or Acquittance, a (a) Scire facias lies thereupon, becauſe this is grounded upon a Specialty. 18 H. 6. 19. 9 H. 5. 1. admitted.

(a) But it lie only when the Body is in Execution. Kelw. 3. a. 16. b. Dier 285. Pl. 41. Br. Scire facias, 170. Br. Audita Querela 33.—and then too in an Audita Querela, the Proceſs is, a Scire facias, and not a venire facias, upon which only a Diſtreſs infinite can iſſue, which might prove too long a Delay to him that is in Execution. Br. Audita Querela 21. Co. Ent. Audita Querela throughout.—So where ſued for the Nonage of the Plaintiff. Co. Ent. 88. a.

2. (b) If the Party after Judgment ſhews a Releaſe of the Judgment, yet if there be any Variance in the Names, between the Record and the Deed, he ſhall not have any Scire facias. (c) 8 H. 6. 30.

(b) 1 Rol. Abr. 313. Pl. 6.
(c) Fitz. Variance. 4 S. C. Br. 43. S. C.

3. The Conuſor of a Statute ſhall have an Audita Querela, upon ſhewing the Acquittance of the Conuſee. (d) 45 Ed. 3. 24. (e) 47 Ed. 3. 1. b. 11 Ed. 4. 8. (f) 3 H. 4. 12.

(d) Br. Audita Querela 3. S. C.
(e) Fitz. Audita Querela 2. S. C. (f) Fitz. Audita Querela 14. Br. Statute-merchant. 9. S. C.

4. If there be two Conuſees of a Statute, and one releaſes, and after the other ſues Execution, an Audita Querela lies thereupon, for the Debt is releaſed. (g) 11 Ed. 4. 8. b.

(g) Br. Scire facias, 183. S. C.

5. A Scire facias does not lie for a Man in Execution upon a verbal Suggeſtion, without ſhewing a Specialty. 18 H. 6. 19.

6. If a Man recovers a Debt or Damages againſt another, who (h) pays him without other Releaſe or Acquittance, and notwithſtanding the Recoveror ſues Execution, no Audita Querela lies, for a Record cannot be diſcharged without a Specialty, or Record, Diverſity of Court, Title, Chancery, no Remedy at Common Law, nor in Chancery.

(h) Cro. El. 44. S. P. con. the Party having Witneſſes to prove the Payment.

Poſt. Pl. 17. S. P. con. & vide Br. Audita Querela 38 Vidian Ent. 102, 103.

7. If A be bound to B. in a Statute-merchant, and pays the Money, and after B. ſues Execution upon the Statute, A. ſhall not have an Audita Querela upon this Surmiſe, that he has paid the Money, without ſhewing an Acquittance, or Specialty, or Releaſe. (i) 22 Ed. 4. 6. No Relief at Common Law, nor in Chancery, becauſe it was his Folly to pay it without Matter of Record or Specialty.

(i) Br. Conſcience 23. S. C. Fitz. Subpena 16. S. C.

8. (k) If a Man ſues Execution upon a Statute-merchant, the Conuſor ſhall have an Audita Querela, upon a Suggeſtion that he hath agreed with him, and that the Conuſee delivered to him the Statute in lieu of an Acquittance, ſhewing the Statute, and that the Conuſee has ſued Execution upon a forged Statute. (l) 17 Ed. 3. 49. 18 Ed. 3. 36.

(k) Reg. 149. a. S. P. 150. like Point. F. N. B. 104. H.
(l) Fitz. Audita Querela, 22. S. C.

9. So an Audita Querela lies, altho' the Statute which he ſhews, which was given in lieu of an Acquittance, be cancelled. 18 Ed. 36. Fitz. Nat. 104. c. 15 Ed. 3. Audita Querela 10.

10. But he ſhall not have an Audita Querela without ſhewing the Statute. 18 Ed. 3. 36. adjudged.

11. If the Conuſee delivers the Statute in lieu of an Acquittance, and (m) after retakes it from the Conuſor, and ſues Execution, (n) the Conuſor ſhall not have an Audita Querela thereupon, becauſe he does not ſhew the Statute, for notwithſtanding (o) the Delivery in lieu of an Acquittance, it continues his Deed, and is a good Statute. contra (p) 43 Aſſ. 18. by three Juſtices.

(m) But vide F. N. B. 103. C.
(n) If the
(o) Fol. 310.
Conuſee gets the Defeaſance, and then ſues Execution contrary to it, the Conuſor may have an Audita Querela without ſhewing it. Br. Audita Querela 9. (p) Br. Audita Querela, 31. S. C.

12. If a Man be taken upon a Capias ad ſatisfaciendum, upon a Recovery in Debt upon an Obligation, if the Defendant ſhews the Obligation, and ſays, That it was delivered in lieu of an Acquittance, he ſhall have a Scire facias thereupon, in nature of an Audita Querela. (q) 13 H. 4. 10.

(q) Fitz. Scire facias, 147. S. C.

13. An Audita Querela lies upon a Suggeſtion that he made (r) the Statute-merchant per (s) dureſs of Imprisonment. (t) 20 Ed. 3. Audita Querela 27. F. N. 104. L. 15. Ed. 4. 5. b.

(r) Upon a Suggeſtion that a Judgment was confeſſed per dureſs, and Iſſue thereupon, Vidian's Ent. 107. (s) Upon a Suggeſtion that it is forged. F. N. B. 104. c. Fitz. Audita Querela, 9, 10. 21. (t) Ow. 142. S. C. cited.

14. An Audita Querela lies upon a Suggeſtion that he was within Age at the making of the Statute-merchant, and yet is, for this ſhall be tried by Inſpection. 13 Ed. 3. Audita Querela 26, 27. F. N. 104. K. 15 Ed. 4, 5. b.

(u) 1 Rol. Abr. 308. Pl. 7. vid.

15. (u) In Detinue for a Statute, if the Defendant ſays, that the Conuſor delivered it into his Hands to deliver to the Plaintiff, upon Conditions performed, and hath Garniſhment againſt the Conuſor, who pleads with the Plaintiff, and pending the Action, the Defendant delivers the Statute to the Plaintiff, who ſues Execution, the Garniſhee ſhall have an Audita Querela thereupon, without Deed, for here the Condition is but a Conveyance, which appears alſo of Record, and the Deceit to the Court, which is alſo of Record, is the Cauſe of the Action. (x) 12 H. 4. 6. 15.

(x) Fitz. Audita Querela, 15. S. C. Br. Audita Querela, 15. S. C.

16. If the Conuſee of a Statute ſues Execution, and after the Conuſor tenders to him the Money, and he refuſes it, yet he ſhall not have an Audita Querela upon this Matter, becauſe this is grounded upon a Matter in Fact, and (y) he may tender it in Court, and then have a Scire facias, or Audita Querela, contra 22 (z) Aſſ. 44.

(y) Such a Tender made, and what done, thereupon. vide 1 Leon. 141. (z) Br. Audita Querela, 29. S. C.

(a) Supra Pl. 6. S. P. con. Cro. Jac. 29. S. P. per totam Curiam, præter Popham. 8 Bulſ. 140. S. P. per Curiam, con.

17. (a) If a Man recovers againſt B. in Debt upon an Obligation, and before Execution B. pays to him the Condemnation, and after the Recoveror ſues Execution againſt him, he ſhall have an Audita Querela upon the Suggeſtion of this Matter, tho' he hath no Specialty thereof. Mich. 40, 41 Eliz. B. R. between (b) Malines and Dame Hawkins, per Curiam dubitatur, Trin. 14 Jac. B. R. between (c) Morſten and Pierſe, whether the Bail ſhall have an Audita Querela.

1 Rol. Abr. Pl. 5. vide. (b) Cro. El. 634. S. C. and S. P. appears. Cro. Jac. 29. S. C. cited to have been ruled accordingly. 1 Rol. Rep. 384. S. C. cited. (c) Moor 850. Pl. 1158. S. C. but no Judgment, and the Court ſaid, Such a Suggeſtion was not ſufficient without an Affidavit of Payment. 1 Rol. Rep. 383. S. C. dubitatur.

(F) Upon a Deed.

(a) Fitz. Audita Querela, 36. S. C.

1. An Audita Querela lies upon the Acquittance of the Conuſee, who had ſued Execution upon a Statute-merchant or Staple. 22 Ed. 3. 4. b. (a) 26 Ed. 3. 73.

2. If the Conuſee purchaſes the Lands of the Conuſor in Fee, and after aliens it to another, and after ſues Execution of the Statute upon this Land, an Audita Querela lies upon this Matter by the Alienee. 20 Ed. 3. Audita Querela 30.

3. If a Man makes a Feoffment upon Condition to re-infeoff him, and after the Feoffee, to the Intent to deceive him, falſely, and by Covin between him and B. acknowledges a Recognizance to B. and after re-infeoffs him, the Feoffee may have an Audita Querela upon this Matter, for this is grounded upon the Matter of Record, as well as upon the Deceit, which is Matter in Pais, (b) 26 Ed. 3. 73. adjudged.

(b) Fitz. Audita Querela, 36. S. C.

4. If a Man acknowledges a Statute which is uſurious, made againſt the Statute, and after the Conuſee ſues Execution, the Conuſor ſhall

ſhall have an Audita Querela upon this Matter. Paſch. 3 Jac. B. R. between (c) Barnes and Worlice, admitted. (c) Noy 41. S. C. and S. P. appears.

Cro. Jac. 25. S. C. and S. P. appears.

5. (d) If A. hath Judgment in Debt againſt B. in which Action C. was Bail for B. and after B. pays to A. the Money recovered, and after A. ſues out a Capias (e) ad ſatisfaciendum againſt B. and after hath Judgment againſt C. the Bail, C. ſhall not have an Audita Querela upon this Matter, becauſe this is but a naked Matter of Fact Scilicet the Averment of the Payment by the Principal, and upon a naked Matter of Fact no Audita Querela lies. Trin. 3 Jac. B. R. between (f) Randal and Ognell, by all the Juſtices, preter Tanfield. (d) 1 Rol. Abr. 311. Pl. 2. like Point, con. (e) Fol. 311. (f) Cro. Jac. 29. ſeems to be S. C. adjudged contra by all the Judges, preter Popham, tho' it does not there appear that the Audita Querela was brought by the Bail. 1 Rol. Abr. 310. Pl. 17. 1 Rol. Rep. 384. ſeems to be S. C. cited contra.

6. If a Man be bound to another in a Statute-merchant, and puts it in the Hand of a Stranger, upon certain Conditions, Scilicet, to ſtand to the Award of another, and he awards accordingly, and this is perform'd, yet an Audita Querela does not lie upon this Matter without a Specialty. (g) 43 Ed. 3. 28. (g) Fitz. Audita Querela, 16. S. C. Br. 1. S. C.

7. If two are in Execution upon a Judgment, quod unica fiat Executio, and one is diſcharged by Letter of the Decree to the Sheriff, upon which the Sheriff ſends to the Gaoler by his Warrant to deliver him, upon which he is let at large, the other may have an Audita Querela upon this Matter. P. 2 Jac. B. Harman's Caſe, per Curiam.

8. (h) If A. be in Priſon upon an Execution for Damages recovered by B. and after A. purchaſes a Manor, to which Manor B. is a Villein regardant, A. ſhall have an Audita Querela upon this Matter in Fact, without a Writing. 41 Ed. 3. Audita Querela 18. per Curiam. (h) F. N. B. 104. F. S. P. by the Conſor upon a Statute.

9. If the Conuſor infeoffs ſeveral Men of ſeveral Parts of the Land, and after the Conuſee ſues Execution of the Statute againſt one, he ſhall have an Audita Querela (i) upon this Matter. 33 Ed. 3. Audita Querela 38. Co. 3. Sir William Herbert, 14. b. (i) But whether thereupon the Execution ſhall be avoided, Pl. 700. Dier 331. Pl. 23. 2 Bulſ. 1 5. 17. Reg. 149. b. Br. Audita Querela 13. Br. Statute merchant, 11. Br. Audita Querela 39. 40. 46. Aſh. Ent. 137.——but now vide 16 and 17 Car. 2. Cap. 5. made perpetual by 22 and 23 Car. 2. Cap. 2. by which, no Extent upon any Statute, Judgment, or Recognizance ſhall be avoided or delayed, becauſe Part of the Lands extendible are omitted, ſaving to the Party whoſe Lands are extended his Remedy for Contribution. But note no Statutes, unleſs conditioned, for Payment of Money only, nor Extents, unleſs within 20 Years after Judgment, &c. had, are within this Act. or the Party only have Contribution, vide 3 Co. 14. b. 2 Inſt. 396. Moor 524. 536, 537.

10. (k) If A. and B. commit a Battery upon C. and after C. ſues A. in Banco, where he hath Judgment for 20 l. Damage, and after C. ſues B. in B. R. and there hath Judgment againſt him for 100 l. Damage, and takes B. in Execution, and after acknowledges Satisfaction in Banco to A. of the ſaid Judgment, B. may have an Audita Querela thereupon, and diſcharge himſelf out of Execution, becauſe this was but a Treſpaſs, and he ought to have Damages but once, as if he had releaſed to one, the other ſhould have had Advantage thereof. Hill. 11 Car. B. R. between (l) Baylies, & alios contra Barnes, adjudged upon a Demurrer, Intratur Trin. 11 Car. Rot. 359. but after, by Aſſent, the Demurrer was waived, and Iſſue taken whether there was a mean Treſpaſs. (k) Hob. 66. S. P. (l) Corbet and Barns ſeems to be S. C. Cro. Car, 443, 444. adjudged, 1 Jon. 378. adjudged.

11. (m) If *A.* hath Judgment againſt *B.* and *C.* upon a Joint Bond, and *B.* gives another Bond to *A.* for the Payment of the ſame Money at another Day, which *A.* accepts in Satisfaction of the Judgment; yet *C.* ſhall not have an *Audita Querela*, for a bare Surmiſe of this Matter of Fact is not ſufficient to avoid the Judgment. *Trin.* 18 *Jac.* between *Lutterford*, and *Peter le Maire*, *Cro. Jac.* 579. adjudged. (m) 1 Brownl. 29. like Point, adjudged.

(G) By

(G) By what (a) Court it may be (b) granted.

(a) Judgment againſt the Plaintiff in an Audita Querela. becauſe the Record was not brought into Court, ſo as the Party might have Execution if found for him, Cro. El. 33.

1. NO Audita Querela may be granted by the Chancery, (c) unleſs the Record upon (d) which it is granted be (e) there; my Reports, 14 Jac (f) Peers.

(b) Where upon a Statute-merchant, a Capias is returned in B. an Audita Querela cannot iſſue out of that Court, but out of Chancery, returnable in that Court: But upon a Recognizance, or Judgment in B. it may iſſue out of that Court or Chancery, and ſo be either judicial or original, &c. F. N. B. 104. S. 105. B. (c) Vide where it lies in B. upon the Tenor of a Record certified into Chancery, and ſent thither by Mittimus, Br. Audita Querela 20. (d) The Defendant pleads no Record in the Court where, &c. Rob. Ent. 157. (e) In B. after the Record is certified by Writ of Error in B. R. Hern. Ent. 46, 47. Aſht. Ent. 143, 144. (f) Moor 851. S. C. and S. P. per Coke, Chief Juſtice, 1 Rol. Rep. 383. S. C. and S. P. per Coke Ch. Juſtice.

(g) 2 Bulſ. 10. S. P. per totam Curiam.

2. (g) As upon a Judgment in B R. no Audita Querela may be granted in Chancery, my Reports, (h) 14 Jac.

(h) 1 Rol. Rep. 383. S. C. and S. P.

(i) 2 Bulſt. 10. S. P. per totam Curiam.

3. (i) But if a Statute-merchant or Staple (k) be in Chancery, an Audita Querela (l) may be there granted, my Reports, (m) 14 Jac.

(k) An Infant may bring an Audita Querela to avoid a Statute for his Non-age, altho' it be not certified or returned in any Court. per 1 And. 228. and there ſaid, the common Practice was ſo, elſe the Conuſor might be of Age before the Conuſee would procure it to be certified, vide 3 Bulſt. 307. (l) It may be in Banco, tho' the Record be not there, for the Audita Querela is not founded upon the Record, but Matter in Fact, as Infancy, a Defeaſance, &c. per 1 And. 228. and note in the principal Caſe there, the Surmiſe was, that the Conuſor is within Age. vide Cro. El. 208. 364. 1 Leon. 141. 303, 304. and Brownl. Ent. 52. where an Infant becoming Bail in the Counter in London, brought one in B. (m) 1 Rol. Rep. 383. S. C. and S. P. per Coke.

(H) Who ſhall have it, againſt whom, and who not.

(n) Fitz. Audita Querela 16. S C. Br. 1. S. C.

1. IF an Extent upon a Statute-merchant be ſued againſt one Feoffee, where the Condition of the Defeaſance is not broken, the Feoffee ſhall have an Audita Querela (n) 46. Ed. 3. 27. b. 28.

(o) Moor 850. Pl. 1158. S. C. and S. P. admitted.

2. If the Bail in an Action be taken in Execution for the principal Debt, where the Principal hath paid the Money between the Verdict and Judgment, the Bail ſhall have an Audita Querela, my Reports, (o) Morſten againſt Peers.

1 Rol. Rep. 383, 384. S. C. and S. P. admitted 1 Rol. Abr. 310. Pl. 5. like Point contra.

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(p) Vide and adiakely. 1 And. 133. S. P. appears, but as the ſame

3. (p) If the Lands of J. S. one of the Feoffees of J. D. are (q) extended upon a Statute acknowledged by the ſaid J D. and not the Lands of the other Feoffees, ſo that J. S. hath Title to have an Audita Querela, and after he levies a Fine of the Land ſo extended, (r) it ſeems that this Conuſee of the Fine ſhall have an Audita Querela to avoid the Extent. Dubitatur, M. 10 Ja. B. R. between (s) Mulleneux and Erle.

Caſe is reported. Cro. El. 40. the firſt Right to the Action accrued in the Time of the Purchaſor. Moor 661. Pl. 906. S. P. adjornatur, Blackſton and Martin, S. P. Latch. 274. 1 Jon. 91. per Curiam. 3 Bulſ. 308. per Jon. Juſtice, and vide F. N. B. 104. F. Dier 35. Pl. 27. 1 Rol. Abr. 313. Pl. 2. (q) If the Fine was levied after the Extent, and before the Liberate, the Conuſee may have an Audita Querela, becauſe he is the Party grieved, elſe he cannot. Latch. 274. 1 Jon. 90. 91. 3 Bulſt. 309. (r) In the Original it is, ſemble quæ, &c. (s) 2 Bulſt. 14, 5, &c. S. C. and the Opinion of the Court was otherways, tho' no Judgment was given, becauſe ended by Agreement. Cro. Jac. 227. ſeems to be the S. C. and the Opinion of Fleming, Ch. Juſtice, otherways, who ſaid, the better Opinion of the Judges was ſo, upon a Reference to them formerly out of Chancery, but the reſt doubted, and allowed the Audita Querela de bene eſſe.

(I) Against whom it lies.

1. If two Executors ſue Execution for Damages recovered by the Teſtator, where one hath releaſed, an Audita Querela lies (t) againſt both. 21 Ed. 3. 13. b.

(t) Vide Co. Ent. 89. a.

(K) (u) Jointly.

(u) One Audita Querela cannot be founded upon ſeveral Suits of ſeveral Perſons, Moor 354. Pl. 479.— Nor upon ſeveral Suits of

1. If a Statute be acknowledged to two, of which one is an Infant, and they make a Defeaſance, and after ſue Execution contrary to it, an Audita Querela ſhall be brought againſt both, for it does not appear within the Deed, that he is an Infant, (alſo the Deed of the Infant is not void, and peradventure he will affirm it) (x) 48 Ed. 3. 12. b.

the ſame Perſon. per Noy 83. Ow. 107.—but if two are bound by one Deed, in ſeveral Statutes, and the Conuſee releaſes to both, and after ſues Execution againſt them ſeverally, they may upon this Releaſe join in an Audita Querela, F. N. B. 104. M. (x) Br. Brief, 81. S. C.

2. If a Statute be made to Baron and Feme, and they make a Defeaſance, and ſue Execution contrary to it, the Audita Querela ſhall be brought againſt both, altho' the Defeaſance be void as to the Wife, for this Action is in Lieu of an Anſwer of the Execution which is ſued by both, and this is all one as if the Baron alone had made the Defeaſance, which would have been a ſufficient Diſcharge, contra (y) 48 Ed. 3. 12.

(y) Br. Audita Querela 11. S. C. Br. Brief 81. S.C. Br. Baron and Feme, 24. S. C.

3. Vide 11 Ed. 4. 8. b. An Audita Querela was brought againſt Baron and Feme, and a third Perſon upon an Execution, upon a Statute by them, and admitted good.

4. If a Statute be acknowledged to two, and one makes a Defeaſance, and after both ſue Execution, it ſeems the Audita Querela lies againſt both, for it is a Diſcharge of the Whole, and this is in Lieu of an Anſwer to the Execution, (for the Execution cannot be defeated againſt him who did not make the Defeaſance, if he be not joined) contra (z) 48 Ed. 3. 12. b.

(z) Br. Audita Querela 11. S. C.

5. If two Conuſees make a Defeaſance for them and each of them, the Audita Querela may be brought againſt one only. (a) 48 Ed. 3. 13.

(a) Br. Audita Querela 11. S. C.

6. If a Statute be acknowledged to one, and a Defeaſance made by him, if the Audita Querela be brought againſt the Conuſee, and a Stranger, the Writ ſhall abate. 48 Ed. 3. 13.

7. If a Statute be acknowledged to two, and one releaſes, and after they both ſue Execution, the Audita Querela may be brought againſt both. (b) 11 Ed. 4. 8. b.

(b) Br. Scire facias, 183. S. C. Fitz. Default 9. S. C. Br. 95. S. C.

8. So the Audita Querela may be brought only againſt him that releaſed. 24 Ed. 3. 27.

9. If a Statute be acknowledged to a Feme ſole, and J. S. and after the Feme takes Huſband, and J. S. releaſes, and after Execution is ſued, the Audita Querela may be brought againſt the Baron and Feme, and J. S. 11 Ed. 4. 8. b.

10. (c) If two jointly acknowledge a Statute, and their ſeveral Lands are taken in Execution, they cannot upon any Invalidity of the Statute, jointly bring an *Audita Querela*; for the Wrong done to the one by an Execution of his Lands, is no Wrong to the other. Between *Farmer* and *Downs*, *Noy* 1. adjudged, vide *Librum*, for there it is (d) *If two Jointenants*, &c. but I ſuppoſe it is miſprinted, tho' it does not appear to be ſo by the *Errata* at the End of the Book.

(c) Worſly and Charnock, S. P. Ow. 106, 107. adjudged by 3 Judges, the other aſſenting. Cro. El. 472, bis 473. adjudged by 3 againſt 1. But there ſaid per Curiam, where the Statute is good, and after releaſed, and Execution ſued againſt the Releaſe, perhaps it is otherways, becauſe grounded upon one intire Cauſe, vide Br. Audita Querela 19. (d) That Tenants in common ſhall join in an Audita Querela,

Querela, &c. vide Moor 664. arguendo. ——One Jointenant may have an Audita Querela, without his Companion, per March 71. per Barkly.

11. If *A. B.* and *C.* committ a Battery upon *D.* and *D.* ſues *A. in Banco*, and recovers, and after ſues *B.* and *C.* in *B. R.* and hath Judgment there againſt them, and *A.* pays the Damages recovered againſt him, and thereupon Satisfaction is acknowledged upon the Judgment *in Banco*, and after *B.* is taken in Execution; upon this ſpecial Matter, both *B.* and *C.* may join in an *Audita Querela*, for tho' *C.* is not yet grieved, yet he is privy to the Judgment. *Hill.* 11 *Car.* Between (e) *Corbet* and *Barns.* 1 *Jon.* 377, 378. adjudged.

(e) Cro. Car. 443. S. C. adjudged.

(L) Bars of an *Audita Querela.*

1. IF the Conuſor hath Right to have an Audita Querela againſt him who hath the Land in Extent, and he enters upon him, and makes a Feoffment to another, whoſe Eſtate comes afterwards to the Extendor, the Audita Querela is extinct. (a) 46 Ed. 3. 30. b.

2. So if the Feoffment had been upon Condition to render it up, and he does it accordingly, altho' the Extendor does not come to the Land, yet by the Feoffment this Audita Querela is extinct, and not revived, contra (b) 46 Ed. 3. 30. b. 31. admit.

3. But there it is admitted 31, that if the Extendor had the Eſtate in the mean Time, between the Feoffment and the rendring up, the Audita Querela had been gone.

4. (c) If a Man be (d) nonſuit in an Audita Querela, this will not bind him perpetually, but he may have a new Audita Querela. (e) 22 Ed. 3. 4. b. 20 Ed. 3. Audita Querela 29. contra (f) 17 Ed. 3. 27. (g) 24 Ed. 3. 24. b.

(a) Br. Audita Querela 5. S. C. Br. Feoffment de terres 6. S. C.

(b) Br. Audita Querela 5. S. C. Br. Feoffments de terres, 6. S. C.

Fol. 313.

(c) F. N. B. 104. O. S. P. but he ſhall not again have a Superſedeas, 104. O. P. Q. But where an Audita Querela ſhall be a Superſedeas, vide 2 Rol. Abr. 493. Letter H. (d) So if a Man relinquiſhes an Audita Querela, founded upon one Suggeſtion, he may have a new Writ founded upon another, Fitz. Audita Querela 16. Br. 1. (e) Fitz. Judgment 183. S. C. Br. Audita Querela 11. S. C. (f) Fitz. Audita Querela 21. S. C. (g) Fitz. Audita Querela 11. S. C.

5. If the Conuſee of a Statute delivers the Statute to the Conuſor in Lieu of an Acquittance, and after ſues Execution, and the Conuſor comes and prays a Re-extent, becauſe the Land is extended too low, and this is done accordingly, he ſhall never avoid this Grant by an Audita Querela, becauſe when he pray'd a Re-extent, he admitted the Statute extendible and executory. (h) 43 Aſſ. 18. adjudged.

6. (i) If the Acquittance upon which the Audita Querela is grounded, does not agree with the Statute which is to be diſcharged, but is ſo variant that it cannot be the ſame, the Audita Querela ſhall be (k) diſallowed. 18 Ed. 3. 58. b. adjudged.

(h) Br. Audita Querela 31. S. C. 1 Rol. Abr. 306 Pl. 6. S. C. Fitz. Aſſiſe 351. S. C.

(i) 1 Rol. Abr. 309. Pl. 2. like Point. F. N. B. 104. R. like Point (k) But this goes only prove to the Querela 31. in Abatement, and the Plaintiff may have a new Writ. F. N. B. 104. R. and ſo it may Diſadvantage of the Conuſee by a further Delay of his Execution, &c. Fitz. Audita

7. But if the Plaintiff in the Audita Querela grounds his Suit in Chancery upon an Indenture, yet he may in Banco maintain it upon a Payment by Deed. 18 Ed. 3. 58. b.

8. So altho' the Payment was after the Writ brought. 18 Ed. 3. 58. b.

9. If *A.* brings an *Audita Querela* againſt *B.* and declares, that whereas *B.* had recovered againſt *A.* 200 *l.* Debt, *&c.* and thereupon the ſaid *A.* was outlawed, and upon a *Capias utlegatum* taken, and in Execution, at the Suit of the ſaid *B.* and after from the ſaid Execution, was delivered, and ſuffered to go at large, *&c.* and yet *B.* hath taken out Execution upon the ſaid Judgment, and endeavours, *&c.* the Defendant may plead, and ſhew how that after the ſaid Enlargement, and before the Purchaſe of the *Audita Querela*, the Outlawry was ſet aſide, and made void, and ſo conclude, *Quod* (l) *non habetur tale recordum, Paſch.* 8 *Jac.* Dr. *Drury's* Caſe. 8 *Co.* 141, 142, *&c.* adjudged.

(l) In this ſpecial Caſe null tiel Record of the Outlawry may be pleaded without queſtion, vide Rob. Ent. 157. and per 3 Keb. 291. 1 Mod. 111. null tiel Record ſeems to be a common Plea in this Action, yet Q. for if there is no ſuch Record, what Damage

mage can the Defendant receive by the Plaintiff's being discharged of all Executions thereupon, and vide Hern's Ent. 49. Ashton's Ent. 143.

(M) In what Cases a Bar against one shall be against the other.

1. If the Conusor of a Statute aliens Part of the Lands after a Release made of the Statute by the Conusee, and after the Conusee sues Execution against the Conusor, and he sues an Audita Querela, and is nonsuit therein, this shall not be any Bar of the Audita Querela of the Feoffee, for he may have one also. (a) 17 Ed. 3. 27. 35.

2. But it had been otherways, if the Alienation had been after the Nonsuit, for then (b) he comes under the Charge. (c) 17 Ed. 3. 27. 35.

(a) Fitz. Audita Querela 21. S. C.
(b) 1 Rol. Abr. 312. Pl. 3. vid.
(c) Fitz. Audita Querela 21. S. C.

(N) In what Cases a Discharge for one shall be for the other.

1. If several acknowledge a Statute, and one discharges it against himself by Audita Querela for Infancy, this does not discharge the others also. 18 Ed. 3. 58. b.

(O) (a) (b) (c) Judgment.

1. If the Conusee of a Statute-merchant releases it, and (d) after sues Execution upon the Body of the Conusor, he shall have an Audita Querela, and recover Damages against him. (e) 47 Ed. 1. b.

(a) If the Plaintiff's Goods were taken in Execution, he shall be restored to them altho' no Mention is thereof made in the Judgment, Brown and Burnet, 1 Sid. 74. but by the Report of that Case. 1 Keb. 245, 260. per Hern secondary, that is, only where the Goods continue in the Sheriff's Hand; but if the Money is paid to the Plaintiff upon the first Judgment, there is no Remedy for it again. (b) Dier 194. Pl. 3. (c) If after Judgment and Execution, an Audita Querela is brought, and the Execution superseded, and after it is found against the Plaintiff in the Audita Querela, the Party shall have Execution awarded upon the Judgment in the Audita Querela, and not upon the first Judgment. 1 Sid. 14. per Twisden, 1 Keb. 245, 556. upon either. 1 Bulst. 188. but Q. yet note the Difference of the Form of the Entry of the Bail in the old Precedents, as in Rast. Coke, &c. and the Form in the more modern Entries. In the old it was Part of the Condition of the Recognizance, That the Principal should render himself, &c. (d) But he shall not recover Damages, unless the Execution be served Br. Audita Querela 7. (e) Fitz. Audita Querela 2. S. C. N. Bendl. 80. Pl. 112. S. C. cited. Br. Audita Querela 7. S. C.

2. If *A.* hath Judgment against *B.* for Costs and Damages, and releases to *B.* all Executions, and after *B.* brings a Writ of Error, and thereupon the Judgment is affirmed, and further Costs given for the Delay of the Execution, and *A.* takes *B.* in Execution for the Whole; upon an *Audita Querela* *B.* shall be discharged *Quoad* the Damages and first Costs, but not *Quoad* the second Costs. *Hill.* 11 *Jac.* Between (f) *Child* and *Durant.* *Cro. Jac.* 337. adjudged.

(f) 1 Rol. Rep. 11. S.C. as the Reporter believes adjudged accordingly, notwithstanding the Audita Querela was brought to be relieved against the Whole, for per Curiam, the Sums are severally set forth in the Audita Querela, viz. so much for the first, and so much for the second.

Pleading.

The Writ and Declaration.

(a) F. N. B. 104. R. S. P. Fitz. Audita Querela 17. S. P. vide Raſt. Ent. 99. a. (b) Ow. 142. S. C. but S. P. does not appear.

1. (a) ALtho' the Writ may comprehend divers Cauſes, yet the Count ought to comprehend but one, or if it alledge divers Cauſes, yet it ought to rely upon one only, otherways the Court will be inveigled by Duplicity and Uncertainty. *Mich.* 42, and 43 *Eliz.* between (b) *Foreſt* and *Ballard. Cro. El.* 809. adjudged upon Demurrer, *per totam Curiam.*

2. If a *Scire facias*, in Nature of an *Audita Querela*, ſets forth, that the Plaintiff was Tenant of a certain Meſſuage in *D.* and that *A.* was ſeiſed thereof, and of other Lands in Fee, and acknowledged a Statute, and that the Conuſee has taken only the ſaid Meſſuage in Execution, *&c. ad grave damnum, &c.* and the Defendant pleads that *A.* was not ſeiſed of the other Lands, and thereupon Iſſue is joined, and found for the Plaintiff, he ſhall have Judgment, for the ſaying that he was Tenant, and that it was *ad grave damnum* of the Plaintiff (c) implies, that he was Tenant at the Time of the Execution. *Hill.* 1 *Car.* Between (d) *Blackſton* and *Martin. Latch* 112, 274. adjudged the rather, becauſe the Plaintiff by his Plea hath admitted him to be Tenant.

(c) So the ſaying, that the Lands were delivered upon the Liberate, is a ſufficient Averment of an Duſter. Winch. 20, 23. (d) 1 Jon. 90, 91. S. C. and S. P. adjudged per totam Curiam, and ſaid, the common Courſe and Form was ſo. 3 Bulſt. 308. S. C. and S. P. adjudged per totam Curiam, who delivered their Opinion Seriatim, and 309. it is ſaid all the modern Precedents are ſo. March 69. S. C. cited, and vide Raſt. Ent. 99. a.

3. In an *Audita Querela*, the Count ſet forth, that *A.* and *B.* acknowledged a Statute to *C.* and thereupon *A.* was taken in Execution, and after by the Aſſent of *C.* ſet at large, and notwithſtanding, the ſaid *C.* to vex the ſaid *A.* and *B. minus juſte*, by Virtue of an Inquiſition found before the Sheriff of *S.* the Lands and Goods mentioned in the Inquiſition, *eid. C. deliberavit*, whereas it ought to have been by the Sheriff, *deliberari procuravit. Paſch.* 5 *Car.* between *Hyot*, and *Hoxton*, and *Broughton. Cro. Car.* 153. adjudged and affirmed upon a Writ of Error, that the Writ being good, and ſhewing a ſufficient Cauſe of Diſcharge, the Declaration will ſerve, being good in Point of the Cauſe of Diſcharge, tho' ill in Point of Aggravation of Damages, the Iſſue being taken upon the Cauſe of Diſcharge, and found for the Plaintiff.

Fol. 314.

Avowry.

(A) (a) (b) Where Seiſin is neceſſary to avow.

(a) Per 32 H. 8. cap. 2. it muſt be alledged within 40 Years next before the making of an Avowry or Conuſance. (b) Tho' per 21 H. 8. cap. 19. the Lord need not avow upon any Perſon in certain, yet he muſt alledge Seiſin by the Hands of ſome Tenant in certain within 40 Years. Co. Lit. 268. b. (c) For that is his Title, and where the Commencement of the Rent appears, Seiſin is not material. 8 Co. 65. a. (d) Br. Avowry 52. S. C.

1. **IF a Man makes a Gift in Tail, rendring Rent, he may avow, without laying any Seiſin, becauſe the Reverſion gives him a ſufficient Privity, and he ſhall count (c) upon the Reſervation.** (d) 8 H. 6. 18.

2. If *A.* by Deed indented made a Feoffment in Fee to *B.* and his Heirs, rendring 10 *s. per Annum*, to *A.* and his Heirs, of which Rent *A.* or his Heirs have not been ſeiſed within 40 Years, yet the Heirs of *A.*

may distrain, &c. for the Statute must be intended in such Cases (e) only, where before the Statute the Avowant was obliged to alledge a Seisin, and that was where the Seisin was so material, and of such Force, that tho' it was by Incroachment, yet it could not be avoided in an Avowry. *Mich.* 6. *Jac.* between (f) *Cooper* and *Foster*, 8 Co. 64. b. adjudged.

(e) So this Statute extends not to a new Rent created by Act of Parliament, Faulkner and Bellingham, admitted. Cro. Car. 80, 81. 214. Lit. Rep. 42, 43. Hetly 28. 36, 37, &c. 1 Jon. 233, 234. (f) 1 Brownl. 169, 170. S. C. adjudged.

(B) What Act shall be a good Seisin.

1. AN Attornment in a Court of Record in a per quæ servitia is a good Seisin to avow, because this is with the doing of Fealty. (a) 8 H. 6. 17. b.

(a) Br. Avowry, 52. S. C. Br. Seisin 33. S. C.

2. (b) If the Tenant which owes Suit of Court, be annexed for the not doing thereof, and he pays the Amercement to the Lord, this is a good Seisin of the Suit. 12 H. 7. Kell. 3. b. per Curiam. 13 H. 7. 16.

(b) 2 Rol. Abr. 464. Letter D. vide.

3. If the Tenant (c) fecit Finem with the Lord for his Suit in the Court of the Lord, this is a good Seisin of the Suit. 13 H. 7. 16.

(c) In the Original it is fait Fine, &c.

4. So if the Tenant delivers (d) a Horse to the Lord for his Rent due, and the Lord agrees thereto, this is a good Seisin of the Rent. 12 H. 7. 3. b. Kell. (e)

(d) 2 Rol. Abr. 464. Letter F.

5. In an Avowry for Suit, if the Lord recovers Damages for the Suit, this is a sufficient Seisin of the Suit. Co. 4. Bevil 9. b.

(e) This should be Kelw. per Curiam.

(C) By whom in respect of the Estate it shall be good.

Homage.

1. IF Homage be due in the right of the Feme, and the Baron does Homage before Issue had, this is no good Seisin against the Feme and her Heirs to have an Avowry. (a) 11 H. 4. 29.

(a) Fitz. Avowry 54. S. C. Br. Avowry 43. S. C.

2. (b) But otherways it is if he does Homage after Issue. (c) 11 H. 4. 29.

(b) Kelw. 84. a. like Point by some. (c) Fitz. Avowry 54. S. C. Br. Avowry 43. S. C.

3. Seisin of Homage by the Hands of a Disseisor is good to avow. (d) 11 H. 4. 29. b.

(d) Br. Avowry 43. S. C.

(D) Other Services.

1. SEisin of Services by the Hands of a Lessee at Will is not good to bind the Tenant. (a) 8 H. 6. 17. 32.

(a) Fitz. Avowry 8. S. C. Br. Avowry 52. S. C.

2. Seisin of Services by the Hands of a Lessee for Years shall not bind the Lessor. 2 H. 6. 2. b.

(b) Br. Avowry 52. S. C.

3. If the Tenant pays the Services to the Lord Paramount, this Seisin by his Hands shall bind the Mesne, &c. (b) 8 H. 6. 17.

(c) Fitz. Avowry 8. S. C. Br. Avowry 52. S. C.

4. Seisin by the Hands of a Disseisor is a good Seisin, and shall bind the Disseisee, altho' he re-enters for the Services due. Dubitatur. (c) 8 H. 6. 18.

(d) Br. Avowry 52. S. C.

5. If the Discontinuee gives Seisin of the Services, this will bind the Issue, tho' he recovers in a Formedon, (d) 8 H. 6. 18.

6. If the Baron Tenant in the Right of his Feme gives Seisin of the Services during the Coverture, this will bind the Feme and her Heirs. 12 Ed. 3. Avowry 104.

Fol. 315.

7. (e) So if the Tenant by the Curtesy, gives Seisin of the Services, this will bind the Heir. 12 Ed. 3. Avowry 104.

(e) Kelw. 84. a. S. P. per Kingsmil con.

(E) By whose Hands.

Tenant in Right.

1. Seisin of Services by the Hands of a Tenant in Right is a good Seisin to avow, as by the Hands of a Disseisee. 8 H. 6. 17. and this will bind the Disseisor.

2. If the Tenant aliens, a Seisin by his Hands after is good before Notice of the Alienation. 8 H. 6. 17. for he is Tenant in Right before Notice, and this will bind the Alienee.

3. If an Alienation be by Fine of a Seigniory, and after the Tenant aliens, yet a Seisin by his Hands in Court after is good, because he that was Tenant at the Note levied, ought to attorn. 8 H. 6. 17. b.

(F) Seisin by whom shall serve for others to avow.

1. Seisin by Tenant in Tail, is not sufficient for the Remainder in Fee of the Seigniory. 45 Ed. 3. 38.

2. If a Fine be levied to one for Life, the Remainder to another in Tail of a Manor, if the Tenant for Life takes Seisin of the Services, this will be a good Seisin for him in the Remainder in Tail to avow. (a) 20 H. 6. 7. Curia.

3. So (b) a fortiori, if the Conveyance was by Deed. (c) 20 H. 6. 7.

(a) Fitz. Avowry 11. S. C.

(b) In the Original a pluis fort, &c. (c) Fitz. Avowry 11. S. C.

4. The Seisin of Services by an Abbot shall be sufficient for his Successor to avow. (d) 34 H. 6. 46. per Curiam.

5. If a Feme Seigniores hath Seisin of the Services due at one Time, and after takes Husband, and hath Issue, and dies before other Seisin; the Seisin of the Feme before Coverture is not sufficient for the Baron Tenant by the Curtesy after the Death of the Feme to avow. Quære (e) 1 Ed. 3. 6. b.

(d) Fitz. Avowry 25. S. C.

(c) Q. the Book, for I find no such Matter there.

(G) (a) In what Cases Seisin of one Thing shall serve for another to avow.

(a) Seisin of one Service may be a Seisin in Law of an other, which is sufficient to avow, but to have an Assize, an actual Seisin is requisite, 4 Co. 9. a. 2 Rol. Abr. 463. Pl. 2.—but Seisin of any Part of a Service, is an actual Seisin of the whole to have an Assize. 4 Co. 9. b. Co. Lit. 53. a. (b) 4 Co. 8. b. S. P.

Homage.

1. (b) Seisin of Escuage is sufficient to avow for Relief. 4 Ed. 2. Avowry 200. per Scrope.

2. Seisin of Homage is sufficient to avow for Relief. (c) 13 H. 4. 5. b. 20 Ed. 3. Avowry 131.

(c) Fitz. Avowry 197. S. C. Br. Tenure 85. S. C.

3. (d) **Seiſin of Homage is ſufficient to avow for Eſcuage.** (e) 13 H. 4. 5. b. Tempore Ed. 1. Avowry 229. **by the Juſtices.**

4. **Seiſin of Rent is ſufficient to avow for Relief.** 4 Ed. 2. Avowry 200. per Scrope.

5. (f) **Seiſin of Eſcuage is a ſufficient Seiſin of Homage,** (g) **becauſe Eſcuage draws to it Homage.** 21 Ed. 3. 52. 3 Ed. 2. Avowry 187. **adjudged,** (h) 5 Ed. 2. Avowry 229. **adjudged,** 19 Ed. 2. Avowry 224. Dubitatur, 13 Ed. 3. Avowry 103.

(d) 4 Co. 8. b. S. P.

(e) Fitz. Avowry 197. S. C.

(f) 4 Co. 8. b. S. P. reſolved.

(g) And Seiſin of a ſuperior Service, is a Seiſin of all inferior Services which are incident thereto. 4 Co. 8. b. cited.

(h) Hut. 50. S. C.

6. **Seiſin of Rent ſhall be a Seiſin of Fealty.** 29 Ed. 3. 24. **adjudged.**

7. Seiſin of Fealty is a ſufficient Seiſin of (i) Homage and Eſcuage, for when the Tenant does Fealty, he ſwears to do all other Services. *Mich.* 17 and 18 *Eliz.* (k) *Bevil's* Caſe, 4 *Co.* 8. a. adjudgod *per totam Curiam.*

(i) It is a ſufficient Seiſin of all manner of Services. Co. Lit. 68. a.

(k) 1 And. 57, 58. S. C. adjudged.

8. So Seiſin of Homage is a Seiſin of all other Services, as well inferior as ſuperior, becauſe in the doing thereof, the Tenant takes upon himſelf to do all Services. *Mich.* 17 and 18 *Eliz.* 4 *Co.* 8. b. reſolved *per Curiam.*

9. Seiſin of Rent, Suit, *&c.* which is annual, is a (l) ſufficient Seiſin of Eſcuage, (m) Homage, Fealty, Heriot-Service, Service to cover the Hall, and ſuch other caſual Services, which may not fall in 40 Years. *Mich.* 17 and 18 *Eliz.* 4 *Co.* 8. b. reſolved *per Curiam.*

(l) And if the Avowant alledge a Seiſin of the Rent, this is a ſufficient Averment, that he was ſeiſed of Homage, Whitgift and Barrington, Winch. 31. adjudged, Hut. 50. adjudged, 2 Rol. Rep. 392. adjudged. (m) Winch. 32. S. C. and S. P. cited, and ſaid arguendo, that before this Caſe it was a great Queſtion.

10. But Seiſin of one annual Service is no Seiſin of another annual Service, for in that Caſe it is the Folly of the Lord if he hath not an actual Seiſin of the other Service it ſelf, when it becomes due yearly. *Mich.* 17 and 18 *Eliz.* 4 *Co.* 9, a. reſolved *per Curiam.*

(H) Who may change the Avowry.

Fol. 316.

1. (a) **A Bailiff who hath** (b) **Power to collect Rents cannot change the Avowry of his Lord, as by the Acceptance of Rent,** (c) 41 Ed. 3. 26. b. **for he cannot prejudice his Lord.**

(a) 5 Co. 76. a. S. P. per Curiam arguendo, Hob. 154. at bottom, S. P.

(b) For the Power of a Bailiff, vide 1 Rol. Abr. 339.

(c) Fitz. Avowry 65. S. C. Br. 19. S. C.

2. **A Guardian cannot change the Avowry of the Heir.** (d) 48 Ed. 3. 10.

(d) Br. Avowry 31. S. C. Fitz. 83. S. C.

3. **An Infant Lord cannot, during his Nonage, change his Avowry by his Aſſent.** (e) 48 Ed. 3. 10.

(e) Fitz. Avowry 83. S. C.

(I) Upon whom it may be.

Baron and Feme.

1. **An Avowry ſhall be made upon** Baron **and** Feme **before Iſſue, for all the Services due in the Right of the** Feme. 10 H. 16. 11. b. 39 Ed. 3. 15. 13 H. 6. Avowry 21. Curia.

2. **And after Iſſue, the Avowry ſhall be made upon** Baron **and** Feme **for Services due in the Right of the** Feme, **other than Homage.** 10 H. 6. 24. b. Curia. 13 H. 6. Avowry 21. Curia contra, (a) 8 H. 6. 14.

(a) Br. Avowry 132. S. C.

3. So

3. So after (b) Iſſue the Avowry ſhall be made upon the Baron only, for Homage due in the Right of the Feme, becauſe of his Title to be Tenant by the Curteſy. 10 H. 6. 24. b. Curia, 13 H. 6. Avowry 21. Curia, 18 Ed. 3. 7.

(b) Yet in his Avowry he need not ſhew he had Iſſue by her, but if he had none, it muſt come in of the other ſide. Hut. 50. cited. Winch. 31.

4. But an Avowry for Homage after Iſſue, may be made upon the Baron and Feme alſo. 43 Ed. 3. 13.

(K) (a) Who may compel the Lord to avow upon him.

(a) per 21 H. 8. Cap. 19. the Lord may avow upon the Lands, &c. as in Lands, &c. within his Fee or Seigniory, &c. without naming or making Avowry upon any Perſon in certain, and vide Co. Lit. 268. (b) Fitz. Avowry 65. S. C. Br. 19. S. C. (c) Br. Avowry 31. S. C. Fitz. 83. S. C.

1. If a Man comes to the Tenancy by Diſſeiſin, or by another Manner, ſo that it be a Fee, and the Lord accepts the Services of him, he will compel the Lord to avow upon him. (b) 41 Ed. 3. 26. contra. (c) 48 Ed. 3. 19. Quere.

(d) Fitz. Avowry 12. S. C.

2. The very Lord ſhall not be forced to change his Avowry where he avows upon his very Tenant per le manner, or his Tenant per le manner, unleſs the Tenancy comes lawfully out of the Perſon of his Tenant. (d) 20 H. 6. 9. b.

(e) Fitz. Avowry 65. S. C. Br. 19. S. C. (f) Br. Avowry 31. S. C. Fitz. 83. S. C. (g) Fitz. Avowry 12. S. C.

3. If there be Tenant in Tail, the Remainder in Fee, and the Tenant in Tail makes a Feoffment, the Feoffee ſhall not compel the Lord to avow upon him. (e) 41 Ed. 3. 26. b. (f) 48 Ed. 3. 8. b. 14. H. 4. (g) 20 H. 6. 9. b.

4. If Tenant in Tail makes a Feoffment in Fee, the Feoffee cannot compel the Lord to avow upon him, becauſe he is not Tenant in Tail. 18 Ed. 3. 7.

5. If a Man recovers againſt Tenant in Tail, he may compel the Lord to avow upon him. 41 Ed. 3. 26. b.

6. If a Man recovers againſt my very Tenant by Default, he may compel me to avow upon him, tho' he recovers without Title. 48 Ed. 3. 9.

(h) Br. Ceſſavit 9. S. C.

7. If there be Tenant for Life, the Remainder in Fee, the Tenant for Life may compel the Lord to avow upon him. (h) 45 Ed. 3. 27. b.

(i) Lit. Sect. 454. S. P. (k) How it ſhall be done by pleading the ſpecial Matter. 9 Co. 21. a. (l) Br. Avowry 43. S. C.

8. (i) If my very Tenant is diſſeiſed, yet (k) he may compel me to avow upon him. (l) 11 H. 4. 29. Lit. 106. b. 17 Ed. 3. 64.

(m) Co. Lit. 268. a. S. P. con. (n) Fitz. Avowry 83. S. C. Br. 31. S. C.

9. (m) If my very Tenant be diſſeiſed, and I accept the Services from the Diſſeiſor, yet the Diſſeiſee may compel me to avow upon him. (n) 48 Ed. 3. 9.

Fol. 317.

10. If my very Tenant be diſſeiſed, and dies, his Heir may compel me to avow upon him. (o) 2 Ed. 4. 6.

(o) Fitz. Avowry 31. S. C.

(p) Godb. 302. S. P. arguendo. (q) Fitz. Avowry 35. S. C. Br. 97. S. C.

11. (p) If the Tenant makes a Feoffment, the Feoffee cannot compel the Lord to avow upon him before Notice. 4 H. 6. 20. (q) 8 Ed. 4. 12. but after Notice he may compel the Lord to avow upon him. 4 H. 6. 20.

(r) Fitz. Avowry 31. S. C.

12. So if the Feoffee dies before Notice, his Heir may compel the Lord to avow upon him, for there the Law changes the Avowry. 4 H. 6. 20. b. (r) 2 Ed. 4. 6. per Curiam.

13. If the Tenant aliens Parcel of the Land, yet the Lord ſhall not be forced to change his Avowry without Notice, tho' the Statute be, that the Alienee of Parcel attendat capitali domino pro particula illa, (s) 8 Ed. 4. 12.

(s) Fitz. Avowry 35. S. C. Br. 97. S. C.

14. If the Tenant aliens in Fee, and dies before Notice, (t) now the Alienee may after compel the Lord to avow upon him. Co. 3. Pennant 66. 29 H. 8. 108. (u) 2 Ed. 4. 6. per Curiam, for he cannot avow upon the Heir of the firſt Tenant, becauſe nothing is deſcended to him.

(t) And if in ſuch Caſe he accepts the Rent by the Hands of the Alienee, he ſhall not loſe his Arrearages, becauſe by Act of Law he is compelled to avow upon him. Co. Lit. 269. b. (u) Fitz. Avowry 31. S. C.

15. If Tenant in Dower grants over her Eſtate, yet the Reverſioner ought to avow upon her. 11 H. 4. 19.

16. (x) If the Tenant aliens, and the Alienee gives Notice thereof to the Lord, yet the Alienee cannot compel the Lord to avow upon him, without Tender of all the Arrearages, becauſe (y) if the Lord avows upon him before they are paid, or accepts the Services of the Alienee, he (z) ſhall loſe the Arrearages incurred before the Alienation, in as much as he cannot avow for them upon the Alienee. Co. 3. Pennant 66.

(x) Co. Lit. 269. b. S. P. Kelw. 113. a. S. P. (y) Co. Lit. 259. b. S. P. (z) But if after the Death of the Feoffor, the Lord accepts the Services by the Hands of the Feoffee, yet ſhall he not loſe his Arrearages, for ſince the Law compels him to avow upon the Feoffee, he ſhall not be prejudiced thereby. Co. Lit. 269. b.

17. If the Tenant in Chivalry dies, his Heir of full Age, by which Relief is due, and the Alienee gives Notice thereof to the Lord, yet he cannot compel the Lord to avow upon him before the Relief paid, becauſe then the Lord would loſe the Relief. 4 Ed. 3. 22. Avowry 163. per Wilby.

18. If the Meſn grants his Meſnalty by Fine, tho' there is no Attornment of the Tenant, yet the Lord paramount might avow upon the (a) Grantee, becauſe he was his Tenant in Fact, yet he was not compellable to avow upon him. (b) Lit. Attornment 131.

(a) In the Original it is ſur le meſn pur ceo, &c. and ſo plainly appears to be miſprinted. (b) Sect. 583.

19. But in this Caſe, if the Grantor dies without Heir, in the Life of the Grantee, the Grantee may compel the Lord to avow upon him. Lit. Attornment (c) 131. b.

(c) Sect. 583.

20. If there be Lord and Tenant by Fealty and Rent, and the Tenant makes a Leaſe for Years, and tho' the Leſſor hath done Fealty, and conſtantly paid the Rent, yet the Lord diſtrains the Cattle of the Leſſee for Rent, (where in Truth none is due) and avows upon a meer Stranger, that never had any Thing, as upon his very Tenant for Rent arrear; upon the ſpecial Matter ſhewn, the Leſſor (d) may join in Aid to the Leſſee, and abate the Avowry, and compel the Lord to avow upon his Tenant in Right and in Law. (e) 9 Co. 20, 21. adjudged.

(d) 1 Rol. Abr. 165. Pl. 1, 2. vide. (e) 2 Mod. 103. S. C. cited.

21. If there be Lord Meſn and Tenant, and the Beaſts of the Tenant are taken and impounded by the Lord; the Meſne may take theſe Beaſts out of the Pound, and put in his own in Lieu thereof, and ſue a Replevin, and ſo make himſelf Party, and then if the Lord will avow upon a Stranger, the Meſne may ſhew the Truth of the Matter, and compel the Lord to avow upon him, who is his true Tenant in Law; but in ſuch Caſe the Tenant hath no other Remedy by ſpecial Pleading or otherways howſoever. 9 Co. 22. b.

(L) In what Caſes the Lord hath Election upon whom he will avow.

1. If the Meſn releaſe to the Tenant, yet the Lord may avow upon the Meſne. 45 Ed. 3. 10. b.

2. The Lord may avow upon the Diſſeiſor. (a) 20 H. 6. 9. b.

(a) Fitz. Avowry 12. S. C.

(b) He must avow upon him, else of his own shewing it will appear, that the Reversion (whereunto the Rent is incident) is out of him, and so the Avowry will abate. Co. Lit. 77. a. 269. a. and vide Godb. 302, 320. Hob. 337. Cro. Car. 428. (c) Fitz. Avowry 12. S. C. (d) Br. Avowry 96. S. C. Fitz. 36. S. C.

3. If the Tenant in Tail aliens in Fee, (b) yet the Donor may avow upon him. 19 H. 6. 61. (c) 20 H. 6. 9. b. 18 Ed. 3. 7. (d) 7 Ed. 4. 28. 15 Ed. 4. 13.

(e) Fitz. Avowry 83. S. C. Br. 31. S. C. (f) Br. Avowry 48. S. C. (g) Fitz. Avowry 12. S. C.

4. If the Donee in Tail aliens in Fee, the Lord cannot avow upon the Feoffee, for then he will abate his own Avowry, in as much as he alledges a Gift. (e) 48 Ed. 3. 8. b. Trebony's Avowry 14. (f) 14 H. 4. 37. b. contra (g) 20 H. 6. 9. b.

(h) Br. Avowry 48. S. C.

5. So if the Donee aliens with Warranty, and in a Formedon the Issue is barr'd by a Warranty and Assets, by which the Tail is perpetually bound, yet the Donor ought after to avow upon the Issue. (h) 14 H. 4. 39.

Fol. 318.

6. If the Tenant makes a Feoffment in Fee, the Lord may (i) avow upon him before Notice. (k) 14 H. 4. 38. 4 H. 6. 20. 8 (l) H. 6. 17.

(i) But a Writ of Customs and Services lies not against the Feoffor, nor will a Release to him extinguish the Seigniory, for there is a Diversity between these Actions and Acts, which concern the Right, and a Seisin and Avowry which concern the Possession only. Co. Lit. 269. b. —— So if a Rescous is made, no Assise lies against the Feoffor, and him that made the Rescous, for the Feoffee is Tenant, and in an Assise, the Surplusage incroached shall be avoided. Co. Lit. 269. b. (k) Br. Avowry 48. S. C. (l) Fitz. Avowry 8. Br. 52.

(m) Br. Avowry 96. S. C. Fitz. 36. S. C.

7. If the Tenant aliens in Fee, the Lord cannot avow upon the ancient Tenant for Homage, Fealty, Suit, or other corporal Service to have a Return for it, tho' he had no Notice of the Alienation, because he shall not have these Services of him. (m) 7 Ed. 4. 28.

(n) Lit. Sect. 457. S. P. Co. Lit. 269. b. S. P. Kelw. 113. a. per Keble, S. P. because the Charge of the Rent goes with the Land.

8. (n) If the Tenant aliens, the Lord may avow upon the Alience before any Notice given him, if he will. 7 Ed. 3. 33. Avowry 147. per Herle.

9. If the Tenant after Rent is arrear, makes a Feoffment of one Moiety of his Lands to one Man, and of the other Moiety to another Man, and the Tenant dies without Heir, the Lord may avow for this Rent, upon which of the Feoffees he will, because every Part of the Land is charged with the intire Rent. *Kelw.* 113. a. *per Keble.*

(M) Upon whom, and for what Thing it may be made.

(a) Fitz. Avowry 82. S. C. Br. 30. S. C.

1. If the Tenant infeoffs another, the Lord ought to avow upon the Feoffor for the Arrearages before the Feoffment, and not upon the Feoffee. (a) 47 Ed. 3. 4. b.

(b) Fitz. Avowry 82. S. C. Br. 30. S. C.

2. If the Tenant infeoffs another without Notice, the Lord may avow upon the Feoffor for the Arrearages after the Feoffment, till Notice. Dubitatur. (b) 47 Ed. 3. 4. b.

(c) Br. Avowry 7. S. C.

3. I may avow upon the Disseisor of my Tenant. (c) 3 H. 6. 11. 20 H. 6. 9. b.

(N) In the Name of (a) whom it ſhall be made.

(a) Where the Avowry is made for a Rent due before Marriage, vide 1 Rol. Abr. 348. Pl. 2. and the Notes thereupon.

1. If a Baron be ſeiſed of a Seigniory in the Right of his Feme, the Conuſance ought not to be made for Rent as Bailiff to the Baron only, but as Bailiff to both. 12 R. 2. Avowry 88. contra 13 H. 4. Avowry 198.

2. (b) If there be Leſſee for Years rendring Rent, and the Reverſion deſcends upon a Feme covert, and after the Rent is arrear, and the Baron diſtrains, and the Leſſee brings a Replevin, the Baron ought to avow in the Name of himſelf and his Wife, and not in the Name of himſelf only, for the Avowry is to be made according to the Reverſion which is in the Feme. Mich. 15 Jac. B. R. between (c) Wiſe and Bennet per Curiam: But they adjudged this good, becauſe that he ſaid, That he diſtrained for (d) Rent due in the Right of the Feme, (but (e) Quere how this could make it good.)

(b) 1 Rol. Abr. 347. Pl. 2. S. P.

(c) Cro. Jac. 442. S. C. and S. P. per Curiam, but there, becauſe he had ſhewed the Truth of the Matter as it was, and had averr'd the Life of the Feme, and ſo the Diſtreſs well taken, and the Rent due to him, it was adjudged that the Avowry was good. (d) Osborn and Malladen. S. P. 1 Mod. 273. adjudged. 2 Sand. 197. appears 2 Keb 712. adjudged. (e) 1 Mod. 273. S. C. cited, and this Quere taken Notice of, and Twisden ſaid, Perhaps it was made when Holl was a Student, and ſaid, that it had been adjudged that the Husband alone might avow in the Right of his Wife, —where ſhe is not made Party to the Replevin. 2 Keb. 712.

3. In an Aſſiſe of ſovent Diſtreſs againſt the Baron, who is ſeiſed of a Seigniory in the Right of his Feme, the Baron may juſtify the taking of the Diſtreſs for Fealty and Suit of Court, in his own Name, tho' he hath had no Iſſue by his Feme, (f) 27 Aſſ. 51. The ſame Law for Rent.

(f) Fitz. Aſſiſe 257. S. C. Br. 273. S. C. Br. Avowry 85. S. C.

4. But he cannot juſtify the Diſtreſs for Homage before Iſſue had. (g) 27 Aſſ. 51.

(g) Fitz. Aſſiſe 257. S. C. Br. 273. S. C. Br. Avowry 85. S. C.

5. If by the Cuſtom of a Court-Baron, the Homage of the Court, hath uſed Time out of Mind, &c. to elect a Supervisor of the Common belonging to the Tenants of the Manor, &c. and a Supervisor is elected, who takes the Cattle of one of the Tenants, and impounds them by the ſame Cuſtom, becauſe he hath ſurcharged it; in Replevin againſt him, he cannot avow the Taking as Supervisor, in his own Name upon this Matter, becauſe he does not claim any Intereſt, but only as Supervisor. Mich. 15 Jac. B. R. between (h) Steevens and Keblethwaite, adjudged upon a Demurrer, which intratur Hill. 14 Jac. Rot. 206.

(h) Cro. Jac. 436. S. C. adjudged, and there ſaid, that ſo was the Caſe of the Common Pinder.

6. An Avowry is not good in the Right of one Executor, where there is another Executor not named. 12 R. 2. Avowry 88.

Fol. 319.

(O) (a) In what Caſes it is to be made upon any Perſon in certain, and in what not.

(a) Per 21 H. 8. cap. 19. the Lord may avow upon the Lands, &c. as in Lands, &c. within his Fee or Seigniory, &c.

1. If an Avowry be for Homage, Rent, or other Service, it ought to be made upon ſome Perſon in certain. (b) 14 H. 4. 3.

without naming or making Avowry upon any Perſon in certain, vide Co. Lit. 268. (b) Fitz. Avowry 60. S. C. Br. 46. S. C.

2. If an Avowry be made for Relief, it ought to be made upon the Heir of him upon whoſe Death the Relief is claimed. 34 Ed. 1. Avowry 233. adjudged.

3. But

(c) Fitz. Avowry 60. S. C. Br. 46. S. C.

3. But if an Avowry be for a Fine for Alienation upon a Custom that every Tenant ought to pay a Fine for every Alienation, this shall not be made upon any Person in certain, but upon the Custom. (c) 14 H. 4. 3.

(d) Fitz. Avowry 60. S. C. Br. 46. S. C.

4. So if an Avowry be for a Rent-charge, it shall not be upon any Person. (d) 14 H. 4. 3.

(a) (P) Justification.

(a) This Letter P. is wanting in the Original.

1. If the Avowant ought to have the Thing for which he took the Distress, tho' his Estate be determined after, or before the (b) Distress, yet he may avow, because if he justifies, he shall not have a Return, and so shall not have the Thing for which he distrains. (c) 19 H. 6. 41. Curia.

(b) So is the Original, but I take it to be a Mistake of the Printer, and that it ought to be before the Replevin, &c. vide the Year-Book. (c) Fitz. Avowry 10. S. C. Br. 53. S. C. Br. Justification 6. S. C.

(d) Fitz. Avowry 10. S. C. Br. 53. S. C. Br. Justification 6. S.C.

2. As if a Man takes a Distress for Rent reserved upon a Lease for Years, and after accepts a Surrender of the Land, yet he may avow, because he is to have the Rent, notwithstanding the Surrender. (d) 19 H. 6. 41. Curia.

(e) Fitz. Avowry 10. S. C. Br. 53. S. C. Br. Justification 6. S. C.

3. So if the Rent be reserved upon a Lease pur auter Vie, and after the Rent incurred, cestuy qui Vie dies, he in the Reversion may avow, tho' the Estate be determined, because he is to have the Rent. (e) 19 H. 6. 41.

(f) Ow. 10. like Point, per Curiam.

4. (f) But if the Distress was lawful, but by a Matter ex post facto, he is not to have the Thing for which the Distress was made, there (g) he shall not avow, but may justify. (h) 19 H. 6. 41.

(g) But how far in such Case an Avowry may serve as a Justification. March 103, 104. Q. (h) Fitz. Avowry 10. S. C. Br. 53. S. C. Br. Justification 6. S. C.

(i) Fitz. Avowry 10. S. C. Br. 53. S. C. Br. Justification 6. S. C.

5. As if the Lord distrains for Homage, and after he that ought to do Homage dies, and his Executor sues a Replevin, the Lord ought to justify, because the Homage is gone by his Death. (i) 19 H. 6. 41.

6. But if the Lord distrains for Homage, and after the Tenant infeoffs a Stranger of the Land, yet the Lord may avow, and shall not justify, for he shall recover his Homage against him. 41 Ed. 3. Avowry 79.

(k) Fitz. Avowry 36. S. C. Br. 96. S. C.

7. If the Tenant makes a Feoffment, and after before Notice, the Lord distrains for Homage, yet he shall not avow upon the first Tenant, but shall justify, for he shall not recover the Homage against him, because he was not his Tenant de facto, at the Time. 41 Ed. 3. Avowry 79. 2 R. 2. Avowry 85. (k) 7 Ed. 4. 28.

(l) Fitz. Avowry 36. S. C. Br. 96. S. C.

8. But in this Case, if the Lord avows for Homage before he hath Notice of the Feoffment, yet this will excuse him of Damages, but he shall not have a Return. (l) 7 Ed. 4. 29.

(m) Br. 96. S. C.

9. If Suit of Court be arrear, and after the Tenant aliens in Fee, yet the Lord may avow for the Suit, to have amends for it. (m) 7 Ed. 4. 28. per Moyle.

Fol. 320.

(n) Cro. Jac. 436. S. C. and as to the S. P. the Court inclined accordingly.

10. If by the Custom of a Court-Baron, the Homage hath used to elect a Supervisor of the Common of the Tenants, which hath used by the Custom to take the Cattle which surcharge the Common, and impound them, in a Replevin against the Supervisor, he cannot by this Custom avow as Supervisor, the taking of the Cattle, which surcharge the Common. (n) but ought to justify, because he claims no Interest to himself. Mich. 15 Jac. B. R. between Stevens and Keblethwaite, adjudged upon a Demurrer, which Intratur Hill. 14 Jac. Rot. 206.

11. In a Recaption, the Defendant shall not make an Avowry, as in a Replevin, but shall justify the Taking, &c. as in Trespass, for in a Recaption the Plaintiff shall only recover Damages for the Contempt, which the Defendant hath done contrary to Law, and not for the Taking of the Cattle, nor for the Detaining of them. F. N. 72. b.

12. (o) A Commoner may juſtifie the taking of Cattle of a Stranger upon the Common, Damage-feſant. (p) 15 H. 7. 13. b.

(o) 1 Rol. Abr. 405. Pl. 5. vide, and the Notes there. (p) Br. Treſpaſs 174. S. C. Br. Common 35. S. C.

13. (q) A Commoner may avow the taking of the Cattle of a Stranger upon the Common, Damage-feſant, tho' he can have no Action of Treſpaſs. (r) 15 H. 7. 13. b. Brook Common 35. cited 24 Ed. 3. 42. (s) (Quere where this is.)

(q) 1 Rol. Abr. 405. Pl. 5. vide, and the Notes there. (r) Br. Treſpaſs 174. S. C. (s) It is to be found 24 Ed. 3. 42. a. according to the falſe Print of the old Edition, in the Year 1585.

14. But (t) one Tenant in Common cannot (u) avow the taking of the Cattle of a Stranger upon the Land, Damage-feſant, without making himſelf Bailiff or Servant to his Companion. Paſch. 8 Car. B. R. between (x) Lamſhead Plaintiff, and Leate and Rowel Defendants, adjudged upon Demurrer, I my ſelf being of Counſel with the Defendant. Intratur, Tr. 7 Car. Rot. 810.

(t) Where they may join in Debt for Rent, but muſt ſever in an Avowry, becauſe in the Realty. Lit. Sect. 316, 317. but for this vide the Diviſions, Tit. Joint-Tenants. (u) Conuſanze for Damage-feſant made in the Name of one Tenant in Common. per Cro. El. 530. 2 Judges againſt 1, but Q. (x) 1 Jon. 253. ſeems to be S. C. adjudged.

(a) (Q) Upon what Plea.

(a) This in the Original is R. and ſo plainly appears to be miſprinted.

1. IN Replevin againſt A. and B. if A. pleads non cepit, yet B. may make Conuſance in the Right of A. and avow for himſelf, for B. ſhall not by the Plea of A. be ouſted of his Advantages. 14 Ed. 3. Avowry 118.

2. In a Replevin againſt A. and B. if A. pleads non cepit, yet B. may make Conuſance in the Right of A. and C. for B. ſhall not be ouſted of his Advantages by the Plea of A. 14 Ed. 3. Avowry 118. adjudged.

3. In a Replevin againſt the Lord and his Bailiff, if the Lord pleads non cepit, the Bailiff may avow for Rent in the Right of the Lord, tho' he ſhall not have a Return. 17 Ed. 3. 72. b. adjudged. 15 Ed. 3. Avowry 107. adjudged. D. 8. 246. 70. admit for Damage-feſant. 18 Ed. 3. 53. adjudged. contra 14 Ed. 3. Avowry 118.

4. But in this Caſe he may juſtify without doubt. 17 Ed. 3. 72. b. 18 Ed. 3. 53. b (b) 22 H. 6. 62. b. 53.

(b) Fitz. Replevin 8. S. C. Br. 26. S. C.

5. In a Replevin, if the Defendant ſays, that he took it in another Place, and that this is ancient Demeſne, he may avow the taking there, altho' he ſhall not have a Return, if it be found for him, becauſe the Court hath no Juriſdiction. 21 Ed. 3. 7. 51. contra 21 Ed. 3. 51.

Pleading.

(a) The (b) Form of an Avowry at the Common Law.

(a) For the ſeveral Manners and Forms thereof, vide Co. Lit. 269. a. b. (b) Bene Advocat, &c. for bene cognovit, &c. but Matter of Form. Jenk. Rep. 338. Cro. Jac. 372.——Adhuc aretro exiſtit, but Matter of Form. Cro. Jac. 283. and vide Dal. 72.—Bene cognoſcit captionem pred. loco in quo, &c. but tempore quo, &c. omitted, vide 2 Mod. 4. 5. (c) Moor 237. Pl. 370. S. C. but S. P. does not appear.

1. IF *A.* holds Lands of *B.* by certain Rent, as of his Manor of *D.* and *A.* conveys theſe Lands to the King, who grants them to *J. S.* in an Avowry for this Rent, *B.* muſt ſet forth the ſpecial Matter, and not avow generally, becauſe the Place, where, *&c.* is held of him, as of his Manor of *D. &c.* for this is no Rent-Service, but Rent diſtrainable of common Right. *Hill.* 28 *Eliz.* between (c) *Broker* and *Smith.* 1 *And.* 159, 160. adjudged upon Demurrer, and that ſuch general Avowry was naught in Subſtance, and not to be amended.

(a) Surpluſage (b) in an Avowry.

(a) Where the Defendant made Conuſance as Bailiff to A. Adminiſtrator of B. and it appeared that A. had right, but not as Adminiſtrator, and the Conuſance ſtood as Bailiff of A. and the reſt rejected as Surpluſage. Brown and Dunnery, Hob. 208. Moor 887. Pl. 1248. in Debt, but I ſuppoſe that a Miſtake of the Reporter, for in Hob. where the Caſe is more fully reported, it appears to have been in an Avowry. (b) Where an Avowry is made for ſeveral Rents, and it appears Part is not due, yet the whole Avowry ſhall not abate. vide 11. Rep. 45. b. but for this vide the Sub-diviſions, Title, Writ, where a Writ or Avowry ſhall abate in Part only, (c) 1 Bulſt. 135. &c. S. C. adjudged, becauſe by the Marriage the Rent is now due and arrear to both.

1. IN an Avowry for a Rent-Charge, the Defendant made a Title to *Jan. Stiles*, with whom he married *Anno* 1603, and becauſe at *Mich.* 1597, 20 *l.* was arrear, and not paid to him and his Wife, avowed *Hill.* 7 *Jac.* between (c) *Bowles* and *Poor. Cro. Jac.* 282, 283. adjudged a good Avowry, for the ſaying it was Arrear to him and his Wife, was but Surpluſage, when the contrary appears, he not being married then.

The Form upon the (a) Statute.

(a) 21 H. 8. Cap. 19. 32. H. 8. Cap. 37.

(b) 1 Leon. 301. S. C. and S. P. per Curiam, notwithſtanding it was objected, that this Conuſance is neither according to the Common Law, or Statute, for when the Statute helps the want of naming the Tenant in two Places, it muſt in one.

1. IN an Avowry, the Defendant may ſay, That *B.* was ſeiſed of the Place, where, *&c.* and held the ſame of *A.* by Fealty and Rent, and ſo for Rent-arrear, as Bailiff to *A.* make Conuſance (according to the Statute) as in Lands held of him. *Mich.* 31 and 32 *Eliz.* between (b) *Lucy* and *Fiſher*, *Cro. Eliz.* 146. *per Curiam*, notwithſtanding it was objected, when in the Beginning he names the Tenant, he ought to have gone on in the ſame Manner, and avowed upon him, as at Common Law.

2. If Executors by 32 *H.* 8. *Cap.* 37. avow for the Arrears of a Rent in Fee accrued to their Teſtator, they muſt ſhew that the Land continues in the Seiſin of the Tenant, who ought to have paid it, or in the Hands of ſome other who claims (c) by or from him, according to the Statute. *Hill.* 39 *Eliz.* between *Miles* and *Willoughby*, *Cro. Eliz.* 547. *per Anderſon* and *Walmſly*, upon a ſpecial Demurrer; but however note, the Judgment appears there to have been given for the Avowant.

(c) For this vide Co. Lit. 162. b.

3. But in this Caſe, becauſe the Avowant is a Stranger, he need not ſhew how, but only ſhew it generally, according to the Words of the Statute. *Hill.* 39 *Eliz. Cro. Eliz.* 547. *per Anderſon* and *Walmſly.*

(a) Where but one, and where ſeveral Avowries.

(a) Not one Avowry both for a Rent-Service, and for a Rent-charge, but the Defendant may avow the taking ſo many Cattle for a Rent-ſervice, and ſo many for a Rent-charge. 1 Rol. Rep. 35. per Coke.——But if in Replevin againſt two for one Dr, they make ſeveral Avowries, each in his own Right, both Avowries ſhall abate, otherways the Court would be in Doubt for whom to give Judgment, and they cannot give ſeveral Judgment for the Return of one Dr. 5 Co. 19. a, 38. b.

1. IF *A.* holds one Acre by Knight's Service, and 12 *d.* Rent, and the other in Soccage, and 1 *d.* Rent, and makes a Gift in Tail of both Acres, without any expreſs Reſervation of any Tenure, the ſame Tenures are by Law created between the Donor and Donee, and tho' there is but one Reverſion, yet becauſe the Tenures are ſeveral, the Donor muſt make ſeveral Avowries, for the Avowry is made in reſpect of the Tenures. *Co. Lit.* 32. a.

2. In Replevin for a Colt and a Cow, the Defendant may avow for ſeveral Heriots, and ſhew that the Father of the Plaintiff was ſeiſed, *&c.* and ſhew the ſeveral heriotable Tenures, and Death, *&c.* and that he took

the Colt and Cow *nomine heriotorum*, (b) without ſhewing which he took in reſpect of the one Tenure, and which in reſpect of the other. *Hill.* 8 *Jac.* between *Syliard* and 1 *Bulſt.* 101, 102. adjudged.

(h) Where a Man cannot avow for Part of a Rent due at a Day, without ſhewing that the Reſidue was diſcharged. Holt and Sanbach. Cro. 103, 104. Hut. 96. adjudged.

(a) Certainty in an (b) Avowry.

1. IF in an Avowry the Defendant ſays, That *A.* was ſeiſed, *&c.* and held of the Defendant, by Fealty, Rent, and an Heriot upon the Death of every Tenant, and that *A.* died ſeiſed, *&c.* and for one Heriot, *&c.* this is not ſufficient, but ought to be more certain, *viz.* for the (c) beſt, or two beſt Beaſts, and not generally for one Heriot. *Mich.* 14 *Jac.* between (d) *Shaw* and *Taylor*, *Hut.* 4. adjudged.

(a) Where upon a Copyholder, for a reaſonable Fine, the Value of the Land muſt be ſet forth, and the Certainty of the Fine, that Part of a Penny. (b) It ought to be as certain as a Declaration, for if the Tenant will diſclaim, thereupon intitled to have his Writ of Right for the Land, in lieu of the Services. per Kingſmill, arguendo. (c) But he need not ſhew which was the beſt Beaſt, or the Value thereof, for perhaps it was eſloined, Major and Brandwood, Cro. Car. 260. adjudged, 1 Jon. 300. adjudged, tho' in ſeveral Precedents the beſt Beaſt is preciſely averr'd, which is a good way where known. (d) Hob. 176. S. C. adjudged.

2. In an Avowry for Homage, it need not be ſhewn whether the Tenancy came to the Tenant by Deſcent or Purchaſe. *Trin.* 20 *Jac.* between *Whitgift* and Sir *Francis Barrington*, (e) *Winch.* 31, 32. adjudged upon a ſpecial Demurrer.

(e) Hut. 50. S. C. adjudged upon a ſpecial Demurrer, 2 Rol. Rep. 392. S. C. but S. P. does not appear.

(a) Pleas in Bar to an Avowry.

What may be pleaded at the Common Law.

1. A Stranger to the Avowry can plead nothing in Bar thereof, but *hors de ſon Fee*, or that which is tantamount. 9 *Co.* 20. b.

(a) He that denies the Seiſin within the Time of Limitation, ought firſt to acknowledge the Tenure, to the End the Lord may have a Writ of Cuſtoms and Services. 9 Co. 34. b. 35. a.

2. But the right Tenant, tho' he be a Stranger to the Avowry, being made a Party by Aid prier, may plead Matter in Abatement of the Avowry. 9 *Co.* 20. *b.*

3. But at Common Law, where the Avowry was made only upon the Land, as in Caſe of cuſtomary Profits, as a Fine for Alienation, *&c.* ſo in Caſe of a Rent-charge, the Plaintiff might have pleaded any Diſcharge, tho' he was a meer Stranger, and had nothing in the Land. *Hob.* 108, 109.

(a) (b) Hors de ſon Fee.

1. IF a Stranger claims a Seigniory, and diſtrains, and avows for the Service, the Tenant may plead, That the Tenancy is *extra feodum*, *&c.* of him that is out of the Seigniory, or not holden of him, but he cannot plead *extra feodum*, *&c.* unleſs he takes the Tenancy upon himſelf. (c) Co. *Lit.* 1. b.

(a) Vide. Br. and Fitz. Hors de ſon Fee. Doctr. Plac. 216. (b) Where the Lands are held of one, and yet may be within the Fee of another, Scilicet the Lord Paramount. 1 And. 237. (c) 2 Mod. 104. S. C. cited, and there ſaid by the Ch. Juſtice, that this Rule is to be intended in Caſes of an Aſſize, and that ſo were all the Books cited in Co. Lit. for Proof of this Opinion.

2. In an Avowry, the Tenant cannot plead: *Ne unques ſeiſie* of ſuch Services generally, becauſe, he leaves no Remedy for the Lord, either by Avowry, or by Writ of Cuſtoms and Services, and therefore if he is a Tenant in Fee-ſimple, he ought either to diſclaim, or plead *Hors de ſon Fee.* 9 Co. 34. b.

3. If

3. If in (d) Treſpaſs for taking of Goods, the Defendant juſtifies by the Command of the Lord of the Manor, of whom the Plaintiff held by Fealty and Rent, and that for Non-payment of the Rent he took them, *nomine diſtrictionis*, the Plaintiff may reply, That the *Locus in quo eſt extra abſq; hoc quod eſt infra feodum, &c. Trin.* 28 *Car.* 2. Between *Sherrard* and *Smith*. 2 *Mod.* 103, 104. adjudged upon a ſpecial Demurrer, it being ſhewn for Cauſe, That the Plaintiff had not taken the Tenancy upon himſelf.

(d) So in an Avowry, a Stranger may plead generally Hors de ſon Fee, and ſo may Tenant for Years. 2 Mod. 104. per Curiam.

What Pleas ſince the (a) Statute, and where an Avowry is made according to the Statute.

(a) 21 H. 8. Cap. 19. by which Statute all Plaintiffs and Defendants ſhall have like Pleas, and like Aid Prayers in all ſuch Avowries, Conuſances, and Juſtifications, (Pleas of Diſclaimer only excepted) as they might have had before the Act, vide Co. Lit. 268. b. vide Brown and Goldſmith, Hob. 108 Moor 870. Pl. 1208. which laſt Book ſeems to be miſprinted, and vide Cro. Jac. 127. 2 Brownl. 102.

(a) Where the Seiſin, and where the Tenure ſhall be travers'd.

(a) For the general Learning hereof, vide 9 Co. 33, 34, &c. Godb. 23, 24. Kelw. 31. b. Davis and Turner. Winch. 18. 1 Brownl. 172.

1. (b) IF the Defendant avows for, and alledges a Seiſin of Rent payable at two Feaſts, The Plaintiff may ſay, That he holds by the ſame Rent payable at one, *abſq; hoc*, that it is payable at the two Feaſts, for this is another Tenure. *Trin.* 26 *Eliz.* Between *Throgmorton* and *Terringham.*

(b) 9 Co. 34. b. S. P.

2. (c) If in an Avowry for Rent, the Defendant alledges the Tenure to be by Fealty, Rent, and Suit of Court, where the true Tenure is by Fealty, and Rent only, the Seiſin of the Suit is not material, for the Tenancy was not originally charged with any Service of this Nature, and therefore in this Caſe the Tenure is traverſable. *Paſch.* 42 *Eliz.* (d) *Bucknal's* Caſe. 9 *Co.* 33. reſolved, and upon a ſpecial Iſſue joined upon the Tenure, and this Matter ſpecially found, it was adjudged againſt the Avowant. 9 *Co.* 36.

(c) Kelw. 31. b. S. P. per 2 Judges.

(d) Cro. El. 799. S. C. adjudged, and ſaid, That in an Avowry the whole Tenure is material, but otherways in Treſpaſs or Reſcous.

3. But where the Lord gets quiet and peaceable Seiſin of more Rent than is due, becauſe the Tenancy is charged with a Service of ſuch Nature, the Seiſin is traverſable, and not the Tenure. *Paſch.* 42 *Eliz. Bucknal's* Caſe. 9 *Co.* 36. *per Curiam.*

(e) At Common Law he could not have pleaded non Tenure generally, and therefore he cannot, tho' the Avowry be upon the Statute. Cro. Jac. 127. per Curiam.

4. But unleſs the Tenant (e) confeſs a Tenure in Part, he cannot traverſe the Tenure, for he cannot ſay that he holds of a Stranger, *abſq; hoc*, that he holds of the Avowant, but in that Caſe he ought to diſclaim, or plead *Hors de ſon Fee.* 9 *Co.* 35. a.

5. But in a *Ne injuſte vexes*, *Ceſſavit*, Aſſize, Reſcous, or Treſpaſs, ſuch Seiſin of more Rent ſhall be avoided, for the Tenure, and not the Seiſin is traverſable. 9 *Co.* 34. a.

6. If the Lord avows for Services, and alledges Seiſin by the Hands of any one in certain, as by the Hand of his very Tenant, the Plaintiff may plead, That the Avowant was never ſeiſed by his Hands. 9 *Co.* 35. a.

7. The Seiſin of that Service only is traverſable, for which the Avowry is made, unleſs the Seiſin of a Superior Service is alledged, which in Law is a Seiſin of that. 9 *Co.* 35. a.

(a) Ancient Demeſne.

Fol. 321.

(A) (b) What ſhall be ſaid (c) ancient Demeſne.

1. A Acre of Land may be ancient Demeſne, which is (d) Parcel of a Manor, (e) which is not ancient Demeſne. 30 Ed. 3. 12. admitted. Land which is Frank Fee may be held of a Manor of ancient Demeſne. (f) 11 H. 4. 86.

(a) Regularly all general Statutes extend thereto. 4 Inſt. 270. but vide 1 And. 71, &c. (b) Not that which is holden by Knight's Service. F. N. B. 14. b. 1 Leon. 232. (c) Where in an Aſſiſe for Rent, the Defendant may plead, That the Land out of which, &c. is ancient Demeſne, vide Dier 8. a. 11 Co. 10. b. 1 Leon. 333. 2 Leon. 190. (d) Vide ancient Demeſne, but the Copyholds being Parcel of the ſame Manor were not, vide 3 Lev. 405. (f) Br. ancient Demeſne 15. S. C.

2. That which is approved by the Lord out of his Waſtes, cannot be ancient Demeſne, (g) 5 Aſſ. 2. for the Waſtes are Part of the Demeſnes.

(g) Br. ancient Demeſne 26. S. C.

(B) (a) What Privileges the Tenants ſhall have.

(a) Where a Town may be ancient Demeſne of the Crown, as London, and yet the Inhabitants thereof not have the Privileges of Tenants in ancient Demeſne, vide

(b) Toll Free.

1. They may ſell or buy Oxen, or other Beaſts, to Manure their Land, and maintain their Houſes, without paying Toll in every Market and Fair throughout the Realm. (c) 7 H. 4. 44. b. F. N. 228. A 9. (d) H. 6. 25. b. or other Place.

1 Leon. 191. (b) And what other Privileges, vide 2 Inſt. 543. 4 Inſt. 269. F. N. B. 228. b. c. d. e. Hob. 48. (c) Br. ancient Demeſne 14. S. C. —Such Tenant not excuſed of being Conſtable. 1 Vent. 344. (d) Fitz. Toll 8. S. C.

2. If a Tenant be a Common Merchant, to buy and ſell Cattle in a Fair and Market, and he buys Cattle to ſell again, and within half a Year after ſells them again at a Fair, yet he ſhall not pay Toll, but is within the Privilege. (e) 7 H. 4. 44. b. Curia.

(e) Br. ancient Demeſne 14. S. C.

3. So in this Caſe, if he ſells them the next Market after he bought them, yet he is within the Privilege. (f) 7 H. 4. 44 b. Curiam.

(f) Br. ancient Demeſne 14. S. C.

4. (g) They ſhall be diſcharged of Toll for Things coming from the Tenement of which they are ſeiſed in ancient Demeſne, ſold for their Suſtenance. (h) 9 H. 6. 25. b.

(g) 2 Inſt. 221. S. P. (h) Fitz. Toll 8. S. C.

5. (i) So they ſhall be diſcharged for Things ſold ariſing upon the Soil held. (k) 19 H. 6. 66. b.

(i) 2 Inſt. 221. S. P. (k) Br. ancient Demeſne 22. S. C.

6. So they ſhall be diſcharged of Toll for their Goods bought for the Support of their Eſtate, according to the Quantity of their Tenement in ancient Demeſne, as for their Cattle, and other Things neceſſary. (l) 9 H. 6. 25. b.

(l) Fitz. Toll 8. S. C.

7. They ſhall be diſcharged of Toll for Things which they buy to manure their Soil. (m) 19 H. 6. 66. b.

(m) Br. ancient Demeſne 22. S. C.

8. Quere if they ſhall be diſcharged of Toll of all Things which they ſell and buy. (n) 19 H. 6. 66. b.

(n) Br. ancient Demeſne 22. S. C.

9. (o) Nota, in Juſtice Hutton's Reports, there is cited one (p) Ward's Caſe to be adjudged in B. R. 28 Eliz. touching the Toll of the Town of Leiſtock in Suffolk, where it was adjudged, (q) that the Privilege of ancient Demeſne does not extend to him that is a Merchant, or that Trades and gets his Living by buying and ſelling, but the Privilege

(o) F. N. B. 228. D. and vide 2 Leon. 191. (p) Cro. El. 227. S. C.

and S. P. adjudged. 1 Leon. 231, 233. S. C. adjudged.

vilege was annexed to the Perſon in reſpect of the Land, Scilicet, (r) becauſe (s) they manure the Demeans of the King, and provide Corn for the Garriſons of the King, and Purveyance was not then in Uſe, but the Privilege is intended for thoſe Things which ariſe, or are to be uſed in the Land, or for his Family that manures the Land.

(q) 2 Inſt. 221. S. P.

(r) 2 Inſt. 221. S. P. and ſame Reaſon, for by his Tenure he ought rather to be an Husbandman than a Merchant. (s) For this vide 2 Inſt. 542, 543. 4 Inſt. 269. 2 Leon. 191.

Fol. 322.

(C) Who ſhall be a Tenant to have the Advantage of the Privilege.

In reſpect of the Eſtate.

(a) Fitz. Toll. 8. S. C.

1. A Tenant in Fee of ancient Demeſne ſhall have the Privilege to be Toll-free in Fairs and Markets. (a) 9 H. 6. 25. b.

(b) F. N. B. 228. D. S. P. 2 Leon. 191. S. P.

2. (b) So Tenant at Will of ancient Demeſne ſhall have the Privilege to be Toll-free. (c) 9 H. 6. 25. b.

(c) Fitz. Toll 8. S. C.

(D) In reſpect of the Perſon.

(a) Fitz. Toll 8. S. C.

1. If a Lord be Tenant, and lives in ancient Demeſne, he ſhall be diſcharged for all his Houſhold, having regard to the Quantity of his Tenement. (a) 9 H. 6. 25. b.

(E) (a) In (b) what (c) Actions and (d) Suits it (e) will be a good Plea.

(a) Not in a Warrantia Charte, F. N. B. 135. K.

(b) Not in Actions meerly perſonal, as Debt upon a Leaſe, Treſpaſs, Quare clauſum fregit, &c. ſecus, in all real Actions, Actions of Account, Replevin, Ejectment, Writ of Meſne, &c. 4 Inſt. 270. Hob. 47. 5 Co. 105. a. (c) If in a Writ of Right Cloſe in ancient Demeſne, the Tenant pleads in Abatement, and thereupon the Writ by Judgment is abated, and the Demandant brings a Writ of falſe Judgment in the Common Pleas, where the Writ is affirmed to be good, that Court ſhall proceed as the inferior Court ſhould have done. 4 Inſt. 270. F. N. B 19. D. (d) For what Cauſes the Plea may be removed out of the Court of ancient Demeſne. 4 Inſt. 269, 270. vide F. N. B. 13. B. F. (e) Upon a Judgment in ancient Demeſne, and a Writ de executione judicii awarded, the Suitors return, that they did not execute the Writ, becauſe it appeared to them, that the Land was Frank-Fee, but the Return diſallowed, becauſe the Party had admitted the Juriſdiction. Moor 451. Pl. 615. vide. (f) Br. ancient Demeſne 20. 37. S. C.

1. Where by Recovery in the Action the Land will be Frank-Fee, ancient Demeſne is a good Plea. (f) 8 H. 6. 34.

(g) 4 Inſt. 270. S. P. (h) Br. ancient Demeſne 21. S. C.

2. (g) In real Actions, ancient Demeſne is a good Plea. (h) 8 H. 6. 1.

(i) Hob. 47. S. P.

3. In (i) a Writ of Ward of Land, ancient Demeſne is a good Plea. 46 Ed. 3. 2.

(k) 4 Inſt. 270. S. P. (l) Fitz. Meſne 17. ancient Demeſne 26.

4. (k) In a Writ of Meſne it is a good Plea, becauſe the Tenancy may come in Debate in this Writ. 21 Ed. 3. 10. (l) 28 Ed. 3. 95. adjudged.

(m) Godb. 64. S. P. agreed per Curiam 310. S. P. ar-

5. (m) In Replevin, ancient Demeſne is a good Plea, becauſe by Intendment, the Freehold will come in Debate. 4 H. 6. 19. (n) 7 H. 6. 35. b. 21 Ed. 3. 10. 51. 29 Ed. 3. 9. 30 Ed. 3. 12. b. adjudged contra (o)

17 Ed. 3. 52, 75. till the Realty comes in Debate, because he may traverſe the Taking. quendo. 4 Inſt. 270. S. P. 1 Bulſt. 108. S. P. by 2 Judges. Ow. 24. S. P. ſaid. (n) Br. ancient Demeſne 20. S. C. (o) Fitz. ancient Demeſne 14. S. C.

6. (p) In a Writ of Account againſt a Bailiff of a Manor, ancient Demeſne of the Manor is a good Plea. (q) 8 H. 6. 34. (p) 4 Inſt. 270. S. P. 5 Co. 105. a. S. P. (q) Br. ancient Demeſne 20. 37. S. C.

7. (r) In an (s) Aſſiſe, ancient Demeſne is a good Plea. (t) 7 H. 6. 35. b. (r) Where in an Aſſiſe for Rent, ancient Demeſne of the Land out of which the Rent iſſues, is a good Plea, vide Dier 8. a. (s) And triable by the Recognitors of the Aſſiſe. 2 Inſt. 397. (t) Br. ancient Demeſne 20. S. C.

8. (u) In a Writ of Account againſt a Guardian in Soccage, ancient Demeſne is a good Plea, because the Tenancy may come in Debate, for the Defendant may ſay, That the Land is held by Knight's Service. 21 Ed. 3. 10. adjudged. (u) 5 Co. 105. a. S. P.

9. In a Writ of Admeaſurement of Paſture, ancient Demeſne is a good Plea, for tho' no Land be demanded, yet by this the Common ſhall be admeaſured, and by this the Land will be Frank-Fee. (x) 8 H. 6. 34. (x) Br. ancient Demeſne 20. 36. S. C.

10. (y) In a Partition between Tenants in Common, ancient Demeſne is a good Plea, for tho' this does not demand Land directly, yet upon the Matter he demands it a latere, and ſo the Recovery in this Action will make it Frank-Fee. Tr. 12 Jac. B. between (z) Grace and Grace, per Curiam. (y) Raym. 249. S. P. adjudged. (z) Raym. 249. S. C. cited.

11. In Treſpaſs for trampling his Graſs, ancient Demeſne is no Plea. (a) 8 H. 6. 34. (a) Br. ancient Demeſne 20. 37. S. C.

12. In a Writ of Treſpaſs, Quare Columbare fregit, & Columbas interfecit, ancient Demeſne is no Plea. 47 Ed. 3. 22. b.

13. (b) In Treſpaſs contra pacem, tho' the Realty comes in Debate, yet ancient Demeſne is no Plea, because they cannot hold Plea in ancient Demeſne of a Plea contra Pacem. (c) 17 Ed. 3. 52. (b) Cro. El. 826. S. P. per Warberton, arguendo. (c) Fitz. ancient Demeſne 14. S. C.

14. In Detinue for a Charter of Froffment of certain Land which is ancient Demeſne, and Count of a Bailment in a Town which is ancient Demeſne, yet ancient Demeſne ſhall not be any Plea. 3 Ed. 3. Itinere North' Title ancient Demeſne. 22. 43 Ed. 3. ancient Demeſne 25. Fol. 323.

15. (d) In an Aſſiſe by Tenant by Statute merchant, ancient Demeſne is no good Plea, because the Plaintiff does not demand the Freehold but till he hath (e) Satisfaction. (f) 2 Ed. 2. ancient Demeſne 24. (d) 2 Inſt. 397 S. P. Hob. 48. vide 5 Co. 105. b. vide 22 Aſſ. Pl. 45. there cited. Br. ancient Demeſne 33. (e) This in the Original, as alſo in Fitz. is, ſuis ces Chateux, which I ſuppoſe, there to be miſprinted, but if it be not, I confeſs, I know not the Engliſh thereof. (f) Hob. 48. S. C.

16. In a Juris utrum of his free Alms, ancient Demeſne is not any Plea, for it cannot be ancient Demeſne, and Frank Almoign. 32 Ed. 1. ancient Demeſne 39.

17. (g) In a Quare impedit, ancient Demeſne is no Plea, because if it ſhould be granted there ſhould be a Failure of Right, for there they cannot grant a Writ to the Biſhop. (h) 7 H. 6. 35. b. (g) Hob. 48. S. P. (h) Br. ancient Demeſne 20. S. C.

18. (i) So in an Action of Waſte, ancient Demeſne is no Plea, because in ancient Demeſne, they cannot upon the Diſtreſs returned, award a Writ to inquire of the Waſte, according to the Statute, for the Sheriff ought (k) by the Statute, to go in Perſon, which cannot be ſupplied by their Officer, and ſo there ſhould be a Failure of Right, and the Land ſhall not be Frank-Fee by a Judgment in this Action at the Common Law, because he could not have it within ancient Demeſne. (l) 7 H. 6. 35. M. 37 El B. between Green and Baker, by three Juſtices, Walmſly doubting thereof, contra (m) 8 H. 6. 34. by all the Juſtices. (i) 2 Inſt. 306. S. P. 4 Inſt. 270. S. P. con. Hob. 47. S. P. Ow. 24. S. P. adjudged. (k) 13 Ed. 1. cap. 14. explained 2 Inſt. 289. 39. (l) Hob. 47. at the Bottom, and 48. S. C. cited and allowed. Br. ancient Demeſne 20. S. C. (m) Br. ancient Demeſne 20. 37. S. C.

(n) 20 H. 3. cap. 3. explained, 2 Inſt. 83, 84.

19. So in a Rediſſeiſin, ancient Demeſne is no Plea, becauſe the Proceedings in ancient Demeſne are (n) by the Statute appointed to be made by the Sheriff, *Aſſumptis ſecum Coronatoribus Comitatus, &c.* and in ancient Demeſne there are no Coroners. 4 *Inſt.* 270.

(o) Hob. 47. S. P. agreed per Curiam, 1 Bulſt. 108. S. P. per 2 Judges. Hetl. 177. S. P. per Curiam.

20. (o) In an *Ejectione firmæ*, ancient Demeſne is a good Plea, for by Common Intendment, the Right and Title of the Land will come in Queſtion. *Hill.* 43 *Eliz.* between (p) *Smith* and *Alden.* 5 *Co.* 105. a. b. adjudged, and ſaid, If in this Action it ſhould not be a good Plea, the ancient Privileges of theſe Tenants would be loſt, in as much as moſt Titles at this Day are tried by Ejectment.

(p) Cro. El. 826. S. C. and S. P. by 2 Judges againſt 1, and ruled accordingly. 2 Rol. Rep. 181. S. C. cited.

(q) Lands in ancient Demeſne are extendible upon a Statute-Merchant, Staple, or Elegit. 4 Inſt. 270. Moor 211. Pl. 351. 2 Inſt. 397. 1 Brownl. 234. S. C. adjudged.

21. Lands in ancient Demeſne upon an (q) Elegit, may by the Sheriff be delivered in Execution, becauſe the Title of the Land is not directly put in Plea in the King's Court. *Hill.* 10 *Jac.* between (r) *Cox* and *Balmſly.* *Hob.* 47. adjudged.

(r) Moor 211. Pl. 351. S. C. cited.

(F) By Matter ſubſequent

(a) Fitz. ancient Demeſne 10. S. C. Br. 7. S. C. (b) Br. ancient Demeſne 20. S. C.

1. **In Treſpaſs, if upon Pleading the Freehold comes in Debate, ancient Demeſne is a good Plea.** (a) 46 Ed. 3. 1. b. contra (b) 7 H. 6. 35. b. **becauſe then the King will loſe his Fine,** contra (c) 17 Ed. 3. 52. **becauſe the Court there cannot hold Plea of an Action** contra pacem.

(c) Fitz. ancient Demeſne 14. S. C.

(d) Hob. 47. S. C. cited. Fitz. ancient Demeſne 10. S. C. Br. 7. S. C.

2. **In Treſpaſs for trampling his Graſs, if the Defendant juſtifies by Force of a Common, and ſo he did it** ſine injuria, **ancient Demeſne is no Plea, becauſe the Concluſion hath made the Iſſue upon the Perſonalty, not upon the Common which touches the Freehold.** (d) 46 Ed. 3. 2.

(G) What Perſon may plead it.

Who in reſpect of his Eſtate.

(a) Fitz. ancient Demeſne 9. S. C. Br. 6. S. C.

1. **A Leſſee for Years cannot plead ancient Demeſne.** (a) 41 Ed 3. 22. b.

(b) The Manor it ſelf, and the Demeſne Lands thereof, is pleadable at Common Law. F. N. B. 11. M. (c) 2 Leon. 191. S. P. per Coke, arguendo. (d) Fitz. ancient Demeſne 9. S. C. Br. 6. S. C.

2. (b) **The (c) Lord in an Action againſt him, cannot plead ancient Demeſne, for it is Frank-Fee in his Hand.** (d) 41 Ed. 3. 22. 1 Ed. 3. 14.

(e) Fitz. ancient Demeſne 9. S. C. Br. 6. S. C.

3. **So in an Action againſt the Lord and others, the Lord cannot plead it, nor the others, becauſe they are joined with him.** (e) 41 Ed. 3. 22.

(f) Fitz. ancient Demeſne 9. S. C. Br. 6. S. C.

4. **If the Lord brings an Action againſt the Tenant, ancient Demeſne is no Plea, for the Action is brought to defeat the Eſtate of the Tenant, and to make it Frank-Fee.** (f) 41 Ed. 3. 22. b. **Quere, for if the Tenant bars the Demandant by Judgment, peradventure this will make the Land Frank Fee, which ſhall not be againſt the Will of the Tenant, altho' the Lord agrees thereto.** 1 Ed. 3. 14.

(H) At what Time it may be pleaded.

Fol. 324.

1. AT the Grand Cape returned, the Plaintiff releaſed the Default, Ancient Demeſne is a good Plea. (a) 8 H. 6. 1.

2. In a Replevin after Deliverance made by the Sheriff, the Defendant in Banco may plead, That the Place, where, &c. is Ancient Demeſne. &c. 30 Ed. 3. 12. b. adjudged.

(a) Br. Ancient Demeſne 21. S. C.

(I) What Act or Thing will make it frank Fee.

1. (a) SOme Books are generally, that a Fine levied in the King's Court, will make it frank Fee. F. N. 13 C. (b) 7 H. 4. 3. b. (c) 28.

(a) 4 Inſt. 269, 270. S. P.

(b) Br. Ancient Demeſne 12. S. C. (c) Br. Ancient Demeſne 13. S. C.

2. A Fine with a Grant and Render to the Tenant without Execution, will make it frank Fee. (d) 40 Ed. 3. 4. b.

3. So a Fine upon a Releaſe with Warranty to the Tenant, will make it frank Fee, becauſe he is eſtopped to ſay it is Ancient Demeſne againſt the Fine, in which he affirms the Juriſdiction of the Court in which it is levied. 21 Ed. 3. 25. adjudged.

4. A Recovery at the Common Law in an Aſſize, will make it frank Fee. (e) 11 H. 4. 86.

5. So a Fine upon a Releaſe without Warranty, will make it frank Fee. Dubitatur, (f) 40 Ed. 3, 4. b.

6. If the Tenant levies a Fine in a Writ of Warranty of Charters, this does not make the Land frank Fee, becauſe the Land does not paſs by this. 21 Ed. 3. 32. b.

7. If the Tenant levies a Fine of this without any original Writ, yet this will make the Land frank Fee till it be reverſed, for this is not void, but only voidable. 26 H. 8. Aſſize 13. adjudged.

8. If a Manor of Ancient Demeſne comes to the King, and he aliens the Manor to another, the Tenements held of the Manor continue Ancient Demeſne, as they were before, for the King paſſes but the Services of them, but the Demeſnes are frank Fee. 21 Ed. 3. 56. (g) 21 Aſſ. Pl. 13.

9. If the Land comes to the King, this makes it frank Fee. (h) 17 Ed. 3. 52. 75. b. 21 Ed. 3. 46. b. contra 18 Ed. 3. 19. 21 Ed. 3. 56. (i) 21 Aſſ. Pl. 13. adjudged.

(d) Fitz. Ancient Demeſne 8. S. C. Br. 4. S. C.

(e) Br. Ancient Demeſne 15. S. C.

(f) Fitz. Ancient Demeſne 8. S. C. Br. 4. S. C.

(g) Br. Ancient Demeſne 32. S. C.

(h) Fitz. Ancient Demeſne 14. S. C. (i) Br. Ancient Demeſne 32. S. C.

10. (k) If the Land which is Ancient Demeſne comes to the King, this makes the Land frank Fee, and if the King leaſes it for Life, yet it will be frank Fee. (l) 11 H. 4. 86. a. b.

11. So if he grants it over in Fee, rendring Rent, or without Rent, it will be frank Fee. (m) 17 Ed. 3. 52. 75. b. 21 Ed. 3. 46. b. 56. (n) 21 Aſſ. Pl. 13. adjudged.

(k) 4 Inſt. 270. S. P.

(l) Br. Ancient Demeſne 15. S. C.

(m) Fitz. Ancient Demeſne 14. S. C. (n) Br. Ancient Demeſne 32. S. C.

12. (o) If the Lord infeoffs another of the Tenancy, this makes the Land frank Fee, becauſe the Services are extinguiſhed perpetually. (p) 41 Ed. 3. 22. b. (q) 50 Ed. 3. 10. (r) 3 H 6. 47. 18 Ed. 3. 19. 30 Ed. 3. 12. b. admitted, 19 R. 2. Ancient Demeſne 41. Curia.

(o) 4 Inſt. 270 S. P.

(p) Br. Ancient Demeſne 6. S. C. Fitz. 9. S. C. (q) Fitz. Ancient Demeſne 12. S. C. Br. 10. S. C. (r) Fitz. Ancient Demeſne 1. S. C. Br. 2. S. C.

(s) Fitz. Avowry 59. S. C. Br. Ancient Demeſne 11. S. C.

13. So if he leaſes for Life without Deed. (s) 50 Ed. 3. 24. b.

(u) Fitz. Ancient Demeſne 12. S. C. Br. 10. S. C.

14. So if the Lord releaſes to the Tenant all his Right in the Tenancy, this makes the Land frank Fee. 49 Ed. 3. 7. b. (u) 50 Ed. 3. 10.

15. So if the Lord confirms to him to hold by certain Services at the Common Law, this makes the Land frank Fee. 49 Ed. 3. 7. b. Ancient Demeſne 59.

Fol. 325.

(x) 4 Inſt. 270. S. P.

16. (x) If the Lord grants the Services of a Tenant of a Manor in Ancient Demeſne, and the Tenant attorns, this makes the Tenancy to be frank Fee. (y) 50 Ed. 3. 10. 30 Ed. 3. 13.

(y) Fitz. Ancient Demeſne 12. S. C. Br. 10. S. C.

(z) Br. Ancient Demeſne 3. S. C. (a) Fitz. Ancient Demeſne 18. S. C. Br. 34. S. C.

17. If the Lord diſſeiſes the Tenant, this makes the Land frank Fee againſt him as long as it is in his Hands. (z) 20 Hen. 6. 33. F. N. 12 Ed. (a 41 Aſſ. 7.

(b) Fitz. Ancient Demeſne 18. S. C. Br. 34. S. C. (c) 2 Leon. 192. vide. (d) Fitz. Ancient Demeſne 18. S. C. Br. 34. S. C.

18. But this ſhall not bind the Tenant but at his Election, for he may have a Writ of Right-Cloſe againſt him, if he will. F. N. 12 E. 30 Ed. 3. 13. (b) 41 Aſſ. 7.

19. (c) That which comes to be Parcel of the Demeſnes of the Manner, is frank Fee, for if the Lord be diſſeiſed thereof, he ought to have an Aſſize at Common Law. (d) 41 Aſſ. 7. adjudged.

20. If the Lord infeoffs another of the Tenancy, ſaving the ancient Services, this makes the Land frank Fee, for he cannot hold it by the ancient Services. 19 R. 2. Ancient Demeſne 41.

21. If a Plea be removed in Bank, out of an Ancient Demeſne Court, becauſe the Lord will not ſuffer Right to be done there, this makes the Land frank Fee always. 11 Ed. 2. Cauſe de remover Plea 21.

22. If the Lord acknowledges a Fine in a Monſtraverunt, and by this abridges the Services of the Tenant, this makes the Land frank Fee. 30 Ed. 3. 13. b.

23. If the Lord by Deed confirms to the Tenant, to hold freely by the Services before due, this makes the Land frank Fee. 30 Ed. 3. 13.

24. If the Lord confirms to the Tenant, to hold freely by certain Services for all Services, this makes the Land frank Fee, becauſe the ancient Cuſtoms are changed, and he ſhall hold according to the Deed. Dubitatur, 30 Ed. 3. 12. b.

25. If the Lord by Deed confirms to the Tenant, to hold by certain Services for all Services, this will make the Land frank Fee, becauſe he is now to hold according to the Deed. 21 Ed. 3. 32. b.

26. If the Lord confirms to the Tenant to hold by leſs Services, this will make the Land frank Fee. 21 Ed. 3. Cauſe de remover Plea 18.

27. If the Lord joins with the Tenant in a Fine, upon a Writ of Warranty of Charters of the Land, this will make the Land frank Fee. 21 Ed. 3. 32. b.

28. If the Lord by Fine acknowledges the Tenancy to be the Right of the Tenant, come ceo que il ad de ſon done, this makes the Land frank Fee. 30 Ed. 3. 13. b.

29. If the Lord warrants to the Tenant the ancient Cuſtoms, this does not make the Lands free. 30 Ed. 3. 13.

30. If the Lord confirms to his Tenant, to hold by certain Services, for all Services during his Life, this will make the Land frank Fee during his Life, but this will be ancient Demeſne again after his Death. 21 Ed. 3. 33.

31. If the Lord makes an Acquittance to the Tenant of the Services for a certain Time, it ſeems this makes the Land frank Fee for the Time. contra 30 Ed. 3. 13. b.

(e) Br. Ancient Demeſne 36. S. C.

32. In a Precipe quod reddat of Land in Ancient Demeſne, if the Tenant anſwers to the Action, yet the Land is not frank Fee by this, unleſs Judgment be given thereupon. (e) 2 Ed. 4. 26.

33. (f) If

33. (f) If in a Writ of Right-Cloſe, in Ancient Demeſne, the Tenant pleads in Abatement of the Writ, and that by Judgment is abated, and the Demandant brings a Writ of falſe Judgment, wherein the Writ of Right is affirmed to be good, the Court of Common Pleas ſhall proceed as the inferior Court ſhould have done, and altho' Judgment be there given to recover the Land, yet the Land is not frank Fee; but continues Ancient Demeſne, becauſe the Beginning and Foundation of theſe Proceedings was in the Court of Ancient Demeſne. 4 *Inſt.* 270.

(f) F. N. B. 19 D. S. P.

(K) By whom.

Fol. 326.

1. (a) IF the Tenant levies a Fine of the Land, this makes it frank Fee till the Lord hath repealed it by a Writ of Diſceit. (b) 50 Ed. 3. 25.

(a) 2 Leon. 192. S. P. per Clinch. (b) Fitz. Avowry 59. S. C. Br. Ancient Demeſne 11. S. C. Fitz. Cauſe de remover Plea 10. S. C.

2. If the King makes a Feoffment of the Land, this makes it frank Fee. 2 Ed. 40. b. per Scroop.

3. If the Lord of the Manor makes a Feoffment of Ancient Demeſne Land, this makes the Land frank Fee. 2 Ed. 3. 40. b. per Scroop.

(L) To whom.

1. IF the Lord confirms to the Diſſeiſor of the Tenant, to hold at Common Law, if the Diſſeiſee re-enters, or recovers, the Land ſhall be Ancient Demeſne again. 49 Ed. 3. 9.

2. But in (a) 50 Ed. 3. 10. (b) 25. it is held, the Lord diſſeiſes the Tenant, and makes a Feoffment, and after the Tenant recovers in Ancient Demeſne, yet the Seigniory is not revived.

(a) Fitz. Ancient Demeſne 12. S. C. Br. 10. S. C. (b) Fitz. Avowry 59. S. C. Br. Ancient Demeſne 11. S. C.

3. If the Land be made frank Fee as to thoſe in Poſſeſſion, yet it ſhall not be ſaid to be frank Fee as to thoſe who claim Paramount this making of it frank Fee. (c) 50 Ed. 3. 24. b.

(c) Fitz. Avowry 59. S. C. Br. Ancient Demeſne 11. S. C.

4. If the King ſeiſes Land in Ancient Demeſne without Title, and aliens it to another to hold of him, if after the Patent be repealed, and he that hath the Right, reſtored to the Land, the Land ſhall be Ancient Demeſne again. 21 Ed. 3. 46. b.

(M) By whom it may be made frank Fee.

1. IF the Tenant in Ancient Demeſne makes a Feoffment in Fee, and the King confirms it, this ſhall not bind the Lord, as it ſeems, without his Conſent, but he may avoid it. contra 1 Ed. 3. 5. but Quere.

2. If the Tenant in Ancient Demeſne makes a Feoffment in Fee by Leave of the King, given by Charter, yet this does not make the Land (a) frank Fee, without ſhewing the Charter of Feoffment of the King, or the Lord of the Manor. 2 Ed. 3. 40. b.

(a) This is Ancient Demeſne in the Original, and ſo plainly appears to be miſprinted there.

(N) What Perſons ſhall be bound by making it frank Fee.

(a) Br. Ancient Demeſne 13. S. C.

1. IF Land in Ancient Demeſne held of the King, be made frank Fee, by a Fine levied, this will bind till the King avoids it. (a) 7 H. 4. 29. b. (b) 11 H. 4. 86. b.

(b) Br. Ancient Demeſne 15 S. C. Br. Diſceit 37. S. C.

(O) In what Caſes it may be made Ancient Demeſne again, without a Writ of Diſceit.

1. IF a Fine ſur render be levied of Land which is Ancient Demeſne, the Claim of the Lord within the Year will not avail to ſave the Nature of the Tenancy, becauſe every Claim ſuppoſes a ſubſequent Action. 1 Ed. 3. 5. 26.

2. If a Fine is levied in the Common Pleas, the Lord (not being Party to the Record) can have no *Scire facias* thereupon to reverſe the Fine, but muſt bring a Writ of Diſceit. *Trin.* 7 *Will.* 3. between *Zouch* and *Thomſon*, 3 *Lev.* 419. adjudged.

(P) (a) Diſceit, who ſhall have it.

(a) The Parties to the Fine or Recovery ſhall Fol. 327. be fined and impriſoned, *pro deceptione Curie*. 4 Inſt. 270.

1. (b) IF a Fine be levied at the Common Law of Land in Ancient Demeſne, the Lord may avoid it by a Writ of Diſceit. 1 Ed. 3. 5. 26. b.

(b) F. N. B. 98. A. S. P.

(c) F. N. B. 99. E. S. P.

2. (c) A Termor may have this Writ, and make it Ancient Demeſne again, at leaſt during his Time. 1 Ed. 3. 5. 26. b.

(Q) Diſceit, at what Time it lies.

1. THe Lord may have a Writ of Diſceit as well within the Year after the Fine levied, as after. 1 Ed. 3. 5. 26. b.

(R) What ſhall be reverſed.

What makes the Land frank Fee.

(a) F. N. B. 98. P. S. P. 1 Leon. 290. S. P.

1. (a) IF a Fine be levied in Bank of Land, of which Parcel is at Common Law, and Part Ancient Demeſne, yet the Fine ſhall be annulled for that which is Ancient Demeſne. 7 Hen. 4. 44. and ſhall ſtand for the Reſidue. (b) 17 Ed. 3. 31. b. (c) 21 Ed. 3. 20. b. adjudged.

(b) Fitz. Diſceit 37. S. C. (c) Fitz. Diſceit 44. S. C.

(S) After the Reverſal of that which makes the Land Frank Fee, who ſhall have it.

1. (a) **If a (b) Fine be reverſed in Diſceit, the Conuſor (c) ſhall have it again, becauſe the Fine was void, for that it was Coram non judice,** contra (d) 7 H. 4. 44. (e) 17 Ed. 3. 31. b. Dubitatur. (f) 8 H. 4. 24.

(a) 4 Inſt. 276. S. P. 10 Co. 50. a. S. P.

(b) So of a Recovery, and the Parties to the Fine or Recovery, ſhall be fined pro deceptione Curie. 4 Inſt. 270. (c) But if after the Fine levied, the Conuſor had releaſed to the Conuſee and his Heirs, or confirmed his Eſtate, he ſhould have retained the Lands, notwithſtanding the Fine was deſtroyed, becauſe by the Releaſe or Confirmation, his Eſtate would have been made firm and rightful. F. N. B. 98. A. 10 Co. 50. a. 1 Leon. 290. (d) Fitz. Diſceit 38. S. C. (e) Fitz. Diſceit 37. S. C. (f) Fitz. Fines 30. S. C. Br. 36. S. C.

2. If Tenant in Tail of Lands in ancient Demeſn, leaſes for ſixty Years, and after levies a Fine with Proclamations in the Common Pleas, and this is after reverſed in a Writ of Diſceit, yet *quoad* the Leſſee, this Fine ſhall not be avoided, but ſhall make the Leaſe good againſt the Iſſue in Tail. *Mich.* 26 and 27 *Eliz.* Anonymus, 1 *Leon* 290. the better Opinion of the Book upon an Ejectment brought by the Iſſue in Tail, *ſed adjornatur.*

(a) (b) (c) (d) **Pleading.**

(a) Doct. Pl. 51, 52. (b) In what Action it may be pleaded, vide 1 Rol. Abr. 322. (c) At what Time it may be pleaded, and if after Imparlance, vide the Diviſions, Title Pleading. (d) It may be alledged, De antiquo Dominico Domini Regis Anglie, or, De antiquo Dominico Domini Regis Corone ſue, &c.

Authority.

Fol. 328.

(A) What ſhall be ſaid a (a) good, what a bad, or void Authority.

(a) A. by Letter of Attorney conſtitutes and appoints, and in his Stead and Place puts B. to ſurrender a certain Copyhold. this Authority is ſufficient, and as full, as if ſaid for him, and in his Name, &c. 1 Brownl. 94. per Tanfield, con. Yelv. who ſaid the Letter of Attorney was lame, for notwithſtanding any Thing that appears, it may be the Copyhold of

1. **If a Man ſigns and ſeals a Leaſe of Ejectment indented, but does not deliver it, and at the ſame Time ſeals and delivers a Letter of Attorney, in which he recites,** Whereas he by Indenture of Leaſe, bearing ſuch a Date, *&c.* (**which is true**) hath demiſed to *B.* ſuch Land, *habendum, &c.* Now theſe Preſents witneſs, that he makes J. S. his lawful Attorney, to deliver the ſaid Indenture upon the Land, as his Deed; **tho' according to the proper Signification of the Words, the Leaſe ought to be taken to be delivered by him, and ſo this Letter of Attorney void to deliver it again, for this cannot be an Indenture if it was not delivered, nor can it be a Demiſe as it is recited, if the Leaſe was not delivered, yet all Parts of the Letter of Attorney being laid together, and the Intent of the Parties, and Proof being made that the Leaſe was not delivered, but only ſigned and ſealed, it appears that this was only an improper Expreſſion of his Intent, by calling it an Indenture and a Demiſe, for if he had intended that this was an Indenture ſealed and delivered, this Letter of Attorney to deliver it upon the Land, need not have been made.** Mich. 24 Car. B R. between Emery and Cooke, per Curiam, Scilicet, **my Brother Baron, and my ſelf ruled it upon Evidence at the Bar.**

2. (b) Copyhold of

B. himſelf.—An Authority ad petend' recipiend' & recuperand' a certain Debt, is ſufficient to arreſt, &c. becauſe neceſſary in order to recover. Randal and Parvy. 1 Rol. Rep. 390. per Curiam. Palm. 394. per Curiam. Godb. 359, 360. per Curiam.——If a Steward makes a Deputy hac vice, to take a Surrender of a Copyhold, & ulterius ad faciend' & exequend' quantum in ſe eſt, by Virtue of theſe laſt Words, the Deputy may take a conditional Surrender. Cro. El. 48, 49.

(b) Lit. Rep. 144. S. P. arguendo, 146. S. P. per Curiam.

(c) For Variance between the Charter and the Letter of Attorney to deliver it, vide Lit. Rep. 144, 145, 146.

2. (b) If *A.* makes a Charter of Feoffment to *B.* dated the 10th of *Sept.* and *B.* by another Deed, reciting that *A.* had made unto him a Charter of Feoffment, bearing Date the 11th of *Sept.* gives Authority to *C.* to receive Livery and Seiſin for him, *Secundum formam & effectum Chartæ pred* and *C.* receives Livery upon the Feoffment accordingly, this Livery is void, for the Warrant is to receive it *Secundum formam Chartæ*, dated the 11th of *Sept.* (c) whereas there was no ſuch Charter. *Hill.* 40 *Eliz.* between *Marriot* and *Smith* adjudged.

(B) (a) What ſhall be a good Execution of an Authority.

(a) If after a Leaſe to A. B. and C. upon Condition that they ſhall not alien without Licenſe, the Leſſor makes a Licenſe, that A. B. or C. may alien, this gives them ſeveral Authorities to alien. Godb. 93. (b) Co. Lit. 181. b. (c) And where and what Authorities ſhall be ſtrictly purſued, and may not be tranſferred. Moor 43. Pl. 129, 119. Pl. 263, 217. Pl. 355. Bridg. 114, 115. Godb. 39, 84, 307. 2 Rol. Rep. 6. Ow. 73. 1 Bulſt. 104. 2 Mod. 318. Kelw. 43, 44. Lit. Rep. 144, 145. 1 Mod. 210.

1. (b) Vide (c) for this Co. Lit. 112. b. 113. and the Iriſh Caſe of Tenures.

2. A. deviſes Lands in Tail, and if the Donee dies without Iſſue, that it ſhall be ſold by his Sons in Law, he then having 5 Sons in Law, and dies, and after one of the Sons in Law died in the Life of the Donee, and after the Donee dies without Iſſue, the 4 ſurviving Sons in Law may ſell it, becauſe they were named generally Sons in Law, not by particular Name, and it may be ſold by all, and the Words are ſatisfied by the plural Number. Hill. 26 Eliz. B. R. between (d) Vincent and Lee, adjudged upon a ſpecial Verdict. Co. Lit. 113.

(d) Cro. El. 26. S. C. adjudged. Moor 147. Pl. 291. S. C. adjudged. 1 And. 145. S. C. cited. 1 Leon. 286. S. C. adjudged. 3 Leon. 106. S. C. adjudged. Infra Pl. 18.

3. If a Judgment be aſſigned to the King in Satisfaction of a Debt due to the King, with a Proviſo, that if the Barons of the Exchequer, or any two of them revoke it, that it ſhall be void, and after three of the Barons revoke it, (there being four) as it ſeems, this is a good Revocation, for if three revoke it, two do it. Co. 5. Hoe 91. reſolved.

4. But if the Words had been, That if the Barons, or any two of them jointly or ſeverally, revoke it, &c. there three of them could not revoke it, for this is neither jointly nor ſeverally. Co. 5. Hoe 91.

5. If the King grants a Warrant to four, Scilicet, the Treaſurer, Chamberlains, and Under-Treaſurer of the Exchequer, by which the King gives Power to them, or any one of them, to pay out of the King's Treaſure, the Coſts and Expences of any Man, who ſhall be employed in Service of the King, and after two of the ſaid (e) four give a Warrant for the Payment of a certain Sum to J. S. this is a good Warrant, tho' neither all four, nor one only did it. Dubitatur, Co. 11. Earl of Devon. 92.

(e) Fol. 329.

6. (f) If a (g) Warrant be made to three, or any one of them, conjunctim & diviſim, to arreſt J. S. upon Proceſs, tho' this be joint and ſeveral, (h) yet two of them may execute it, becauſe this is in Execution of Juſtice, and therefore ſhall be more favoured than other Things, and (i) perhaps the two may have a better Opportunity than the three ſhall have at another Time. Mich. 15 Jac. between Lover and

(f) Poph. 202. S. P. dubitatur, White and Wiltſhire, S. P. Palm. 52, 53. adjudged. 2 Rol.

and Ludlam adjudged per Curiam, this being moved in Arrest of Judgment, where an Assumpsit was partly upon a Deliverance upon such an Arrest. M. 4 Jac. B. R. in a Rescous against Bale and Grooby, per Tanfield. M. 11 Jac. B. R. adjudged. Tr. 14 Jac B. R. between (k) Walcolt and Emson, adjudged. Rep. 137. adjudged.

(g) So upon a Warrant to 4 & cuilibet eorum, &c. King and

Hobs. Cro. El. 913. adjudged. Noy 47. dubitatur, Yelv. 26. adjudged per 2 Judges against 1. 3 Bulst. 210. cited. 1 Rol. Rep. 299. S. C. cited. (h) Co. Lit. 181. b. S. P. Hut. 127. S. P. adjudged. (i) But a Commission directed to 6, 4, or 2, cannot be executed by 3, because that is a judicial Act. Yelv. 26. Noy 47. 2 Inst. 380. (k) 3 Bulst. 209, 210. S. C. adjudged. 1 Rol. Rep. 406. S. C. adjudged.

7. (l) If a Letter of Attorney to make Livery of Seisin conjunctim & divisim, be made to three, and two of them make Livery, the third being absent, this is not good, for this is not conjunctim nec divisim. (m) 36 H. 8. D. 62. 27 H. 8. 6. b. Co. 5. Hoe 91. (l) Co. Lit. 181. b. S. P. 1 Rol. Rep. 299, 300. S.P. (m) Yelv. 26.

S. C. cited, 2 Rol. Rep. 257. S. C. cited.

8. But in the said Case, if two make the Livery, the third being present, and doing and saying nothing, this is good, for it shall be taken to be the Act of all, they coming there for that Purpose. Dubitatur, D. 36 H. 8. 62.

9. If A. devises Lands to B. his Wife, for Life, and devises further, That if it appears that there is not sufficient to pay his Debts, that then B. shall have Power to sell so much of the Land as will pay the Debts, in this Case B. may sell but so much of the Land as will suffice to pay the Debts. Mich. 9 Car. B. R. between (n) Dike and Ricke, adjudged per Curiam, upon a Demurrer. (n) Cro. Car. 335, 336. S. C. adjudged.

10. If Cestuy que use had devised, That his Wife should sell his Land, and made his Wife Executrix, and died, and the Woman took another Husband, (*) she might have sold the Land to her Husband, because she did it in another's Right, and the Husband should be in by the Devisor. 10 H. 7. 20. Co. Lit. 112. (*) That a Feme covert, without her Husband, may execute a Power, vide the Case of Daniel and Ubly. Lat. 9, 10, 39, &c. 134. 1 Jon. 137. Noy 80.

11. If Land be devised to Executors to sell, tho' one Executor refuses, yet the other Executors cannot sell to him, because he is Party and Privy to the last Will, and remains Executor notwithstanding his Refusal. Co. Lit. 113. Tr. 27 H. 8. 6. Ben. Reports.

12. If a Man devises Lands to B. his Wife, for Life, the Remainder to C. in Fee, and by a Codicil he devises that B. shall have Power six Months before her Death to lease it for six Years; B. takes a second Husband, she, and her second Husband, may lease it by Deed or without Deed, for six Years, and if they lease it for six Years, habend' a die datus, yet this is good, (o) she being living the next Day. P. 13 Car. B. R. between Harris and Graham, adjudged upon a special Verdict. Intratur, Mich. 11 Car. Rot. 370. (o) This is ten steant, &c. in the Original, and so plainly appears to be misprinted there.

13. If A. by Will in Writing, devises Lands to B. for Life, and devises further, that B. (whom he makes his Executor) shall have Power to sell the Reversion in Fee, in Case there shall not be sufficient Goods to pay his Debts, and after dies, and after B. not having sufficient Goods, sells the Land by Bargain and Sale, by Deed inrolled to J. S. and his Heirs, tho' the Estate for Life passes by this Bargain and Sale by the Statute of 27 H. 8. of Uses and Enrollments, but not the Reversion in Fee by the Statutes, because the Vendee comes in by Force of the Devise, and not by the Statute, yet it shall pass by this Deed enrolled as a Sale, according to the Will, tho' neither the Will nor power are recited in the Deed, (p) because B. had no Power to sell the Fee of the Land but by the Will. Mich. 9 Car. B. R. between (q) Dike and Rick, per Curiam, agreed upon a Demurrer in Replevin, and then was cited a Case to be adjudged. (p) Sir Edward Clere's Case, like Point. 6 Co. 18. a. adjudged. Cro. El. 878. adjudged. Cro. Jac. 31. adjudged upon a Writ of Error. Co. Lit. 111. b. 112. a. Jenk. Rep. 260. adjudged. Moor 367. Pl. 773. adjudged, and for this vide

2 Car. B. R. between (r) Daniel and Ubly, which Intratur Hill. 22 Jac. Rot. 720.

Hob. 160. (q) Cro. Car. 335, 336. S. C. adjudged, that it must be pleaded accordingly. 1 Jon. 327. adjudged, that it must be pleaded accordingly. (r) Latch 9, 10, 39, &c. 134. S. C. but S. P. does not appear. Noy 80. S. C. adjudged. 1 Jon. 137, 138. S. C. adjudged.

14. If

Fol. 330.

14. If a Man deviſes that his Executors ſhall ſell certain Lands, and dies, and the Executors enter, and make a Feoffment of the Lands, this is an Execution of the Will, to convey the Land to the Feoffee, for he is in by the Deviſe. Lit. F. 169. Co. Lit. 113.

15. If a Man deviſes Lands to his Executors to ſell, and dies, the Executors may ſell Part of the Land at one Time, and Part at another Time, as he can find Purchaſors. Co. Lit. 113.

16. (s) If a Man deviſes that his Executors ſhall ſell his Land, and (t) one dies, the other cannot ſell, for being but a bare Authority, it cannot ſurvive. *Co. Lit.* 112. b.

(s) Co. Lit. 181. b. S. P.

(t) So if one refuſed till 21 H. 8. cap. 4. vide Co. Lit. 113. a.

(u) Co. Lit. 181. b. S. P.

(x) Vide Cro. El. 856.

17. (u) But if a Man deviſes Lands to his Executors to be ſold, and make two Executors, and one dies, the Survivor may ſell, for as the Eſtate, ſo the Truſt ſhall ſurvive, and (x) there is a Diverſity, between a naked Truſt, and a Truſt coupled with an Intereſt. *Co. Lit.* 113. b.

(y) So if there had been but one Executor living. Howel and Barns. Cro. Car. 382. adjudged. 1 Jon. 352. adjudged, but vide 1 And. 145, 146. Moor 61, 62. ſupra Pl. 2.

18. If a Man deviſes his Land to *A.* for Life, and that after his Deceaſe his Lands ſhall be ſold by his Executors, and makes three or four Executors, and during the Life of *A.* one of the Executors dies, and then *A.* dies, the ſurviving Executors may ſell, becauſe the Land could not be ſold before, and (y) the plural Number of Executors remains. *Co. Lit.* 112. b.

(z) Ow. 155. S. C. adjudged. Moor 341. Pl. 463. S. C. adjudged. Cro. El. 524. S. C. adjudged, the Words there being, That his Executors, or any of them might ſell, but by Ow. 156. it appears there were two different ſpecial Verdicts in the Caſe, which might occaſion a Difference in the Reports thereof.

19. If *A.* being ſeiſed in Fee of a Reverſion in 20 Acres *expectant* upon an Eſtate for Life, and of other 60 Acres in Poſſeſſion, and for the Performance of his own and his Father's Will, deviſes all his Lands and Tenements to his Executors, and wills, that they ſhould take the Profits thereof for 10 Years, and that after the Expiration thereof, the ſame ſhould be ſold by his Executors, or by one of them, and dies, and after the Tenant for Life dies, and then *one of the Executors* dies, the other two may ſell the 20 Acres, for as they may perform his Will, ſo they may ſell in order thereto. *Hill.* 35 *Eliz.* between (z) *Townſend* and *Wales.* 2 *And.* 59. adjudged.

(C) What (a) Authority is well purſued, and what not.

Authority coupled with a Confidence.

(a) If the Lord Licenſes a Stranger ad ponend' averia, into the Common, this extends only to Commonable Cattle, and not to Hogs. 2 Mod. 7. per Holt, Ch. Juſtice. —but if the Licenſe be for a particular Time, it is otherways. 2 Mod. 7. per Holt.

1. An Executor having Authority to ſell, cannot ſell by Attorney. Co. 9. 77. b.

(b) But it is otherways where a certain Time is limited for the Loan of the Horſe, for in that Caſe he hath an Intereſt in the Horſe, and may let his Servant ride. 1 Mod. 210. per Holt.

2. If *A.* lends *B.* a Horſe (b) to ride to *York*, *B.* cannot let his Man ride him, for the Licenſe is a Matter of Pleaſure annexed to the Perſon of *B.* and cannot be transferr'd. *Hill.* 27 and 28 *Car.* 2. between *Bringloe* and *Morris.* 1 *Mod.* 210. adjudged upon a Demurrer, in an Action of Treſpaſs for immoderately riding the Plaintiff's Mare, where the Defendant pleaded, That the Plaintiff, *licentiam eidem dedit equitare*, and that the Defendant and his Servant *alternatim*, had rid upon the ſaid Mare.

3. Otherways, if *B.* for Money hires a Horſe of *A.* to ride to *York.* 1 *Mod.* 210. agreed *per Curiam.*

(D) Authority general, as abſolute Owner of the Land.

1. CEſtuy que Uſe might have made a Feoffment. per 1 Rich 3. by Attorney. Co. 9. Comb. 75. B. D. 11.
2. El. 283. and there a Judgment was cited. 25 H. 8. accordingly, (a) 9 H. 7. 26. per Curiam econtra.

(a) Br. Feoffment al' Uſes. 28. S. C. Fitz. Feoffment 42. S. C.

(E) Authority particular, as abſolute Owner of the Land.

1. LEſſee for Life hath Power to make Leaſes rendring the ancient Rent, he cannot make them by Letter of Attorney. (a) Co. 9. Comb. 76.

(a) 2 Rol. Rep. 393. S. C. cited.

(F) What Authority is well executed, what not.

(a) Executed in the Name of him who gave the Authority.

1. When a Man hath Authority to do an Act, he ought to do it in the Name of him that gave the Authority. Co. 9. Comb. 76. b.
2. So he that hath Authority to make a Leaſe for me; ſo he that hath Authority to ſurrender for me a Copyhold.
3. But if Executors have Authority to ſell Land, they may ſell in their own Name for Neceſſity, for he that gave the Authority is dead.

(a) For this Godb. 389. Moor 70, 71. Pl. 191. Moor 818. Pl. 1106.

(G) (a) What ſhall be a good (b) Execution of an Authority mixt with an Intereſt.

1. (c) IF the Lord gives Licence to a Copyholder for Life, to leaſe the Copyhold for 5 Years, the Copyholder may leaſe it for 3 Years, for this is comprehended within the Licence, in as much as he hath given him Licence to leaſe for more Years. (Mich. (d) 15 Jac. B. R. between Woolridge and Banbridge, adjudged upon a ſpecial Verdict.

2. If the Lord gives Licenſe to a Copyholder for Life, to leaſe the Copyhold for 5 Years, if the Copyholder tam diu viveret, and he leaſes it for 5 Years generally, without a Limitation, ſi tam diu (e) viveret, yet this is a good Purſuance of the Licence, and ſo a good Performance, for the Leaſe is determinable by his Death, by a Limitation in Law, and therefore as much is implied by Law, as if he had made an actual Limitation. Mich. 15 Jac. B. R. between (f) Woolridge and Bambridge, adjudged upon a ſpecial Verdict. H. 38. El. B. between (g) Hatt and Arrowſmith, adjudged.

(a) Where a Man doth more or leſs than he is authorized to do. vide Co. Lit. 258. a.
(b) As to the Delivery or Receiving of Seiſin by Letter of Attorney. vide 2 Rol. Abr. 8.
(c) Cro. El. 535. S. P. adjudged. (d) Cro. Jac. 436. S. C. adjudged.
(e) Fol. 331.
(f) Cro. Jac. 436. S. C. adjudged.
(g) Poph. 105. S. C. adjudged. Haddon and Arrowſmith. Cro. El. 461, 462. bis S. C. adjudged Ow. 72, 73. S. C. adjudged.

(D) Who may revoke it.

(a) Fitz. Arbitrament 12. S. C. Br. 4. 4. S. C. (b) Br. Arbitrament 49. S. C. (e) Br. Arbitrament 37. S. C. (d) Br. Arbitrament 49. S. C. (e) Br. Arbitrament 35. S. C.

1. If 2 submit themselves to the Award of J. S. one only may revoke the Submission. (a) 28 H. 6. 6. b. adjudged. (b) 21 H. 6. 30. Brook in Abridgment. 5 Ed. 4. tho' bound in an Obligation to stand to the Award, but he shall forfeit his Obligation thereby. (c) 8 Ed. 4. 10. b. (d) 21 H. 6. 30. Co. 8. Vinior, 82. contra (e) 5 Ed. 4. 3. where he is bound by Obligation.

(f) Fitz. Arbitrament 12. S. C. Br. 4. S. C.

2. If 2 of one Part, and one of the other Part submit to the Award of J. S. one of the said 2 may revoke the Submission without the other, contra (f) 28 H. 6. 6. b.

(E) What shall be said a (a) Revocation in Law.

(a) Where a Licence is countermandable or not, vide Palm. 71, &c. Godb. 282. Poph. 151. 2. Rol. Rep. 143. 152. (b) Vide Dal. 45. Cro. El. 26. Moor 62. 1 Leon. 286. 3 Leon. 106. (c) What shall be a good Revocation of Uses, vide 2 Rol. Abr. 262, 263. (d) Cro. El. 856. S. C. adjudged. Noy 38. S. C. adjudged.

1. If a Man makes a Feoffment to 4, to the Use of himself for Life, the Remainder to his Son in Tail, provided that if the Feoffor shall find any Offence or Disobedience in his Son, that then he, upon the Payment of 12 d. to the Feoffees, may revoke the first Uses, if the said Feoffees do give (b) their Consent to the said Revocation, and after one of the Feoffees dies, the Power of Revocation is by this determined, for the Authority cannot survive, so that the Father upon the Tender of 12 d. cannot (c) revoke with the Consent of the surviving Feoffees. M. 43, 44. El. B. R. between (d) Atwater and Berte, adjudged.

(e) 2 Brownl. 290. S. C. and S. P. agreed per Curiam. 1 Brownl. 64. S. C. but S. P. not so clearly to be collected thence. (f) Br. Arbitrament 37. S. C.

2. If 2 submit themselves to the Award of 2 Arbitrators, and after by Order out of Chancery, the Arbitrators are made Commissioners, to determine the Controversie between the said Parties, this is no Revocation of their arbitrary Power. P. 40 El. B. between Hill and Hill, per Curiam.

3. If A. and B. submit to the Award of J. S. and after, before any Award made, revoke the Authority of the Arbitrator, this is not any Revocation in Law, till Notice of this Revocation given to the Arbitrator. (e) Co. 8. Vinior 82. per Curiam. (f) 8 Ed. 4. 10. b. 21. b.

(g) In the Original this is J. S. & puis, &c. and so plainly appears to be misprinted there.

4. If A. of the one Part, and B. and C. a Feme sole of the other Part submit themselves to the Award of (g) J N. and after C. takes J. S. to Husband, and after the Arbitrator, before any Notice of the Marriage, makes an Award, That B. and C. shall pay 30 l. to A. yet this shall not bind J. S. and C. his Wife, nor B. for the Submission, by the Marriage of C. is revoked as to B. also, and this also without any Notice. P. 13 Car. B. R. between White and Gifford, & alios per Curiam, upon a Demurrer, upon which the Plaintiff discontinued his Action by the Consent of the Court. Intratur Trin. 11 Car.

(h) So if the Lessor grants over his Estate, yet the Lessee may alien Cro. Jac. 103. (i) Fol. 332

5. If the Lessor by Deed licences the Lessee for Years, or Life, to alien (who is restrain'd by Condition not to alien without Licence) and the (h) Lessor dies before the Lessee aliens, yet this is no Countermand (i) of the Licence, for the Licence exempts the Lessee out of the Penalty of the Condition, and it was executed on the Part of the Lessor as much as could be. Co. Lit. 52. b. cited. Mich. 3 Jac. B. to be so resolved.

(k) So if the King licences J. S. to sell Wine and dies. 1 Sid. 6, 7. adjudged.

6. If the King gives Licence (k) to alien in Mort-main, and dies, yet it may be executed after. Co. Lit. 52. b.

(a) (b) (c) Bail

(a) (b) (c) Bail.

Fol. 333.

(a) Vide Mainprise, 2 Rol. Abr. 112.

(b) For the Diversity between Bail and Mainprise, vide 4 Inst. 179. Godb. 339.—against him that is mainprised de die in diem, no Bill can be filed, otherways against him that is bailed. 4 Inst. 180.

(A) To what Time the Bail shall relate.

1. **In B. R. tho' the Bail of the Defendant be taken and entred the last Day of the Term, and the Bill be put in at any Time the same Term, this is well enough by the Course of the King's Bench, tho' in Strictness of Law, the Defendant is answerable but from the Bail, as in Custodia Marescballi, and not before. Hobart's Reports 96. between (d) Plat and Plummer, adjudged in a Writ of Error.**

(c) For Misdemeanors in taking Bail. Cro. El. 714. Cro. Jac 256. Cro. Car. 146. 2 Sid. 90, 91. 21 Jac. Cap. 26. (d) Hob. Fol. 70. S. C. adjudged, Cro. Jac. 384. S. C. adjudged, because the Bill, whensoever filed, hath Relation to the first Day of the Term.

2. If in *Trover* commenced in *Hillary* Term, the Conversion is alledged to be the 3d of *February*, in the same Term, and Bail is filed the last Day of the Term, (e) yet this is well enough, for the Action shall not be said to be depending, until the Bail is filed. *Trin.* 23 *Car.* 2. Anonymus. 1 *Vent.* 135. adjudged.

(e) So the Statute of Limitations may be pleaded, if the Time be elapsed before the Day wherein the Bail is filed, tho' not before the first Day of the Term, wherein the Action is brought. 1 Vent. 135. per Curiam.

(B) (a) How it (b) shall be performed.

(a) How far liable in other Actions at the Suit of the same or other Persons. Cro. Jac. 449. 451. Stil. 464. 2 Sid. 163. 2 Jon. 188.

1. (c) **If a (d) Scire facias be brought against the Bail in Banco, upon a Judgment had against the Principal, and Judgment given there against the Bail if no (e) Capias ad satisfaciendum was awarded against the Principal, before the suing of the** Scire facias, **this is Error, for by Law it ought to be.** Mich. 13 Car. B R. **between (f)** South **and** Griffith, per Curiam, **as well in Banco, quam in Banco Regis.**

1 Mod. 16. 2 Jon 188. 1 Mod. 5. (b) Where the Entry of the Judgment against the Principal is only ulterius Curia, that he shall recover, this is in Effect no Judgment, and the Bail shall not be charged, Dampost and Thatcher. Cro. El. 145. adjudged, 2 Leon. 1, 2. adjudged. (c) Barrock and Thompson, S. P. 1 Rol. Abr. 308. Pl. 13. resolved and admitted by the Judgment. Stil. 281, 282. 323. resolved and admitted by the Judgment, Hobs and Tadcastle, S. P. Moor 432. Pl. 607. Cro. El. 597. Goulf. 174, 175. in all those Books resolved and admitted by the Judgment, 3 Bulst. 333. cited, Poph. 186. cited. 4 Leon 36. S. P. per Wray, Cro. El. 733. S. P. Calf and Bingly, S. P. 3 Bulst. 331. 334. per Curiam, Poph. 186. per Curiam, 1 Jon. 139. per Curiam, Cro. Jac. 98. vide.——It must issue, and be returned, but may be filed at any time after. 1 Lev. 225, 226. (d) Where the Bail by Custom cannot be charged without a Scire facias, 1 Rol. Abr. 563. Pl. 13.——How many Days there must be between the Teste and Return of such Scire facias, vide Cro. El. 738.——Where there was a Contrivance between the Plaintiff and Principal, to free and discharge the Principal, and charge the Bail, 2 Bulst. 43. vide. (e) To warrant a Scire facias against the Bail, it must be awarded within the Year, else not till a Scire facias against the Principal, 2 Jon. 96. (f) Cro. Car. 481. S. C. and S. P. per totam Curiam in Banco, preter Hob. Ch. Justice, who held otherways, because in Banco the Recognizance is in a Sum certain, conditioned, that the Principal shall render his Body, &c. and after upon a Writ of Error in B. R. the whole Court there were of Opinion con. Hob. 1 Jon. 396. S. C. but S. P. does not appear. 1 Rol. Abr. 779. Pl. 4. S. C. and S. P.

2. **If the Defendant in an Action** in Banco, **finds Bail, and after Judgment against him, and a** Capias **awarded, if he does not render himself before the** Capias **returned** non est inventus, **and filed, yet he may render himself after the Return, and filing thereof, to save the Bail.** Mich. 8. Jac. B. **between** Boathbye **and** Davenant.

3. **But in** Banco Regis, **if the Principal renders himself to Prison after the** Capias **against him returned** non est inventus, **and filed of Record, this will excuse the Bail by the Course of the King's Bench.** Hill. 4 Jac. B. R. **between** Fletcher **and** Muffet, per Curiam.

4. So

4. So in Banco Regis, vel Banco, if the Principal renders himself after the said Return of the Capias, and after the first Scire facias awarded against the Bail, and before the Return thereof, this will discharge the Bail. Hill. 4 Jac. B. R. between Fletcher and Muffet, per Curiam, Mich. 8 Jac. B. between Boothbye and Davenant, resolved upon Demurrer, tho' the Prothonotaries said, That their Course was contrary in Banco, contra Mich. 41 El. B. R. between (g) Walmsey and Haver, adjudged.

(g) Cro. El. 618. S. C. and S. P. adjudged otherways than cited here.

5. So if Bail be taken, and Judgment given in Banco, and after this comes in Banco Regis by Writ of Error, and there a Capias is awarded against the Principal, and returned non est inventus, and filed, and a Scire facias awarded (h) against the Bail, yet if the Principal renders himself to Prison before the Return thereof, the Bail are discharged thereby, by the Course of the King's Bench. Hill. 4 Jac. between Fletcher and Muffet, per Curiam.

(h) Fol. 262.

6. In Banco Regis, if the Principal be returned non est inventus, and a Scire facias awarded against the Bail, who are returned, summoned, and filed, and they at this Day do not bring in the Principal, they shall be charged. Hill. 4 Jac. B. R. in Fletcher and Muffet's Case. per Popham and Williams.

7. But if the Bail, in the said Case, be returned nihil, and an alias is awarded, they may bring in the Principal well enough (i) at the Return thereof, and discharge themselves. Hill. 4. Jac. B. R. in Fletcher's Case. per Popham and Williams, Mich. 2. Car. between (k) Calfe, & alios, Plaintiffs, and Dingly and Davies Defendants, which, intratur Hill. 22 Jac. Rot. resolved per Curiam, B. R. that the Bail in Discharge of himself, may bring in the Principal at any Time before the Return of the second Scire facias, but after the Day of the Return of the second Scire facias against the Bail past, tho' this second Scire facias is not filed of Record, yet the Day of the Return being past, the bringing in of the Principal afterwards will not excuse the Bail. P. 11 Car. B. R. between Vawdie and Avis, per Curiam, adjudged, and the Clerks said it was the Course.

(i) For the general Understanding at what Time the Bail may bring in the Principal, vide Cro. Jac. 109. 165. 2 Brownl. 76. Cro. El. 738. 3 Bulst. 182. Moor 850. Pl. 1156.

2 Rol. Rep. 367. 382. 1 Leon. 58. Godb. 339. Lit. Rep. 194. Stil. 134. 324. 425. (k) Latch. 149, 150. S. C. but S. P. does not appear, tho' such like Matter is there touched upon. 3 Bulst. 331, &c. S. C. but S. P. does not appear, tho' such Matter is there touched upon. 1 Jon. 139. S. C. and S. P. agreed by all.

8. If upon the Return of the first Scire facias, against the Bail in Banco, the Principal comes in and renders himself, this will excuse the Bail. Mich. 10 Jac. B. between the Earl of Hertford, and Kirton, adjudged.

9. If the Principal, in Discharge of his Bail, renders himself in Banco Regis, to a Tip-staff of the King's Bench, in the Morning of the last Day of the Return of the second Scire facias, and after Dinner of the same Day, the Tip-staff carries him to a Judge of the said Court, who commits him to Prison in Execution, in Discharge of his Bail, but this is not entred of Record till another Day, but then this is entred as committed the last Day of the Return, tho' the Clerks of the Court say, That if he rendred himself, or was committed after Dinner, this is not sufficient to discharge the Bail, and tho' the Time of the Render and Commitment appears upon Examination, as before, yet in as much as the Time of his Commitment does not appear upon Record, but only that he was committed such a Day, the Court will intend, that he was committed in the Morning, according to Law, in Discharge of his Bail. Tr. 16 Car. B. R. between Owen and Griffith, adjudged.

(l) The Render must be made in that Court where the Record is at that Time. Cro. Jac. 98.

10. If A. recovers in Debt in Banco against B. and after B. brings a Writ of Error in B. R. which is allowed in Banco, and after before the Return of the Writ of Error, the Bail by Habeas Corpus bring into Court the said B. in exonerationem Manucaptor' yet this is no Discharge of the Bail, because the Writ of Error is a Supersedeas, so that he cannot pray him in Execution, which is the Intent of the Bail. (l) But if the Record be not (m) removed at the Return thereof in Banco Regis, and after B. is brought into Court by Habeas Corpus, this will be a Discharge of the Bail, for there he may be put in Execution. Hobart's Reports 161. (n) Bradshaw's Case.

(m) After the Removal of the Record, the Bail cannot bring in the Principal. The Spanish Ambassador against Gifford. 3 Bulst. 183. per Coke, but Moor 850. Pl. 1156. in the same Case it is said semble, it is otherways, vide. (n) Hob. Fol. 116. S. C.

11. (o) If in an Action in Banco Regis, A. and B. are Bail for another, and after Judgment against the Principal, he brings a Writ of Error in Camera Scaccarii, and pending this Writ of Error, the Bail bring in the Principal, or the Principal renders himself to Prison, tho' the Recoveror cannot prap him in Execution, nor (p) can the Court put him in Execution, because the Writ of Error is a Supersedeas to it, yet this is a good Discharge of the Bail, for the Marshal ought to keep him in Prison as a Pledge, till the Judgment be affirmed or disaffirmed, as he does upon mean Process for want of Bail. Mich. 2 Car. B. R. (q) between Calfe, & alios, Plaintiffs, and Dingly and Davies Defendants, per Curiam, intratur Hill. 22 Jac. B. R. Rot. Hill. 12 Car. B. R. between Cotton and Olberry, per Curiam, adjudged contra H. 2 Jac. B. R. between (r) Codnor and Henderson, per Curiam.

(o) Austin and Monk. S. P. (admitting the Bail given upon a Writ of Error according to 3 Jac. cap. 8. may render the Principal) Moor 853. Pl. 1165. per Curiam, Cro. Jac. 402. appears. 3 Bulst. 191. 1 Rol. Rep. 392. appears. Raym. 100. S. P. per Curiam. 3 Mod. 87. S. P. arguendo. (q) Latch 149. S. C. and S. P. per Ch. Justice, and Jones. 3 Bulst. 331, 332, &c. S. C. and S. P. per Curiam. Noy 82. S. C. not well reported. Poph. 186. S. C. adjudged. 1 Jon. 138, 139. S. C. adjudged. 2 Rol. Abr. 491. Pl. 6. S. C. (r) Latch 149. S. C. cited. Poph. 186. S. C. cited. 2 Rol. Abr. 491. Pl. 6. S. C.

(p) Fol. 335.

12. (s) If a Man hath Judgment in Debt in Banco, and the Defendant is taken in Execution, who after brings a Writ of Error, and his Body is removed in Banco Regis, by Habeas Corpus, and there bailed, and the Bail bound in a Recognizance, That the Principal shall prosecute his Writ of Error with Effect, and if the Judgment be affirmed, that he shall pay the Sum recovered, and after the Plaintiff, in the Writ of Error, pays the Sum recovered, and after the Judgment is affirmed, (t) it seems in a Scire facias against the Bail, they cannot plead this Payment by the Principal in Discharge of themselves, because this Payment does not discharge the Principal himself.

(s) Stil. 324. S. P. arguend' 2 Lev. 212. S. P. agreed, per Curiam con.

(t) In the Original it is semble, &c.

13. So in this Case, if mean between the Writ of Error brought, and the Judgment affirmed, the Debtee releases to the Principal the Debt, it seems the Bail in a Scire facias against them, (u) cannot discharge themselves by this Release, Dubitatur, Tr. 14 Jac. B. R. between (x) Harrison and Hukesly.

(u) The not is wanting in the Original, and so appears to be misprinted.

(x) Cro. Jac. 401. S. C. adjornatur. 2 Bulst. 231, 232. S. C. and S. P. per totam Curiam, con. but no Judgment, for the Parties perceiving the Opinion of the Court, rested satisfied, and it was moved no more. 1 Rol. Rep. 386. S. C. adjornatur. Moor 852. Pl. 1161. S. C. adjudged con.

14. If A. is Bail for B. in B. R. in an Action of Battery, at the Suit of C. and a Verdict and Judgment is given in this against (y) B. for 100 l. Damages and Costs, and pending this Action, and before Judgment, another Action of Battery is brought in Banco by C. against D. another for the same Battery, and a Verdict against him for 20 l. Damages, and after the Judgment against B. Judgment is given in Banco against D. and Execution and Satisfaction thereupon acknowledged in Banco, in a Scire facias upon the Judgment in Banco Regis against A. the Bail to have Execution of the Judgment for the 100 l. Damages, the Bail cannot plead this Recovery and Satisfaction in Banco, for it is not within the Condition of his Recognizance. P. 11 Car. B. R. between Barns and Hills adjudged upon Demurrer, intratur, Hill. 10. Rot. 897.

(y) In the Original it is A. and so appears plainly to be misprinted.

15. (z) If a Man be Bail for J. S. in an Action brought against him in B. R. and the Plaintiff recovers there against J. S. and he brings a Writ of Error in Camera Scaccarii, where the Judgment is affirmed, and Costs there assessed by the Statute of the 3 H. 7. the Bail in Banco Regis shall not be charged with these Costs assessed in the Writ of Error, but only with the principal Judgment. Tr. 4 Jac. Br. By Tanfield and Fenner, P. 20 Jac. B. R. between Hartly and Jones, adjudged per Curiam, and said by the Clerks to be the common Course.

(z) Cro. Jac. 636. S. P. adjudged. Cro. El. 587, 588. S. P. by 2 Justices, the rest absent. Noy 18. S. P. by 2 Judges, and Kemp secondary.

16. In a Scire facias against the Bail, upon a Recognizance, whether the Bail may plead that before the Principal was taken in Execution by the Sheriff upon a Capias ad satisfaciendum, and thereupon (a) paid the Money. Tr. 11 Car. B. R. between Cockain and Procter, such

(a) The Bail cannot plead Payment by

the Principal, per Dodway and Parrot. Cro. El. 132. such a Plea pleaded in a foreign County, and the Court doubted whether it was a good Plea, but they ordered that he should swear his Plea, because it was a foreign Plea.

adjudged. 2 Leon. 213. adjudged. Stil. 324. arguend'. but Cro. Eliz. 233. it is adjudged con. because their Recognizance, as to them, is but as an Obligation with Condition, upon which they might well plead Performance, tho' in a Scire facias the Defendant could not plead it, unless Satisfaction be acknowledged upon Record, because by nude Payment he cannot avoid a Matter of Record, and vide 2 Lev. 212. where it is agreed per Curiam, the Bail may plead Payment by the Principal.

(b) 2 Lev. 212. S. P. adjudged.

17. (b) In a Scire facias against the Bail, upon his Recognizance, the Bail cannot plead, That the Principal paid to the Plaintiff 80 l. in Satisfaction of the Judgment, which was 100 l. and thereupon the Plaintiff acquitted and discharged the Principal of the Judgment, for 80 l. cannot be any Satisfaction of 100 l. and this is also pleaded without Deed, or Matter of Record. Mich. 16 (c) Car. B. R. between Orton and Holton, & alios, adjudged upon Demurrer. Intratur Trin. 16 Car. Rot. 560.

(c) Fol. 336.

18. Rotulo Parliamenti, 7 H. 5. Numero 21. The Commons pray'd, that in a Scire facias, upon a Recognizance for Appearance in Court, to find sureties of the Peace, that the Party might save his Default by the Increase of Water, Imprisonment, Infirmity, or Command of the King, or his Lieutenant, Guardian of England, of which it was now doubted, whether he could save the Default for these Causes.

(a) This is misplaced in the Original, and there, as here, stands as a new Division, under the general Title Bail, and therefore is there, as here, marked with the Letter C. and the computation of the Placita begins again, as here.

(C) (a) Answer, Let the Common Law be kept.

1. If A. becomes Bail for B. in an Action at the Suit of C. and after C. recovers against B. and after the Capias against B. is returned non est inventus, and this is filed of Record, and after B. dies before any Scire facias sued against A. yet this will not excuse A. the Bail, in as much as B. died after the Capias returned and filed, and yet he might, in his Discharge, have brought in B. (if he had been living) before the second Scire facias returned, but this is ex gratia Curiæ. Trin. 5 Jac. B. R. (b) between Tinkerly and Boothe, adjudged upon Demurrer.

(b) Cro. Jac. 165. S. C. where the Defendant pleaded, That the Principal died before the Scire facias brought, and without more it was adjudged no good Plea. Hut. 47. S. C. cited.

(c) Sougate and Sparrow, S. P. in Debt upon Record of the Bail 1 Jon. 29. adjudged. Hut. 47. adjudged. Winch 61, 62. adjornatur. Godb. 354. seems to be S. C but no Judgment, Williams and Vaughan, S. P. Cro. Jac. 97. adjudged. Moor 775. Pl. 1073. adjudged. 2 Mod. 28. cited, Poph. 186. cited. Hut. 47. cited. Stil. 324. S. P. 2 Bulst. 260. vide. (d) They may plead that the Principal died before any Judgment against him, because they cannot have a Writ of Error to reverse that Judgment, Warter and Petry. Cro. El. 199. adjudged, but 2 Leon. 101. the whole Court, except Wray, inclined otherways. (e) Latch 149, 150. S. C. adjudged. 3 Bulst. 331, 332. &c. S. C. adjudged. Noy 82. S. C. not well reported, Poph. 186. adjudged for the same Reason. 1 Jon. 138, 139. adjudged. 1 Rol. Abr. 450. Pl. 7. S. C. (f) It need not of Necessity be averr'd Williams and Vaughan. Moor 775. Pl. 1073. adjudged. Cro. Jac. 97. adjudged, and the Clerks said the Course was both ways. Poph. 186. cited. (g) 1 Jon. 29. S. C. cited. Moor 432. Pl. 607. S. C. adjudged. Cro. El. 597. S. C. adjudged. Goulst. 174, 175. S. C. adjudged. Hut. 47. S. C. cited. Noy 83. S. C. cited. 1 Rol. Abr. 450. Pl. 7. S. C.

2. (c) But otherways it had been, (d) if he had been dead before the Capias returned and filed. Trin. 5 Jac. B. R. per Curiam agreed, Mich. 2 Car. B. R. between (e) Calfe, & alios, Plaintiffs, and Dingly and Davies Defendants, adjudged upon Demurrer, (f) in as much as it was not averr'd by the Plaintiff in the Scire facias against the Bail, that there was a Capias returned against the Principal before his Death, which ought to have come of his Part, (but it seems this is not Law) and there cited by Justice Jones, 43 Eliz. B. R. between (g) Hobbs and Dancaster, adjudged, That the Death of the Principal, before the Return of the Capias, discharges the Bail.

3. If B. be arrested at the Suit of A. and this is returned in Banco, where B. and C. as his Bail, become bound in a Recognizance, viz. B.

in 200 l. being the Principal, and C. the Bail, in 100 l. that B. shall appear to an Action to be (h) brought, &c. according to the usual Form, and after Judgment is given against B. in the Action, and after a Scire facias is brought against B. and C. upon their several Recognizances, who plead the Release of A. to B. the Principal, of all Debts, Duties, Judgments, Executions and Demands; this is a good Plea, as well for B. the Principal, as for C. the Bail, because this discharges the Debt and Judgment, and the Bail may well plead a Satisfaction of the Judgment, and the Release is a Satisfaction. Pasch. 21 Car. B. R. between Bancroft and Willet, adjudged upon a Demurrer, intratur Hill. 20 Car. Rot. 329. Farmer.

(h) This in the Original is port, &c. and not post, &c. and so appears plainly to be misprinted.

4. If a Man taken in Execution upon a Statute, at the Suit of J. S. sues an Audita Querela in Chancery to avoid this, for Usury, and finds there 4 Manucaptors ad standum Juri & ad prosequendum cum effectu, and after the Parties plead to Issue, which is found against the Plaintiff in the Audita Querela, the Manucaptors by this Recognizance, are bound to bring in the Body of the Plaintiff in Person, quousque, &c. or to satisfy the Debt, tho' there be no Mention thereof in the Condition of the Recognizance, for by the Words (ad standum juri) is intended, to stand to the Judgment of the Court, for otherways these Words would be idle, in as much as the first Words, ad prosequendum cum effectu, will compel him to do all that which is to be done before Judgment, and to stand to the Judgment of the Court, is to pay the Judgment. Pasch. 3 Jac. B. R. between (i) Barnes and Worlich, adjudged.

(i) Yelv. 59. S. C. adjudged. Cro. Jac. 67. S. C. adjudged.

5. If a Man brings a Writ of Error upon a Judgment in Banco, and finds Manucaptors to prosecute it with Effect, and after does not take out any Writ of Scire facias ad audiendum Errores; this is a Forfeiture of the Recognizance of the Manucaptors, for this is a Default in him. Hill. 13 Jac. B. R. between Sir Thomas (k) Middleton and Twinio adjudged.

Fol. 337.

(k) 1 Rol. Rep. 329. S. C. and S. P. per Curiam.

6. So in this Case, if he takes out the Scire facias, but does not deliver it to the Sheriff, this is a Default which will forfeit the Recognizance, for he ought to deliver it to the Sheriff. Hill. 13 Jac. B. R. between (l) Sir Thomas Middleton and Twinio, adjudged.

(l) 1 Rol. Rep. 329. S. C. and S. P. per Curiam.

7. If the Principal renders himself in Court in Exonerationem Manucaptoris, this ought to be entred of Record, Hobart's Reports, 283. between (m) Welby and Cunning.

(m) Moor 888. Pl. 1249. S. C. and S. P.

8. (n) When the Principal renders himself in Exonerationem Manucaptoris in Court, if the Plaintiff or his Attorney be present, (o) he ought to make his Election, to take him in Execution, or to refuse him, of which an (p) Entry is to be made of Record. Hobart's Reports. (q) 284.

(n) 1 Leon. 58. S. P. and done accordingly. (o) 2 Bulst. 260, 261. vide.

(p) For the Form thereof vide 1 Leon. 58. (q) Moor 888. Pl. 1249. S. C. and S. P.

9. But if the Plaintiff be absent at the Time of the Render, he ought not to be presently discharged, because the Time of the Render is uncertain, and therefore he ought to be committed, so that the Plaintiff may have Time to make his Election. Hobart's Reports. (r) 284.

(r) Moor 888. Pl. 1249. S. C. and S. P.

10. (s) And when in the said Case he is committed, the Use is to call the Plaintiff, or his Attorney, to take him in Execution, or to relinquish him, and to enter his Acceptance or Refusal of Record. Hobart's Reports, 284.

(s) Cro. El. 22. S. P. and done accordingly.

11. But in the said Case of the Commitment, if the Plaintiff and his Attorney be dead, there ought to be a Means by Record to enforce an Answer, as by Scire facias, against the Executor or Administrator of the Plaintiff, to answer whether he will have him in Execution or not. Hobart's Reports, 284.

12. If B. be bound to A. in a Bill of 20 l. and in Consideration that A. will deliver to him the said Bill, assumes to find 2 sufficient Sureties, which will enter into an Obligation to the said A. for the Payment of the said 20 l. and B. after procures 2 to be bound to A. for the Payment of the said 20 l. which are not of any Worth or Value, &c this is not any Performance of the Promise, for insufficient Sureties are all one with no Sureties. Trin. 39 Eliz. B. R. between (t) Gower and Capper, adjudged upon a Demurrer.

(t) Cro. El. 543. S. C. adjudged.

13. In

13. In a *Scire facias* againſt Bail, they cannot plead, That the Plaintiff hath arreſted the Principal in the *Stannery*-Court, *per quod*, they could not have his Body, *&c.* for they might have removed him by *Habeas Corpus*, *&c. Paſch.* 37 *Eliz.* between *Marſhal* and *Vincent. Moor* 400. *Pl.* 524. adjudged.

(u) A. became Bail for B. in the Portmote-Court of the City of Cheſter, and Judgment was there given for B. and upon a Writ of Error before the Juſtices of the great Seſſions of the County of Cheſter, that Judgment was reverſed, and after, upon a Writ of Error in B. R. both Judgments were reverſed, and it was there adjudged, That the Plaintiff ſhould recover 50 l. Damages, &c. And it was urged, that A. was not liable, for by the Reverſal there is no Judgment in the inferior Court againſt B. and took a Difference where the Judgment of the inferior Court is affirmed, and where reverſed. 2 Jon. 96. adjornatur.

14. If *A.* becomes Bail for *B.* in an (u) inferior Court, and there Judgment is given for *B.* and thereupon the Plaintiff brings a Writ of Error, and that Judgment is reverſed, and Judgment given for the Plaintiff againſt *B.* the Bail is liable, for when the firſt Judgment is reverſed, it is as if that Judgment had never been, and as if at the firſt the Principal had been condemned in the inferior Court. *Hill.* 2 *Jac.* between *Loffe* and *Kelbridge. Cro. Jac.* 94. *per Curiam.*

(x) Farnly and Baſſet ſeems to be S. P. Cro. Jac. 203, 204. adjudged con. Yelv. 120, 121. adjudged con. but the ſuperior Court, it ſhould have been a Superſedeas to the Habeas Corpus, and the old Bail ſhould have ſtood. (y) Moor 836. Pl. 1128. S. C. adjudged. 1 Rol. Rep. 64. S. C. adjudged, notwithſtanding the old Bail was diſcharged, and new put in, the new Bail being taken off the File, and made void the ſame Term, while the Record was in the Breaſt and Power of the Court. 2 Bulſt. 286, 287. S. C. adjudged.

15. (x) If a Cauſe is removed out of an inferior Court by *Habeas Corpus*, and new Bail found, and after, in the ſame Term, it is remanded by *Procedendo*, the old Bail ſhall ſtand, for when a Cauſe is remanded, the ſame Term in which it was removed, no Record is made thereof. *Mich.* 12 *Jac. B. R.* between (y) *Beſton* and *Buller. Cro. Jac.* 363. adjudged. and there ſaid, that *Brook Mainpriſe* 96. and *Procedendo* 16. is ſo to be underſtood.

(z) Moor 836. Pl. 1128. S. C. and S. P. per Curiam.

16. Otherways where it is remanded in another Term. *Mich.* 12 *Jac.* between (z) *Beſton* and *Buller. Cro. Jac.* 363. *per Curiam.*

1 Rol. Rep. S. C. and S. P. per Curiam. 2 Bulſt. 286, 287. S. C. and S. P. per Curiam.

(a) So in Debt upon a Bond, conditioned for the Appearance of J. S. the Defendant cannot plead, that before the Day of Appearance he rendred himſelf to the Officer in Diſcharge of the Bail. 3 Mod. 88. for the Condition being to appear, if no Appearance entred, it is not diſcharged, vide ✠ Q. if the Book is not miſprinted. (b) Moor 853. Pl. 1165. S. C. and S. P. adjudged per totam Curiam, but 3 Bulſt. 191. S. C. 1 Rol. Rep. 392. S. C. upon this Point the Court were divided, but gave Judgment for the Plaintiff, becauſe of a Defect in the Plea. 3 Mod. 87. S. P. arguendo.

17. If *A.* brings a Writ of Error upon a Judgment obtained againſt him, and according to the 3 *Jac. cap.* 8. *B.* enters into a Recognizance, conditioned, that *A.* ſhall proſecute his Writ of Error with Effect, and if Judgment ſhall be affirmed, that he will pay the Condemnation, *&c.* and after the Judgment is affirmed, *B.* cannot (a) render *A.* the Principal, for this *Manucaption* is not to render the Body, but to pay the Debt. *Paſch.* 14 *Jac.* between (b) *Auſten* and *Monk. Cro. Jac.* 402. adjudged without Argument.

(c) 2 Mod. 312. S. C. adjudged, the Bail being for 6, & the Plea, that he had taken 2 of them in Execution, 1 Vent. 314, 315. S. C. adjornatur, the Bail being for 2, and the Plea, that he had taken one of them in Execution.

18. In a *Scire facias* againſt Bail, they cannot plead that before the Return of the ſecond *Scire facias*, the Plaintiff proſecuted a *teſtatum Capias* againſt the Principal, directed to the Sheriff of, *&c.* who took the Principal in Execution upon the ſaid Judgment, *& adhuc habet & detinet, &c.* for the Recognizance was forfeited before. *Paſch.* 29 *Car.* between (c) *Aſtree* and *Palfryman.* 2 *Jon.* 75. adjudged.

19. If there be an Original and *Capias* in one County, and Bail thereupon filed, and the Plaintiff after declares in another County, and thereupon obtains Judgment, by this Variation the Bail are diſcharged, and not liable to the Damages upon this Declaration. *Trin.* 1 *Jac.* 2. B. between *Yates* and *Plaintin.* 3 *Lev.* 235. adjudged and agreed by the Prothonotaries, tho' by the Courſe of the Court, the Plaintiff might declare in another County, and the Judgment would be good.

20. If

21. If after Bail put in, and before the Plaintiff hath declared, the Defendant obtains an Injunction, and this is continued for ſeveral Terms, and after diſſolved, and the Plaintiff ſoon after declares and gets Judgment, and brings a *Scire facias* againſt the Bail, they cannot plead that no Declaration was delivered or filed againſt the Principal (d) within 2 Terms after the Action commenced, and Bail entred, for there was no Default in the Plaintiff, that he did not declare ſooner. *Hill.* 1 *Will.* and *Mar'.* Between *Doe* and *Dawſon*, 3 *Mod.* 274. adjudged.

(d) Cro. Jac. 620, bis 621. vide.

(a) Who are bailable.

(a) Where the Commitmen is inſufficient, or illegal, 2 Bulſt. 341, 342, 343. 2 Brownl. 20.

1. BY the Common Law, if the Party (b) accuſed could find ſufficient Sureties, he was not to be committed to Priſon, (c) but it was after provided in Parliament, that in Caſe of Homicide, the Offender ſhould not be bailed, as appears by *Glanvil*, cited 2 *Inſt.* 186.

Vaugh. 154. Moor 839. Pl. 1132. 840. Pl. 1133. 840. Pl. 1134. 3 Bulſt. 48, 49. 1 Rol. Rep. 220. 337. 410. But for this vide the Diviſions, Title Habeas Corpus. (b) So, tho' indicted of Treaſon or Felony, 2 Inſt. 189. (c) 2 Inſt. 42.

2. By the Common Law, the (d) Acceſſory (e) was bailable till the Principal was attainted, but not after. *Stamf.* 71. a.

(d) But not by the common Writ de homine replegiando, 2 Inſt. 186. (e) The Acceſſories in an Appeal having ſeverally pleaded not guilty, and a ceſſet proceſſus, till all the Principals were convicted, quoad them entred, interim traditi fuer' ſeparatim in ballium. Dier 120. Pl. 10.

3. But in caſe of the Death of a Man, the Principal was not Mainpriſable by the Common or Statute Law. *Per Stamf.* 71. b.

4. But indeed, in (f) Caſe of an Appeal, where there was no Indictment to affirm it, there were ſuch Circumſtances in the Caſe, that the Juſtices let the Defendant to Bail. *Stamf.* 72. a.

(f) Where the Defendant in an Appeal is bailable, vide 1 Bulſt. 85. 1 Sid. 316. 2 Jon. 210.

5. If in an Appeal of Death the Defendant pleads *Excommengement* in the Plaintiff, the Defendant ſhall be let to Mainpriſe until the Plaintiff be aſſoiled. *Stamf.* 72. b.

6. (g) When a Statute ſays, *The Body ſhall be impriſoned at the Pleaſure of the King*, the Priſoner ſhall not be bailed till the King's Will be known. *Per Stamf.* 74.

(g) 4 Inſt. 179. it is ſaid, this Rule is good, if rightly underſtood, for in ſuch Caſe he cannot be impriſoned, before he is indicted, convicted, and Judgment given, and then he is not bailable, becauſe his Offence appears.

7 *Per* 52 *H.* 3. *Cap.* 8. and 13 *Ed.* 1. *Cap.* 26. thoſe taken for a Re-diſſeiſin ſhall not be delivered without the (h) ſpecial Command of the King.

(h) That is, they ſhall not upon the common Writ de homine replegiando, but there ſhall be a ſpecial Writ reciting the whole Matter. Vide 2 Inſt. 115. 416.

8. By the Statute of *Weſtminſter*, 1 Cap. 15. it is Enacted, *That foraſmuch as* (i) *Sheriffs and others, had taken and let out ſome which were not* (k) *repleviſable, and kept in Priſon others that were repleviſable; and that it had not been determined what Perſons were repleviſable or not, but* (l) *only ſuch as be taken for* (m) *the Death of a Man, or by* (n) *Command* (o) *of the King, or his Juſtices, or* (p) *for the Foreſt: It is provided, That* (q) *Perſons* (r) *outlawed, abjured the Realm, Provors, and ſuch as be taken with the Manner; Breakers of Priſon, Thieves, openly defamed and known Appellees by Provors,* (s) *ſo long as the Provors live; Houſe burners, thoſe taken for falſe Money, or counterfeiting the King's Seal, Perſons* (t) *excommunicate, and taken at the Prayer of the Biſhop, or for* (u) *manifeſt Offences, and Treaſon againſt the King himſelf, are not repleviſable by the common* (x) *Writ, or* (y) *without:* (z) *But ſuch as are indicted of* Larceny *by Inqueſt* (a) *before the Sheriff or Bailiffs, by their Office, or of light Suſpicion, or* petty Larceny, *not above the Value of* 12 d. *if not guilty of other* Larceny *before, or thoſe guilty of Receipt of Felons, or of Commandment, Force, or Aid in Felony done, or other Treſpaſs, for which*

(i) So that this Statute beginning with inferior Officers, it extends not to the Judges of ſuperior Courts, and they do not take or keep any, &c. 2 Inſt. 185, 186.

(k) Repleby, or Pleby, is properly appli-

ed to the Sheriffs taking Pledges and Bail to the highest

which one ought to lose Life or Member, the Appellees by Provors, after the Death of the Provors, (if no common Thief, nor defamed) shall be let out upon sufficient Sureties, (for which the Sheriff will answer) without giving ought of their Goods, &c.

Courts of Record, 2 Inst. 186. (l) Intended they were not bailable by the Sheriff. 2 Inst. 186. (m) And yet per 2 and 3 Ph. and Mar. Cap. 13. it appears, that in Case of Manslaughter, Bail may be taken in some Cases, and therefore this Clause must be intended of ordinary Bail, Poyne's Case, 1 Rol. Rep. 268. 3 Bulst. 113. (n) By lawful Process in a legal Course, 2 Inst. 186, 187.——But yet if he is imprisoned upon the personal Command of the King only, tho' it is illegal, yet he cannot be bailed by the Sheriff, but by the Courts at Westminster, upon an Habeas Corpus, 2 Inst. 187. (o) Per Stamf. 72. this is intended of his personal Command, by his own Mouth, or of his Council, which is incorporated into him, and vide 1 Rol. Rep. 134. (p) But how such as are taken for Vert or Venison, shall be mainprised, and by whom, vide 1 Ed. 3. Cap. 8. (q) For non stat indifferenter, whether such are guilty or not, for the outlawed and abjured are attainted, and the Provor hath confessed, &c. and he that is taken with the Manner, is taken with the Thing, as it were, in his Hand, or upon his Back, 2 Inst. 388.——and tho' the Bailment of such as are attainted, is not by express Words, restrained by the Statute, yet it must be so intended, Stamf. 74. (r) But if upon a Capias utlegatum, he pleads Misnomer, or alledge Error, he may be bailed, 2 Inst. 188. Stamf. 74.——but yet vide Stil. 419. where one outlawed for a Robbery, &c. brought Error, and was denied Bail in B. R. (s) For so long it serves in Nature of an Indictment,——but if the Provor waives his Appeal, the Appellee shall be bailed, if there be no other Appeal against him, 2 Inst. 188. Stamf. 74.——but tho' he vanquish the Approvor, yet if he be appealed by another Approvor, he shall not be bailed, Stamf. 74. (t) But if the Party offers sufficient Caution, de parendo mandatis Ecclesiæ in forma juris, the Party shall have a Writ to the Bishop, to accept his Caution, and to cause him to be delivered, and if the Bishop will not send to the Sheriff for his Delivery, he shall have a Writ to the Sheriff for his Delivery, 2 Inst. 189.——But he that is taken upon a Capias Excommunicatum, upon the 5 Eliz. tho' he is not bailable by the Sheriff, &c. yet he may be bailed in B. R. 1 Bulst. 122. per totam Curiam, præter Williams. (u) For Bail is taken only where the Matter stat indifferenter, and not when the Offence is open and manifest, 2 Inst. 119. (x) De homine replegiando directed to the Sheriff, 2 Inst. 168.——and these are accordingly mentioned in the Writ, 2 Inst. 187. but this Writ to the Sheriff is taken away by the Statute of 28 Ed. 3. Cap. 9. 2 Inst. 190. F. N. B. 250. A. but this Statute of the 28 Ed. 3. extends only to Sheriffs, and to them only, when indicted by Inquisition before them, 4 Inst. 182. (y) But any of these Offenders are bailable in the King's Bench, &c. 2 Inst. 189. (z) And upon this Statute the Writ de Manucaptione is founded, which mentions the Particulars following, 2 Inst. 190. (a) But per 1 Ed. 4 Cap. 2. upon Indictments or Presentments taken before Sheriffs and Bailiffs, or their Ministers, at their Turn or Law-days, they shall not arrest, attach, or put in Prison any Person therein, but deliver all such Presentments and Indictments to the next Justices of the Peace, at their Sessions, &c.

9. A Man arrested and imprisoned (and bailable) for Felony, shall be bailed before it appears whether he is guilty or not; but if convicted by Verdict or Confession, *&c.* he is not bailable. 4 *Inst.* 178.

(b) 3 Bulst. 114. S. P. per Haughton, 2 Rol. Rep. 68. S. P. per Haughton.

10. (b) So if upon Examination, a Man confesses the Felony, and the Mittimus be for Felony confessed, he cannot be bailed. 4 *Inst.* 178.

11. If one be committed by the personal Command of the King, or by Order from the Council-board, or if any one or (c) two of his Council commit one for High Treason, such Persons may not be delivered by any Court, without due Trial, and Judgment of Acquittal had, *Trin.* 34 *Eliz.* 1 *And.* 298. by all the Judges; but in such Case, upon the Return of a *Habeas Corpus*, (d) the Cause of his Commitment must be certified to the Judges, which cannot conveniently be done, unless Notice thereof be given, generally or specially, to the Gaoler, in whose Custody he is, *&c.*

(c) 1 Rol. Rep. 134. S. P. cited to be adjudged, and vide Moor 839. Pl. 1132. 1 Mod. 145. 1 Leon. 71.

and the Divisions, Title Habeas Corpus. (d) But yet, 1 Rol. 134. it was said by Coke, Ch. Justice, That if the King's Bench, or if he committed one, tho' no Cause was declared, he is not bailable by any, for perhaps it is a Cause touching the State, which is not convenient to be known.

12. *A.* being indicted for Murder, and ready to be tried, the Proceedings upon the Indictment were left off for a Time, upon Suspicion of a partial Jury, and an Appeal brought, and tho' by the Appeal, the Indictment was not gone, yet becaufe the Delay proceeded on the Part of the Profecutor, and not of the Prisoner, he was bailed. *Morgan*'s Case, *Mich.* 8. *Jac.* 1 *Bulst.* 85.

13. If upon an Indictment of Murder, the Jury find a ſpecial Verdict, and thereupon (e) there is a *Curia adviſare vult*, the Priſoner is not bailable. *Mich.* 8 *Jac. Morgan's* Caſe, 1 *Bulſt.* 87, 88. Bail denied in ſuch Caſe.

(e) So where the Priſoner is found guilty, and

Curia adviſare vult, whether Clergy is allowable or not, Dier 179. Pl. 42.

14. *A.* being found guilty of Manſlaughter before the Coroner, and this being returned in *B. R. A.* prayed he might be bailed, becauſe there was no (f) Indictment againſt him, but it was denied, becauſe notwithſtanding it may be (g) Murder. *Mich.* 13 *Jac.* (h) *Poyn's* Caſe, 1 *Rol. Rep.* 268.

(f) But Stil. 371. tho' the Priſoners were indicted of Manſlaughter only, yet the Court denied them Bail. (g) 3 Bulſt. 113. it was ſaid, per Coke, Ch. Juſtice, That in caſe of the Death of a Man, he would not bail without the King's Command. (h) 3 Bulſt. 113. S. C.

15. Several Indicted of Murder were bailed, becauſe no Trial could (i) quickly be had, and they were in Danger of being ſtarved in Priſon. *Lat.* 12.

(i) One removed out of Wales by

Habeas Corpus, bailed, becauſe they have no Gaol-delivery there, Stil. 418.

16. One Indicted of (k) Treaſon (l) may be bailed. *Mich.* 13 *Jac.* 3. *Bulſt.* 113. *per Coke* Ch. Juſtice, but he ſaid they would not do it.

(k) 1 Bulſt. 85. ſuch a Precedent

ſhewed. (l) But not de jure, if not within the Habeas Corpus Act, Raym. 381.

17. A Woman was indicted for Felony and Witchcraft, and becauſe ſhe had twice before been acquitted upon other Indictments of the ſame Nature, ſhe was bailed in *B. R.* to appear at the next Aſſiſes for the County of, *&c. Camel's* Caſe, *Trin.* 24 *Car. Stil.* 116.

18. One committed by the Council of State and Parliament, for publiſhing (m) ſeditious Libels, was denied Bail. *Mich.* 1653. *Stil.* 397.

(m) And Stil. 368. it was doubted

per Rol. Ch. Juſtice, whether one indicted for Perjury might be bailed, but it was ſaid by the Clerks he might.

19. *F.* being indicted of Murder, was bailed in *B. R.* the Court being ſatisfied by Affidavits, that there was good Reaſon for it. *Mich.* 34 *Car.* 2. *Farrington's* Caſe, 2 *Jon.* 222. 4 Perſons becoming Bail, *Corpus pro Corpore.*

20. *Per* 31 Car. 2. Cap. 2. it is Enacted, *Such Perſons as are detained for any Crime, unleſs Felony or Treaſon, plainly expreſſed in the Commitment, being by* Habeas Corpus, *according to that Act in Vacation-Time, brought before the Lord Keeper, or any Judge, ſhall be diſcharged upon their Entry into a Recognizance, with one or more Sureties, for their Appearance in the* King's Bench *the next Term, or at the next Aſſize or Seſſions for the Place where the Commitment was, or where the Offence was committed, or properly cognizable, unleſs detained by legal Proceſs, Order, or Warrant out of ſome Court, or by Warrant under the Hand and Seal of ſome of the Judges or Juſtices of Peace for Matters by Law, not bailable.*

21. And by the ſaid Act, *ſuch Perſons as are committed for High Treaſon, or Felony, plainly expreſſed in the Commitment, upon their Prayer or Petition in open Court, the firſt Week of the Term, or firſt Day of the Seſſions of* Oyer *and* Terminer, *or Gaol-delivery, to be brought to Trial, if not indicted the next Term, Seſſions of* Oyer *and* Terminer, *or Gaol delivery after ſuch Commitment, upon Motion by themſelves, or any on their Behalf, the laſt Day of the Term, Seſſions, or Gaol delivery, ſhall be bailed, unleſs it appear upon Oath, that the Witneſſes for the King could not be produced that Term, Seſſions, or Gaol-delivery, and if not indicted and tried the ſecond Term, Seſſions of* Oyer *and* Terminer, *or Gaol delivery, they ſhall be diſcharged.*

22. And, *Becauſe many Perſons charged with petit Treaſon or Felony, or as Acceſſaries thereto, are committed upon Suſpicion only, and bailable or not, according to the Circumſtances making the Suſpicion more or leſs, which are beſt known to the Juſtices of the Peace that committed them, they ſhall not be removed or bailed by this Act.*

(a) In

(a) In what Actions.

(a) 2 Rol. Abr. 112. vide there Title Mainprise.

1. IF one in Execution brings an Attaint, (b) he may have a (c) Writ to the (d) Justices, commanding them to let him to Mainprise. *F. N. B.*

(b) Cro. Eliz. 106. *D.* 5. per Wray, the Court doth not usually bail, for the Verdict is intended true, till reversed, but in some Cases, upon good Consideration they will bail. (c) Reg. 123. a. (d) Di. 193. Pl. 29. S. P. tho' at first it was doubted whether it lay to the Justices de B. and a Case cited con. where it was commanded to the Warden of the Fleet to have the Body in Court, quolibet die, &c. Dier 365. Pl. 31.

(e) Where upon a Writ of Error, Execution shall be staid in the Courts at Westminster, unless the Plaintiff, with 2 Sureties, becomes bound to the Party (for whom the Judgment was given) in a Recognizance to prosecute with Effect, and pay, &c. 3 Jac. Cap. 8. 13 Car. 2. Stat. 2. Cap. 2. Paragraph 9. 16 and 17 Car. 2. Cap. 8. But for this, vide the Divisions, Title Supersedeas. (f) Dier 193. Margin, S. P. per totam Curiam, & vide 1 Rol. Rep. 386. 2 Bulst. 230. Cro. Jac. 401. Dier 195. Pl. 38. 3 Leon. 113. (g) Bail is commonly taken where Error is assigned in a Matter of Law, Secus where in a Matter in fait. 3 Bulst. 62. per Coke Ch. Justice.

2. Where one in Execution brings (e) Error in *B. R.* and the Error is (f) apparent, the Court (g) usually bails him. *Mich.* 11 *Jac.* 2 *Bulst.* 164. *per Coke* Ch Justice.

3. Otherways where one brings Error in Parliament, because of the Uncertainty how long the Parliament may continue: *Mich.* 11 *Jac.* 164 *per Coke* Ch. Justice.

4. If an *Audita Querela* is founded upon a Release or Record, the Plaintiff may be bailed. *Hill.* 12 *Jac.* 1 *Rol. Rep.* 132. said *per Coke* Ch. Justice.

(h) 1 Rol. Rep. 384. S. P. per Coke, who said, That in the Time of Dier and Wray, and all his Time, the Practice had been never to bail where grounded upon a Matter in Fact only, but where upon a Matter of Writing in Discharge, the Plaintiff had used to be bailed, the Defendant being call'd, to know whether he could deny it, & vide 1 Sid. 286. Dier 285. Pl. 41 339. Pl. 46. & vide 11 H. 6. Cap. 10. 1 Sid. 286. 2 Rol. Abr. 113. Title Mainprise. (i) Yet vide where in such Cases the Plaintiff was bailed. Cro. Jac. 29. 67.

5. (h) But if upon a (i) Surmise of a Matter in Fact only, 'tis otherways. *Hill.* 12 *Jac.* 1 *Rol. Rep.* 132. said *per Coke* Ch. Justice.

(k) 2 Keb. 43. S. C. per Curiam, because there is no Remedy to bring him in Custody again, if the Judgment should be affirmed.——So where several at the Sessions in M. were fined, and brought an Habeas Corpus, and Writ of Error, and pray'd to be bailed, 1 Sid. 320. it was denied, because in Execution for the King, but it was common in the Crown-Office, to bail in such Cases.

6. If one is convicted, and there is Judgment against him at the Sessions in the Country, for Deer-stealing, and he brings a Writ of Error, and thereupon all is removed in *B. R.* yet he shall not be bailed. *Pasch.* 18 *Car.* 2. (k) the King and *Whitamore*, 1 *Sid.* 206. Bail denied *per Curiam* accordingly.

(l) 3 Mod. 121. 1 Sid. 210.

7. If in an *Homine replegiando*, an *Elongatus* is returned, and the Defendant taken upon a *Withernam*, tho' this is no Execution, yet the Defendant shall not be bailed, unless he will confess the Taking and (l) Having the Party in Custody. *Mich.* 34 *Car.* 2. *Design*'s Case, *Raym.* 475. adjudged.

8. But if in an Action for a false Return of an *Elongatus* against the Sheriff, it is found for the Plaintiff, he may be bailed. *Mich.* 34. *Car.* 2. *Raym.* 475. *per Curiam.*

(a) (b) Where common, and where special Bail.

(a) Not in Account, secus in Debt upon an Account, 2 Rol. Rep. 53. per Broome, & vide Noy. 28. 1 Lev. 300. (b) What Bail shall be found for a Feme covert, vide Cro. El. 370. Cro. Jac. 445. 1 Mod. 8 Stil. 475.——and whether one Partner must put in Bail for another. 1 Mod. 45.

1. IN all Actions upon penal Statutes, as upon the 13 of *El.* of *Fraudulent Conveyances*, &c. the Defendant need not put in special Bail. *Mich.* 2 *Jac.* St. *George*'s Case, *Yelv.* 53. said to be according to the Practice in *B. R.*

2. (c) Executors

2. (c) Executors or Adminiſtrators ſhall (d) not find Special Bail (e) for the Debt of the Teſtator, for it is not their Debt, nor (f) ſhall their Bodies be liable to an Execution for it. *Hill.* 7 *Jac.* 2 *Brownl.* 293. *per Curiam.*

(c) 3 Bulſt. 316. S. P. per Curiam ruled, tho' an Attorney was Plaintiff, and it was pretended he was intitled to have ſpecial Bail by his Privilege. 1 Sid. 63. S. P. per Curiam. (d) But in the Courts in London, and other inferior Courts, they always oblige Heirs and Executors to give ſpecial Bail. 2 Lev. 204. per Curiam. (e) So if there be a Judgment againſt an Executor for the Debt, de bonis Teſtatoris, and for the Damages only, de bonis propriis, he may bring Error, and have a Superſedeas, without giving Sureties, according to 3 Jac. cap. 8. for tho' the Words of the Statute are general, yet it muſt be intended where Judgment is againſt the Defendant himſelf, upon his own Bond, or where the Judgment is general againſt the Executors, for it would be unreaſonable they ſhould find Sureties to pay the Whole out of their own Eſtate. Cro. Jac. 352. adjudged, Sir Henry Mildmay's Caſe. Cro. Car. 59. adjudged. Lit. Rep. 2, 3. adjornatur & vide 1 Lev. 145. (f) And upon taking ſpecial Bail, the Recognizance is, ita quod, that he render his Body, which ſhall not be againſt an Executor, but in Caſe of a Devaſtavit only,—and where the Action is founded upon a Devaſtavit, ſpecial Bail muſt be given. 1 Sid. 63. —and 1 Sid. 418. tho' it was ſaid to be the Courſe of the Court of King's Bench, that Executors, upon Removal of a Cauſe out of inferior Courts, ſhould give ſpecial Bail, yet it was ſaid to be unreaſonable, and, per totam Curiam, contra Twiſden, it was ruled in that Caſe, that common Bail ſhould be accepted, and vide Lit. Rep. 81. that in ſuch Caſe Executors muſt give Bail, but vide the Caſe of Lawrence and Bligh. 2 Jon. 82. where it is ſaid, that in ſuch Caſe Executors had uſed to give Bail till Hale's Time, when it was reſolved they ſhould be delivered upon common Bail. 2 Lev. 204. where ſaid, that Keeling and Hale had denied ſpecial Bail in ſuch Caſes, and vide 1 Lev. 245, 268. —So if one is ſued as Heir in an inferior Court, and the Cauſe is removed by Habeas Corpus, the Heir need not put in ſpecial Bail, Lawrence and Bligh, ruled. 2 Lev. 204. 2 Jon. 82. before which, it was ſaid, there was no Precedent one way or the other.

3. In an Action (g) of *Scandalum magnatum*, (h) upon Motion, the Court ordered ſpecial Bail to be given. *Paſch.* 15 *Car.* 2. between the Earl of *Stanford* and *Goodal.* *Raym.* 74.

(g) 2 Mod. 215.

(h) But where, upon Motion, the Court will order common or ſpecial Bail. vide 1 Brownl. 90. 1 Sid. 183. 1 Lev. 39. — in Debt, upon a Bond for Performance of Covenants, according to the Breach aſſigned. 1 Sid. 63.

4. Upon an Affidavit of great Mayhem, and that he intended to declare in (i) Treſpaſs. *Hill.* 17 and 18 *Car.* 2. 1 *Sid.* 276. the Court ordered a ſpecial Latitat, with an *ac etiam*, and that ſo there ſhould be ſpecial Bail, and Quere if ſo in Caſe upon an Affidavit of great Damage.

(i) Special Bail ordered per Curiam, in Caſe of a notorious Battery. 1 Sid. 307. but 1 Mod. 2. denied, and vide 1 Rol. Abr. 335. Pl. 14.

(a) By (b) whom taken.

(a) The King's Bench, if they pleaſe, may Bail in all Caſes, but if the Cauſe of Commitment return-

1. *Per* 4 *Edw.* 3. cap. 2. ſuch as are indicted, or taken by the Keepers of the Peace, and are not bailable by Law, ſhall not be let to Mainpriſe by the Sheriff, or other Miniſter, nor deliver'd but at Common Law.

ed upon an Habeas Corpus be juſt, the Common Pleas muſt remand. Vaugh. 157. (b) Upon a Writ of Odio & atia, vide 2 Inſt. 42, 43.

2. *Per* 5 *Edw.* 3. cap. 8. the Marſhal of the *King's Bench* ſhall not let to Bail his Priſoners, indicted or appealed of Felonies, *&c.*

3. *Per* 23 *H.* 6. cap. 10. Sheriffs, Coroners, *&c.* ſhall let to Bail Perſons by them arreſted, or in their Cuſtody, by Force of any Writ, Bill, or Warrant, in any perſonal Action, or becauſe of any Indictment of Treſpaſs upon reaſonable Sureties, (having ſufficient within the County) to keep their Days in ſuch Place, *&c.* as the Writ, *&c.* require, (ſuch as are in Ward by Condemnation, Execution, *Capias utlegatum*, or (c) *Excommunicatum*, Surety of Peace, or committed by Command of the Juſtices, and Vagabonds, refuſing to ſerve, according to the Statute of Labourers, only excepted.)

(c) Tho' not bailable by the Sheriff, yet he may be bailed in B. R. 1 Bulſt. 122. per totam Curiam, præter Williams.

4. Before the Statute of 1 *Rich.* 3. Chap. 3. which is repealed by the 3 *H.* 7. cap. 3. no Juſtice of the Peace could have bailed (d) any one for Felony, for before this, he ought to have been bailed by the Sheriff, or other Keeper of the Priſon where he was in Ward, or by the Conſtable,

(d) Who was not indicted before them, but this Statute of Rich. 3. gave them

Power to Bail before Indictment. Stamf. 75. — ſtable, and by no other Officer, unleſs Juſtices of the *King's Bench*, Juſtices in *Eyre*, or Juſtices of Gaol-delivery. *Trin.* 37 *Eliz. Poph.* 96. by the Judges at an Aſſembly at *Serjeant's Inn.*

or appealed before them, becauſe, before Indictment, or Appeal, they were no Judges of the Perſon, or Cauſe of Impriſonment, for being of Record, they ought to proceed upon what is judicially before them upon Record; and it would have been abſurd, that they ſhould deliver one to Bail, when they were not Judges of him, or the Cauſe of his Impriſonment, Coke's Treatiſe of Bail, cap. 6. But where Juſtices of Peace may, at this Day, Bail, vide throughout that Treatiſe, which ſeems to have been deſigned particularly for their Uſe,

5. By the 1 *R.* 3. cap. 3. one Juſtice of Peace might have bailed for Suſpicion of Felony.

6. But *per* 3 *H.* 7. cap. 3. that Act is repealed, and Power given to two or more Juſtices of Peace, whereof one is of the *Quorum*, to let any Priſoners, mainpernable by Law, to Bail or Mainpriſe, until the next general Seſſions, or Gaol-delivery.

7. *Per* 1 and 2 *Ph.* and *Mar.* cap. 13. none arreſted for Manſlaughter, or Felony, being bailable by Law, ſhall be bailed by Juſtices of the Peace, if not in open Seſſions, except by two at leaſt, (whereof one is of the *Quorum*) being preſent together at the Time of the Bailment, provided the Juſtices of Peace in *London*, and County of *Middleſex*, and other Cities, Boroughs and Towns corporate may Bail, as before accuſtomed.

8. And by this Act, none ſhall by them be let to Bail, which are not repleviſable by the Statute of *Weſt.* 2. cap. 15.

(e) Cro. Eliz. 731. S. P. per Curiam. 9. (e) If there is Judgment in *B. R.* and the Defendant is taken in Execution, and after brings Error in the *Exchequer-Chamber*, and the Record is removed, he cannot be bailed in *B. R.* becauſe there is no Record there. *Hill.* 3 *Jac.* between *Shepherd* and *Allen. Cro. Jac.* 108. Bail denied accordingly.

(f) But upon a Writ of Error upon a Judgment 10. Nor can he be bailed in the (f) *Exchequer-Chamber*, for they have Authority only to affirm or reverſe the Judgment. *Hill.* 3 *Jac.* between *Shepherd* and *Allen. Cro. Jac.* 108. *per Curiam.*

in Ireland, the Record being removed in B. R. the Court took Bail here, and ſent Directions to have the Defendant ſet at Liberty there. Palm. 286.

(g) Cro. Eliz. 77. S. P. agreed, and like Point agreed, where an Arreſt 11. If one is arreſted in *London* by a Serjeant of the Mace, upon a Plaint of Debt entred in any of the Counters, the Serjeant cannot take Bail, (g) but the Judge in Court muſt. *Trin.* 6 *Car.* between (h) *Salmon* and *Percival. Cro. Car.* 196. adjudged.

was upon a Plaint in the Court of Nottingham, and the Defendant in Gaol, under Cuſtody of the Major, and not of the Serjeant, and Cro. El. 168. it is ſaid, That in all Corporation Courts, the Major, who is Judge, is Gaoler alſo, — Bail being a Matter of Record, cannot be found before any but the Judge of the Court, and not before the Serjeant, tho' alledged, Secundum Conſuetudinem Villæ, but Bail for Appearance only, may be taken by the Serjeant. Cro. Jac. 94, 95. (h) 1 Rol. Abr. 561. Pl. 9. S. C. 1 Jon. 226. S. C. but S. P. does not appear, it being ſaid, The Bail was tendred to the Sheriff.

12. Where, how, and to whom Commiſſions may be granted to take Bail in the Country, in any Action or Suit depending in the Courts at *Weſtminſter*, and how ſuch Bail ſhall be juſtified, vide 4 and 5 *Will.* and *Mar.* cap. 4.

(a) (b) How Bail ſhall be taken.

The (c) Manner and (d) Entry thereof.

(a) No Proceeding in a joint Action againſt ſeveral Defendants, upon Bail put in, in ſeveral Terms. Lat. 283. 1. The Bail, in Caſe of Felony, by the Common Law, are ſeverally bound to the King, by Recognizance, in a certain Sum, *& ultra* (e) *quilibet eorum Corpus pro Corpore.* 4 *Inſt.* 278.

(b) Where in a Sum certain, and where not, and the Diverſity between the Courſe of the King's Bench and Common Pleas. Cro. Jac. 450, 645. Cro. Car. 481. 2 Bulſt. 232. 1 Rol. Rep. 387.

(c) Where upon a Removal by Habeas Corpus, into the Common Pleas, by the Courſe of the Court, Bail is taken before an Appearance entred to the Action. Cro. Jac. 98. vide. (d) At what Time filed. Cro. Jac. 449. 1 Rol. Rep. 372. 1 Rol. Abr. 207. Pl. 14. (e) That is, where the Priſoner is bailed after the Return of the Writ being preſent in Court, Secus, where before the Return, for then he is not in Court, and the Bail ſhall be in a Sum of Money, and not Body for Body. 1 Bulſt. 45. agreed to be the conſtant Rule of the Court.

2. But the Bail of a Felon before 2 Juſtices of Peace, by the Statutes of the 1 and 2 *Ph.* and *Mar'.* and the 2 and 3 *Ph.* and *Mar'.* is, for the Felon in double the Sum, and each of the Bail in ſingle. 4 *Inſt.* 278.

3. If one in Execution upon a Judgment in *B.* brings a Writ of Error in *B. R.* and the Error is apparent, he ſhall be bailed, and (f) the Sureties bound, if the Judgment be affirmed to anſwer the Debt, and not bound to deliver the Body in Execution. *Paſch* 35 *Eliz.* in the Caſe of *Onknal* and *Truſſel, per Curiam. Dier* 193. Margin cited, and that by the Clerks, all the Precedents in Court were ſo; and *Gawdy* ſaid, that in the 4 and 5 *El.* all the Precedents were altered, for before that Time it was doubted.

(f) Hukeſly and Harriſon, S. P. appears, 1 Rol. Rep. 386. Cro. Jac. 401.

4. But if a Man is in Execution upon a Statute-merchant, and ſues an *Audita Querela*, and thereupon (g) is bailed, the Sureties ſhall be obliged to render his Body to be impriſoned, as before he was. *Paſch.* 35 *Eliz. per Curiam, Dier* 193. Margin cited.

(g) It muſt be taken in open Court. 1 Bulſt. 140. Lat. 113.

5. If Bail in Debt is entred in this Manner, *viz. Subpœna executionis in adjudicatione executionis*, where it ought to have been *Subpœna condemnationis*, (h) yet it ſhall ſtand, as well for the Judgment as Execution. *Hill.* 8 *Jac.* between (i) *Hampton* and *Courtny. Cro. Jac.* 272. adjudged upon a Writ of Error, and it was ordered to be amended, and made *Subpœna executionis judicii*, as well as for the Execution.

(h) For Bail cannot be taken for Part, viz. the Execution, and not the Judgment, no more than for Part of the Debt. 1 Bulſt. 107. per Curiam. (i) 1 Bulſt. 107. S. C. adjudged, and the Court refuſed to diſcharge the Bail, tho' the Execution was reverſed.

(a) Pleading.

The Manner thereof.

(a) What Matter the Bail may plead, vide 1 Rol. Abr. 333. through all the Title, how it may be performed.

1. IN pleading a Render of the Principal, the Bail muſt ſay, *Quod venit hic in* (b) *Cur'*, *&* *in* (c) *eadem Curia reddidit ſe, & per eandem Curiam commiſſus fuit, &c. Trin.* 14 *Jac.* between (d) *Auſtin* and *Monk.* 3 *Bulſt.* 192. *per Coke* and *Houghton*, but (e) there being laid to be done the 2d of *February*, (being *Candlemaſs-Day*, and ſo *Dies non juridicus*) it judicially appears, there could be no Court that Day, and ſo the Render and Commitment void.

(b) Stil. 330, 331. vide. (c) The Render muſt be made in that Court where the Record is at the Time. Cro. Jac. 98. 1 Rol. Abr. 334. Pl. 10. (d) 1 Rol. 392, 393. S. C. and S. P. admit per Curiam, tho' it is ſaid, quod adhuc remanet in Cuſtod. &c. for if in Priſon without Render or Commitment, it is not material. (e) Poph. 186. S. C. and S. P. cited.

2. (f) If the Bail plead a Render of the Principal, they (g) muſt conclude their Plea, *Prout patet per recordum*, for this is not to be tried *per Pais*, but by the Record. *Paſch.* 1 *Car.* between (h) *Calf* and *Dingly, & al'. Latch* 149. *per Curiam.*

(f) Welby and Canning, S.P. Hob. 210. Moor 838. Pl. 1249. per Curiam, Middleton, and the Manucaptors of Sylveſter, S. P. 1 Keb. 761, 815. adiudged. 1 Sid 216. dubitatur, and ſaid there were Precedents both ways, Alanſon and Butler, like Point. 1 Lev. 211. adjudged. 2 Keb. 189, 206. adjudged. (g) So if in a Scire facias againſt Bail, upon a Writ of Error, according to the Statute of 3 Jac. they plead, The Plaintiff proſecuted the Writ of Error with Effect, and thereupon the Judgment was reverſed, they muſt conclude, prout patet per recordum. Raym. 50. (h) Noy 82. S. C. and S. P. per Curiam, Poph. 185. S. C. and S. P. per Curiam.

3. If *A.* as Bail, enters into a Recognizance, that *B.* upon 8 Days Warning *comparebit* to any Action that ſhall be brought by *C. necnon*, that if *B.* ſhall be condemned in the ſaid Action, and does not pay, *&c.*

that then he will anſwer the Condemnation, and C. does bring an Action againſt *B.* and he is condemn'd, and does not pay, *&c.* in Debt, upon this Recognizance, it muſt be averr'd, that he gave *B.* 8 Days Warning to appear, *&c.* for *A.* is bound only to anſwer the Condemnation, in ſuch Action upon which 8 Days Warning was given, for that is the Foundation of the Whole, and there is no Reaſon that *B.* by his voluntary Appearance, without Warning, ſhould prejudice his Bail. *Mich.* 2 *Jac.* between (i) *Hargrave* and *Rogers Yelv.* 52, 53. by *Poph. Gaudy*, and *Williams*, contra *Fenner* and *Yelv.* and the Plaintiff accordingly diſcontinued his Action.

(i) Cro. Jac. 45. S. C. and S. P. by the ſame three Judges againſt the ſame two.

Fol. 338.

(a) Bailment.

(a) For a Diverſity between a Poſſeſſion, a Charge, and a ſpecial Uſe, vide 3 Inſt. 108.

1. (b) **If a Man (c) pawns Goods to me for Money, and I put them among my other Goods, and all (d) are ſtole before any Tender of the Money, I ſhall not anſwer to him for the Goods, for I had a Property in the Goods for the Time.** (e) 29 Aſſ. 28. **adjudged.**

(b) Co. Lit. 89. a. S. P. 4 Co. 83. b. S. P. (c) What Intereſt the Pawnee hath in the Goods pawned. vide Ow. 123, 124. Yelv. 178. Cro. Jac. 244. 1 Bulſt. 29, 30. 1 Rol. Rep. 181. (d) The Law is the ſame in Caſe of Fire, and all other inevitable Accidents. Co. Lit. 89. b. (e) Br. Bailment, 7. S. C. Detinue 33. S. C. 1 Rol. Rep. 129. S. C. cited.

(f) Co. Lit. 89. a. S. P. 4 Co. 83. b. S. P. Palm. 551. vide.

2. (f) **But it had been otherways, if the Tender of the Money was before the Stealing, (g) (for by the Tender, the Property was veſted in the Mortgagor) and I but a Bailee.** (h) 29 Aſſ. 28. ad**judged.**

(g) And he may bring Detinue, or Trover for it. 1 Bulſt. 29. Cro. Jac. 244. Yelv. 178. 1 Rol. Rep. 129. (h) Br. Bailment 7. S. C. Detinue 35. S. C. 1 Rol. Rep. 129. S. C. cited.

(i) Co. Lit. 89. a. S. P. 4 Co. 83. b. S. P. Cro. El. 815. S. P.

3. (i) **But a general Bailee of Goods ſhall anſwer for them, if they are ſtole with his own Goods, for when he accepts them generally, it is with a Warranty in Law.** contra (k) 29 Aſſ. 28. per Thorp.

Kelw. 77. b. S. P. per Frowick arguendo 160. a. S. P. arguendo. Sav. 74. vide 1 Sid. 36. S. P. admitted. 1 Rol. Abr. 3 Pl. 2. vide. (k) Br. Bailment 7. S. C. Detinue 35. S. C.

(l) 4 Co. 83. b. S. P.

4. (l) But if Goods are delivered to him to be kept, (m) as he would keep his own, there if they be ſtole from him, (n) without his Default or Negligence, he ſhall not be charged. *Co. Lit.* 89. a.

(m) It is neceſſary for him that receives Goods, to make a ſpecial Acceptance, viz. to be kept as his own, or at the Peril of the Owner. Co. Lit. 89. b. (n) For this vide Doct. and Student 129.

(o) 4 Co. 83. b. S. P.

5. (o) If *A.* leaves a Cheſt locked with *B.* to be kept, and takes away the Key with him, and acquaints not *B.* what is in the Cheſt, and the Cheſt, together with the Goods of *B.* are ſtolen away, *B.* ſhall not be charged therewith, becauſe, as this Caſe is, *A.* did not truſt *B.* with them. *Co. Lit.* 89. a. b.

(p) 1 Rol. Abr. 3. Pl. 3. vide.

6. (p) If *A.* agiſts the Horſe of *B.* for 2 *s.* a Week, and he is ſtole, yet *B.* ſhall have no Action againſt *A. Hill.* 40 *Eliz.* between *Moſly* and *Foſſet. Moor* 543. *Pl.* 720. *per totam Curiam* agreed, unleſs *A.* makes a ſpecial Promiſe to keep or re-deliver him ſafely.

(a) Bailiff.

Fol. 339.

(A) What Perſon may be.

1. A Clerk may be Bailiff of a Manor. (b) 4 H. 4. 2. (c) b.

(a) For the Derivation of the Word, vide Co. Lit. 61. b. 168. b. (b Fitz. Labourers 61. S. C. 51. S. C. (c) In the Original it is 6.

(B) The (a) making of a Bailiff.

1. (b) If a Man takes Cattle, claiming Property to himſelf, as an Heriot, if the Lord agrees to the taking for Services to him due, yet he cannot be ſaid to be his Bailiff for this Time. (c) 7 H. 4. 34. b.

(a) Whether traverſable or not, vide where the Authority ſhall be traverſed or not, in the Sub-diviſions of Traverſe, Title Pleading. (b) Godb. 110. vide. (c) Fitz. Bailiff 7. S. C. Br. 4. S. C. Br. Treſpaſs 86. S. C. Br. Diſtreſs 13. S C.

2. (d) But if he took them without (e) any Command for Services due to the Lord, if the Lord after agreed to the Taking, he ſhall be adjudged as a Bailiff, altho' he was not his Bailiff in any Place before. (f) 7 H. 4. 35.

(d) Godb. 110. S. P. per 2 Judges. (e) A Man's acting for the Bailiff of the King, makes him his Bailiff, for by naked Matter of Fact, a Man may as well be the King, as of a common Perſon, Kelw. 174. (f) Fitz. Bailiff 7. S. C. Br. 4. S. C. Br. Treſpaſs 86. S. C. Br. Diſtreſs 83. S. C.

(C) (a) What (b) Things a Bailiff (c) may do.

1. A Bailiff of a Manor may (d) leaſe the Piſcary for Years. (e) 3 H. 4. 12. b.

(a) For this, in general, vide 1 Rol. Rep. 258. Cro. Jac. 377. 2 Leon. 46. Lit. Rep. 70, 71. 2 Lev. 210. (b) Where a Bailiff of a Manor cannot diſtrain for Amercements, without a ſpecial Warrant from the Steward. Cro. El. 698. 748. 2 Keb. 745. Pl. 55. Moor 574. Pl. 789. 607. Pl. 839. 3 Mod. 138. (c) What Payments he may make, and how to be allowed them upon his Account, vide 1 Rol. Abr. 125. Pl. 8, 9. 126. Pl. 1. (d) Diverſity between a Leaſe for Years, and a Leaſe at Will, for he may do all Things for the Benefit, but nothing for the Diſadvantage of his Lord. Lit. Rep. 71. (e) Fitz. Bailiff 6. S. C.

2. A Bailiff by any Uſage cannot make a Leaſe of his Maſter's Land of an Eſtate of Freehold. (f) 19 Aſſ. 9.

(f) Br. Cuſtoms 33. S. C. Leaſes 25. S. C.

3. A Bailiff may give Licence to another to go over the Land, for this is a Treſpaſs to the Poſſeſſion only, and the Bailiff hath the Diſpoſal of the Profits of the Poſſeſſion, ergo dubitatur M. 13 Jac. B. R. between (g) Winkfield and Bell.

(g) 1 Rol. Rep. 258. S. C. and S. P. if upon a Conſideration, but if not, by the better Opinion there, the Licence is void, but it being there pleaded, quod licentiavit, and found accordingly, it was ſaid by Coke, it ſhould be intended, Cro. Jac. 337. S. C. adjudged per totam Curiam, becauſe, as pleaded, it muſt be intended it was upon a Recompence.

4 A Bailiff of a Manor may himſelf, or may command another, to take Cattle Damage-feſant upon the Land, for he hath the Care of all Things within the Manor. M. 5 Jac. B. between Tomliſon and Benſon, per Curiam.

5. If a Diſtreſs is taken for Damage-feſant, Amends cannot be tendred to the (h) Bailiff, for he cannot deliver a Diſtreſs when it is once taken, (i) no more than he can change the Avowry of his Maſter,

(h) Not to him that maketh Coor nuſance,

or (k) demand Rent upon a Condition of Re-entry. *Paſch.* 43 *El.* between (l) *Pilkington* and *Haſtings*, 5 *Co.* 76. adjudged.

1 Brownl. 173.

(i) Hob. 154. S. P. 1 Rol. Abr. 316. Pl. 1. S. P. (k) Hob. 154. S. P. Dier 222. Pl. 21. S. P. per Curiam, and vide Moor 141. Pl. 282. Cro. El 22. (l) Cro. El. 813. S. C. where A. avowed for Damage-feſant, and B. made Conuſance, as Bailiff to A. and the Plaintiff replied, and ſhew'd a Tender to B. and it was adjudged per totam Curiam, the rather, becauſe the Maſter was preſent at the Diſtreſs: But Gaudy ſaid, if the Diſtreſs had been taken by the Servant alone, the Tender to him would have been more colourable; and Popham ſaid, if the Tender had been to the Bailiff of the Manor, perhaps it might have been good, but not to a Servant, who joined only in the Diſtreſs. Co. Ent. 602. Pl. 17. S. C.

6. In Debt for Rent, upon a Leaſe for Years, the Defendant pleaded, That the Plaintiff made *J. S.* Bailiff of his Manor, of which the Lands in Leaſe were Part, and gave to him Power to receive the Rents of the Leſſees, *&c.* and alſo Power to make Leaſes for Years, and that an Agreement between the ſaid Bailiff and Defendant was made, that he ſhould pay 100*l.* and alſo ſurrender his Leaſe to the Uſe of the Lord, and then ſhould be diſcharged of the Rent, which he hath done; and whether this Agreement would bind the Lord, *Paſch.* 1 *Car.* between *James* and *Owen*, *Palm.* 402. *Dubitatur*, upon Demurrer, and a peremptory Day given to the Defendant to maintain his Plea, after which, the Reporter *nil plus inde audivit.*

7. *A.* leaſes to *B.* for 99 Years, if *B. C.* or *D.* ſhall ſo long live, reſerving a Heriot, or 5 *l.* upon the Death of every of them, *A.* dies, and the Bailiff of *A.* makes Conuſance, as Bailiff generally, for a Heriot, but does not ſhew that *A.* had made his Election, and whether this was not good, and incident to the Place of the Bailiff, or, at leaſt, whether this ſhould not be intended for the Benefit and Advantage of the Maſter, till the contrary was ſhewn. *Mich.* 3 *Car.* between (m) *Bear* and *Hodges*, *Lit. Rep.* 33. 70, 71. *Dubitatur & adjornatur*, and after the Parties agreed.

(m) Hetl. 12. 16, 17. S. C. and S. P. but ill reported.

(a) Bankrupt.

Who ſhall be taken as ſuch.

(a) For the Definition, and Derivation of the Word, vide 4 Inſt. 277.

1. PER 13 *Eliz. Cap.* 10. Any Perſon being a (b) Subject, or Denizen, uſing, or exerciſing the (c) Trade of (d) (e) Merchandiſe by way of Bargaining, Exchange, Rechange, Bartry, Cheviſance or otherways, in Groſs, or by Retail, or (f) ſeeking his or her Trade of living, (g) by buying (h) and ſelling, that departs the Realm, or (i) begins to (k) keep Houſe, or otherways to abſent himſelf, or take Sanctuary, or ſuffers himſelf willingly to be arreſted for any Debt not due, or (l) ſuffers himſelf to be outlawed, or yields himſelf to Priſon, or departs from his Houſe, to the Intent to defraud (m) any of his Creditors, being Subjects born, ſhall be (n) deemed a Bankrupt.

(b) But, per 21 Jac. Cap. 19. Paragr. 15. as well that Act, as all other, ſhall extend to Strangers, both Aliens and Denizens, as well to be relieved, as to be ſubject to the Penalties thereof. (c) A Shoemaker is within the Act, for he lives by his Credit, in buying Leather, and ſelling it again in Shoes, and not upon his manual Labour only. Cro Car. 31. per Curiam, & vide Cro. Eliz. 268, 3 Mod. 330.—That a Cleaver, or Dier, may have an Action for calling them Bankrupt, vide Cro. Jac. 585.—So of a Drover that uſes to buy and ſell Cattle, Collis and Malin, 1 Jon. 304. Cro. Car. 282.—But ſuch as live upon their manual Labour only, as Labourers, Huſbandmen, &c. are not within the Act, Cro. Car. 31. per Curiam.—And if one covenants with the King to victual the Fleet, at a certain Rate, and thereupon buys up great Quantity of Proviſion, &c. and tho' with the Surplus, he victuals Merchants, yet being originally deſigned for the Uſe of the Navy, it will not make him a Trader within the Act, Sir Tho. Littleton's Caſe, 1 Vent. 270. adjudged, 3 Keb. 451. adjudged. (d) An Inn-keeper, as ſuch, can be no Bankrupt, for tho' he buys Proviſions to be ſpent in his Houſe, yet he doth not properly ſell them, but utters them at ſuch Rates which he thinks reaſonable, and the Attendance of his Servants, Furniture of his Houſe, &c. is to be conſidered, and the Statute only mentions Merchants that uſe to buy and ſell in Groſs, or by Retail, and ſuch as get their Living by buying and ſelling, ſo as their principal Means is by buying and ſelling. Criſp and Prat, Cro. Car. 549. adjudged by 3 Judges, contra Barkly, who held the contrary, and the rather, becauſe found by the Verdict.

Verdict, that he got his Living by buying and selling, using the Trade of an Inn-holder, 1 Jon. 437, 438. by 2 Judges against Barkly and Jones, who held, as this Verdict was found, he was a Bankrupt, March 34. resolved by all 4 Judges, and per Barkly, if the Jury had found that he was an Inn-holder only, he should not have been taken to be a Bankrupt, but it being found, that he got his Living by buying and selling, &c. 'tis otherways: And per Jones, Justice, if an Inn-holder lives meerly by buying and selling, as those in London do, he is within the Statutes, but if he hath Land, Hay, and Grain of his own, as many in the Country have, he is not within the Statutes, Newton and Trigg, 3 Lev. 309, 310. adjudged per totam curiam, for an Inn-keeper, for the common Good, keeps an House for the Entertainment of Travellers, and is bound to find them Provisions at reasonable Prices, but being found that he bought and sold Provisions, and thereby got his Living, Dolben inclined, he might be a Bankrupt, but that a Country Inn-keeper, that rents Land, hath Hay, &c. of his own Growth, cannot; but after Dolben assented that Judgment should be given, according to the Opinion of the other Judges, 3 Mod. 327. adjudged, and said, there was no material Difference between an Inn-keeper, and the Master of a Boarding-School, who buys and dresses Provisions for young Scholars, &c. (e) Intended of buying and selling personal Things, not Land, March 35. per Croke. (f) A meer buying and selling brings not a Man within the Statute, but it is intended, of such who gain the greatest Part of their Living thereby, March 35. per Jones and Croke Justices,—and therefore where a Farmer bought and sold Cattle, &c. it was adjudged he was no Bankrupt, March. 35. cited, & vide Cro. Car. 549. (g) A Ship was indebted to a Man for Repairs, and he bought a share in her, and joined with the Owners in the victualling and employing of her, 1 Sid. 411. per Curiam, præter Rainsford, this brought him not within the Statute, the Ship not having got so much as the Repairs came to, and per 1 Vent. 29. the having a Share in a Ship, makes not a Trader within the Act,—but where the Owners join in the freighting the Ship, 1 Vent. 29. dubitatur,—the having a Joint Stock, makes not a Bankrupt, without some Proof of a Disposal thereof, 2 Keb. 487. (h) In the conjunctive, and he that gains his Living by buying only, or selling only, is not within the Statute, March. 34. per Barkly, 3 Mod. 328. —But if one buys in England only, and sells in Ireland, he may be a Bankrupt, for many Merchants do buy beyond Sea, and only sell in England and others buy here, and sell beyond Sea, and the Trading makes a Bankrupt, Dodesworth and Anderson, Raym. 375. adiudged, 2 Jon. 141. adjudged, being found by special Verdict, that he sold but once in England. (i) But if there be a Process out against one, and he thereupon keeps House, to save himself from an Arrest, and after goes out to Market, and other Places, but after he hears of a new Process, keeps House again, and after goes abroad again, &c. he is no Bankrupt, per Cro. El. 13. per Curiam, because he uses to go abroad, and it may be, his Policy will not prevent his Arrest, and Serjeant Goodwin, Fol. 26. makes a Quere of this. (k) But if one keeps House a long Time, this does not presently make him a Bankrupt, but if one conceals himself within his House but for a Day, or Hour, to delay or defraud his Creditors, this makes him a Bankrupt, Palm. 325. (l) This must be intended voluntarily, 1 Lev. 13. and if not necessary, to be found so in a special Verdict, ibid. dubitatur, 2 Sid. 177. 1 Keb. 11. (m) Whose Debts were contracted during his Trading, 3 Mod. 309. 1 Sid. 411. 2 Keb. 453.—but not if contracted after, 3 Lev. 17. 2 Keb. 453.——And if one contracts a Debt while he is a Trader, and after leaves off, and lives upon his Estate in the Country, and after absconds for this Debt, he is a Bankrupt, because he lived by his Trade when the Debt was contracted, Palm. 325. 3 Lev. 17. 1 Vent. 5.——But if a Merchant leaves off his Trade, and after contracts Debts, and after sells off the Surplusage of his Goods, but hath neither Factor, Correspondent, nor Parker, he can be no Bankrupt in respect of these Debts, Sir Rob. Cotton's Case, 1 Sid. 411. adjudged, 1 Vent. 29. adjudged, 2 Keb. 487. but Q. how it shall be known when he has left off his Trade, 1 Vent. 166.——but in such Case, if he leaves his Goods in the Hands of another, to be disposed of, and is a Participator with him in the Loss and Gain, he may be a Bankrupt, Palm. 325. (n) But tho' declared so by Commissioners, he may traverse it, because he hath no other Remedy, 8 Co. 121. a. 4 Inst. 277.——Tho' the Commissioners have the sole Authority to adjudge a Man a Bankrupt, yet in an Action, the Jury must find whether he was so or not, and not barely by the Adjudication of the Commissioners, Raym. 337. 2 Sid. 176.

2. *Per* 1 *Jac. Cap.* 15. because the Description of a Bankrupt, in former Statutes, is not so fully expressed, it is thereby Enacted, That every Person, being a Subject or Denizen, that shall use the Trade of Merchandise, by way of Bargaining, Exchange, Bartry, Chevisance, or otherways, in Gross or by Retail, or seeking his or her Trade of Living, by buying and selling, that shall depart the Realm, begin to keep House, or otherways absent himself, or take Sanctuary, or suffer himself willingly to be arrested for any Debt not due, or suffer himself to be outlawed, or yield himself to Prison, or fraudulently procure himself to be arrested, or his Goods, *&c.* to be attached, or sequestred, or depart from his House, or makes (o) any fraudulent Grant of his Lands, *&c.* to the Intent, or whereby his Creditors being Subjects born, shall, or may be defeated, or being arrested for Debt, shall lie in Prison for 6 Months, or more, upon that, or any other Arrest or Detention, shall be adjudged a Bankrupt.

(o) Hut. 42, 43. a Case very darkly reported, vide.

3. *Per* 21 *Jac. Cap.* 19. setting forth, that there were Defects in the former Description of a Bankrupt, it is Enacted, That every Person that uses the Trade of Merchandise, *&c.* or that uses the Trade of a Scrivener, receiving

receiving other Mens Money into his Truſt and Cuſtody, who by himſelf, or others ſhall procure any Protection, (except ſuch as ſhall be lawfully protected by Privilege of Parliament) or by Petition, Bill, &c. ſhall endeavour to compel their Creditors to take leſs than their due Debts, or to gain longer Time for Payment thereof, than was given upon the original Contract, or being indebted in 100 *l.* or more, ſhall not pay, or compound for the ſame, within 6 Months after the ſame becomes due, and the Debtor be arreſted for the ſame, or within 6 Months after an Original ſued out, and Notice thereof given, or left in Writing, at his Houſe, or laſt Place of Aboad, or being arreſted for Debt, ſhall lie in Priſon for 2 Months, or more, upon that, or other Arreſt or Detention for Debt, or being arreſted for 100 *l.* or more, juſt Debt, eſcapes out of Priſon, or is delivered, by putting in common, or hired Bail, ſhall be adjudged a Bankrupt; and in caſe of Arreſt, lying in Priſon, or getting forth by common or hired Bail from the Time of the Arreſt.

(p) And yet, before this Act, it was adjudged, that ſuch a Trading only, did bring a Man within the Statutes, Goodwin of Bankrupts, 20.

4. *Per* 13 and 14 *Car.* 2. *Cap.* 24. it is (p) declared, That none that adventure in the *Eaſt-India* or *Guinea* Company, or that put Money into any Stock, for carrying on the Fiſhing-Trade, or receive their Dividend in Goods, which they ſell or exchange; ſhall by Reaſon thereof, only be adjudged a Trader within the Statute of Bankrupts: Provided, that Perſons trading in other Way or Manner, ſhall be liable to a Commiſſion as fully, and not otherways, as if that Act had not been made.

From what Time.

Relation de Bankruptcy.

(a) But if A. be arreſted at the Suit of an Executor, before Probat of the Will, and after pays Money to a Stranger, and continues 6 Months in Priſon, the Arreſt (quoad the Stranger) being illegal, A. ſhall not be adjudged a Bankrupt from that Time, ſo as to avoid the Payment made to the Stranger, Duncomb and Walter, 3 Lev. 57, 58. adjudged, Raym. 479. adjornatur, by which Book, ſufficient Bail was put in for his Appearance, but after Payment to the Stranger, and before the Return of the Writ, A. ſurrendred himſelf, in Diſcharge of his Bail, and continued in Priſon, &c. 1 Vent. 370, 371. adjudged, and affirmed upon Error, and the Court ſaid, The Miſchief would be great, if there ſhould be ſuch a Relation to the firſt Arreſt, as to make void the Payment to a Stranger, M.

1. *Per* 21 *Jac. Cap.* 19. *Par.* 2. IF being indebted in 100 *l.* or more, he pays not, or otherways compounds for it within 6 Months next after it becomes due, and the Debtor be arreſted for the ſame, or being arreſted for Debt, lies in Priſon 2 Months upon that, or other Arreſt or Detention for Debt, or being arreſted for 100 *l.* Debt, or more, eſcapes out of Priſon, or is enlarged upon putting in common or hired Bail, he ſhall be adjudged a Bankrupt (a) from his firſt Arreſt.

2. *Per* 1 *Jac. Cap.* 15. *Par.* 14. No Debtor ſhall be prejudiced by Payment of his Debt to any Bankrupt, before he hath Notice that he is ſo.

(b) If a Man commits an Act of Bankruptcy, and after continues in Poſſeſſion of his Lands for 4 Years, and then ſells, and after commits another Act of Bankruptcy, and 2 Years after, a Commiſſion is taken out, &c. this Sale ſhall ſtand, for the Act of Bankruptcy, by which the Sale is to be avoided, muſt be done within 5 Years before the Commiſſion ſued out, Radford and Bludworth, 1 Lev. 13, 14. 2 Sid. 69. 114. 176. the Court divided, 1 Keb. 11, 12. & vide 1 Keb. 722.

3. *Per* 21 *Jac. Cap.* 19. Par. 14. No Purchaſer ſhall be impeached, unleſs the Commiſſion be ſued forth within 5 Years (b) after he becomes a Bankrupt.

Commiſſions

Commiſſions of Bankruptcy.

How, and by whom to be granted.

1. *Per* 34 *H.* 8 cap. 4. The Lord Chancellor, Treaſurer, *&c.* were to take Order with the Bankrupt's Lands and Goods, for Payment of his Debts.

2. *Per* 13 *Eliz.* cap. 7. The Lord Chancellor, or Keeper, (a) upon Complaint in Writing, ſhall (b) have Power, by Commiſſion under the great Seal, to appoint honeſt and diſcreet Perſons, who, or the moſt of them, may take ſuch Order with the Body, *&c.*

(a) But without ſuch Complaint, tho' 20 Men ſwear the Bankruptcy, the Lord Keeper cannot grant a Commiſſion, &c. 2 Chan. Rep. 191. (b) This Commiſſion is grantable de jure, as if the Words had been ſhall, or ought to grant. 2 Chan. Rep. 191.

Commiſſioners.

(a) How they ſhall proceed,

In the Diſcovery of the Bankrupt's Eſtate.

(a) Their Commiſſion and Power is by Force of the ſeveral Acts of Parliament which ought to be purſued, or elſe they are ſubject to the Action of the Party grieved, for he hath no other Remedy. 4 Inſt. 277. (b) And tho' examined before Commiſſioners, yet a Bill for Diſcovery of the ſame Matter, may be filed againſt them in Chancery. 2 Chan. Rep. 73. (c) So if he anſwers not directly to the Queſtion put to him. 1 Vent. 324. per Curiam.— Where, as to the Time of the Sale of Goods by the Bankrupt, the Witneſs would anſwer only as to his Remembrance, and not poſitively. 2 Chan. Rep. 73.

1. *Per* 13 *Eliz.* Cap. 7. Par. 5. They may call before them, by ſuch Proceſs, Ways, or Means, as they think proper, any Perſon ſuſpected to have any of the Bankrupt's Goods, *&c.* in his Cuſtody, or to be indebted to him, and upon Oath, or (b) otherways examine ſuch Perſons of the Certainty thereof, *&c.* And, *per* Par. 6. If ſuch Perſon refuſe to ſwear, or being ſworn, (c) diſcloſes not the whole Truth, he ſhall forfeit double the Value of the Goods, to be levied, *&c.* And, *per* Par. 7. he that fraudulently demands or detains any of the Bankrupt's Goods, *&c.* ſhall forfeit double the Value, *&c.*

2. *Per* 1 *Jac.* Cap. 15. They may examine the Bankrupt upon Interrogatories touching his Lands, *&c.* And *per* Par. 8. if he refuſes, *&c.* they may commit him, *&c.*

3. And *per* 1 *Jac.* Cap. 15. Par. 10. If any Perſon, after Warning, refuſes, or comes not before the Commiſſioners to be examin'd, *&c.* having no Excuſe to be allowed by the Commiſſioners at their Meeting, or having Warning of any other Meeting of the Commiſſioners, appears not before them, having no lawful Impediment to be allow'd, as aforeſaid, they may direct their Warrant, *&c.* to apprehend, and bring him before them, *&c.* or, if being before them, he refuſes to be ſworn, or to anſwer Interrogatories, he ſhall be committed to ſuch Priſon as the Commiſſioners think fit, until he ſhall ſubmit, and be examined, *&c.*

4. *Per* 21 *Jac.* cap. 19. The Wife of a Bankrupt ſhall be examined, and for not coming, or refuſing to be ſworn, *&c.* ſhall incur the ſame Penalty as other Witneſſes.

5. *Per* 1 *Jac.* Cap. 19. The Commiſſioners, in Caſe of Reſiſtance, may break, or by Warrant under their Hands and Seals, authorize others to break open any Doors, *&c.* where the Bankrupt, or his Goods, *&c.* are, or are reputed to be, *&c.*

How they ſhall proceed,

Againſt his Perſon.

1. *Per* 13 *Eliz.* Cap. 7. Par. 9. If the Bankrupt withdraws himſelf from his Houſe, upon Complaint thereof to the Commiſſioners, they may award 5 Proclamations to be made in the Queen's Name, upon 5 Market-Days, in ſuch Places near which the Bankrupt hath moſt commonly dwelled, commanding him to yield his Body before the Commiſſioners, and if he doth not, he ſhall be out of the Queen's Protection, *&c.*

2. *Per* 1 *Jac.* Cap. 15. The Commiſſioners may call before them the Bankrupt, and if upon Warning in writing, 3 Times left at the Houſe where the Bankrupt, his Wife or Family, for the moſt Part, did reſide, within one Year before he became ſo, the Bankrupt ſhall not appear before them, they may cauſe him to be proclaimed at ſuch publick Place, or Places, as they think fit, warning him to appear before them, at a Time appointed, and if upon 5 ſeveral Proclamations, he appear not, they may award a Warrant to ſuch Perſon, *&c.* as they think meet, to apprehend him, and to bring him before them, to be examined, *&c.* and if he refuſes, they may (a) commit him, *&c.*

(a) Noy 140. vide.

3. *Per* 21 *Jac.* Cap. 19. Par. 7. If a Bankrupt fraudulently conveys away his Lands, Goods, *&c.* to the Value of 20 *l.* to hinder the Execution of the Statute, or delay his Creditors, and ſhall not upon his Examination diſcover the ſame, and if it be in his Power, deliver them to the Commiſſioners, or cannot make it appear to the Commiſſioners, that he hath ſuſtained ſome caſual Loſs, whereby he became diſabled, he ſhall be indicted, *&c.*

The Power of the Commiſſioners,

In the Sale and Diſpoſal of his Eſtate.

1. *Per* 13 *Eliz.* Cap. 7. They, or the major Part of them, by Virtue of the Act, and their Commiſſion, may, at their Diſcretion, order the Body of the Bankrupt, and his Lands and Tenements, as well (a) (b) Copy as Freehold, (c) which he had (d) before he became a Bankrupt, or hath purchaſed for Money, or other Recompence, jointly with Wife or Children, to the only Uſe of ſuch Offender, or for ſuch Uſe, Title, *&c.* as he may lawfully depart with, or with other Perſon, to any ſecret Uſe of ſuch Offender; and his Money, Goods, (e) Chattels, *&c.* and (f) Debts, (g) where-ever found, and cauſe the ſame to be ſearched, viewed, rented, and apprized, and by Deed indented, enrolled in one of Her Majeſty's Courts of Record, ſell the Lands, Tenements and Hereditaments, and all Deeds, *&c.* touching the ſame, and all Fees, Annuities, Offices, Goods and Chattels, or (h) otherways order the ſame, for the Satisfaction of the Creditors, *&c.*

(a) But by this Statute, Par. 3. the Vendee, before Entry, ſhall compound with the Lord for his Fine, and then the Lord, at the next Court, ſhall grant to him by Copy, for ſuch Eſtate as was ſold, and he ſhall thereupon be admitted, &c. —But however the Eſtate veſts in the Bargainee, by the Sale of the Commiſſioners, and the Bankrupt cannot after be ſaid to die ſeiſed thereof, Parker and Bleek. Cro. Car. 569. adjudged. 1 Jon. 451, 452. adjudged. (b) Tho' Copyholds are mentioned in this Clauſe only, yet in another Clauſe of this, and in the other Acts, they are included in the general Words, all Lands, &c. Criſp and Prat. Cro. Car. 550. adjudged. 1 Jon. 439. adjudged. March 36. adjudged. & vide 3 Lev. 327. (c) And any Diſpoſition by the Bankrupt after made, tho' in Satisfaction of a juſt Debt, is void. 2 Co. 26. a. Moor 594. Pl. 805. Hut. 43. (d) If A. having committed an Act of Bankruptcy, keeps on his Trade, and 4 Years after binds his Son Apprentice with a Goldſmith, and pays with him 120 l. being the uſual Sum in ſuch Caſes, and 2 Years after, a Commiſſion is taken out againſt A. this Money is not aſſignable by the Commiſſioners, being paid ſo long before the Commiſſion. 3 Lev. 59. adjudged per totam Curiam, upon a ſpecial Verdict, there being no Fraud. (e) But if the Leſſor covenants with the Leſſee to renew, and the Leſſee becomes a Bankrupt, the Commiſſioners cannot aſſign this Covenant. 1 Chan. Rep. 71. and a Bill brought by the Aſſignee, to compel the Leſſor to renew, diſmiſt. (f) An Action for Words is not aſſignable, but when, by the Judgment,

ment, the Damages and Coſts are reduced to a certain Sum, that may be aſſigned, Benſon and Flower, 1 Jon. 215. per Curiam, Cro. Car. 166. per Curiam, & vide 2 Keb. 372. — But if upon a Cap' ad ſatis' the Money is levied, and after the Plaintiff becomes a Bankrupt, and the Money aſſigned before the Return of the Writ, this Aſſignment is void, for being in the Hands of the Sheriff, it was quaſi in Cuſtodia legis, and not the Bankrupt's Money before it was paid him, Benſon and Flower, Cro. Car. 166, 176. adjudged per totam Curiam, and the Money order'd to be paid to the Plaintiff, (who could acknowledge Satisfaction) and not to the Aſſignees. (g) If the Conuſor, after the Extent, and before the Liberate, becomes a Bankrupt, and the Goods are after delivered upon the Liberate, and a Commiſſion is taken out, &c. they cannot be ſold, for by the Extent, they were in Cuſtodia legis, and it was not in the Power of the Conuſor, by any ſubſequent Act, to deſtroy the Effect of the Extent, Audly and Halſey, Cro. Car. 148. adjudged. 1 Jon. 202, 403. adjudged, & vide ſeveral like Caſes there put, and 1 Jac. Cap. 15. Par. 9. (h) Therefore they may ſell Goods without Deed inrolled. 2 Co. 26. a. — or before they have ſearched, viewed, &c. 2 Co. 26. — but they cannot ſell Land without Deed inrolled, and the Inrollment thereof operates not by way of Relation, ſo as to paſs the Eſtate ab initio. 1 Vent. 360, 361. adjudged. 1 Jon. 196, 197. adjudged, for the Commiſſioners having only a bare Authority, nothing paſſes to the Vendee, till the Circumſtances of the Act are obſerved.

2. And *per* Par. 11. of the ſame Statute, Lands, *&c.* purchaſed, deſcending, reverting, or any way coming to him, after he is declared a Bankrupt, ſhall be ſold, *&c.*

3. Provided the Act ſhall not extend to Lands, Tenements, or Hereditaments, Free, or Copy, *bona fide*, conveyed by the Bankrupt, before he became ſo, and not to the Uſe of himſelf, or his Heirs, or ſuch who were privy or conſenting to his fraudulent Purpoſe.

4. *Per* 1 *Jac.* Cap. 15. Par. 5. If any Perſon, who ſhall be Bankrupt, ſhall convey, or cauſe to be conveyed, any (i) Lands or Goods to (k) his (l) Children, or others, or (m) transfer his Debts into other Mens Names, except upon Marriage, of a Child, (both Parties being of the Age of Conſent) or ſome valuable Conſideration, the Commiſſioners may ſell them.

(i) Copyholds are within theſe general Words, Criſp and Prat, Cro. Car. 550. adjudged. 1 Jon. 439. adjudged. March 36. adjudged. (k) But where a Man purchaſed a Copyhold to himſelf and Wife for Life, Remainder to his Son, and his Heirs, and 2 Years after became a Trader, and 4 Years after a Debtor and Bankrupt. Criſp and Prat. Cro. Car. 550. by 3 Judges againſt 1, it was adjudged, they could not ſell it, no Fraud being found. 1 Jon. 438, 439. adjudged by 3 Judges againſt 1, March 37. by 3 Judges againſt Berkly, who after concurred with them. — If a Man be a Tradeſman, and after leaves his Trade, and then Purchaſes, &c. and after becomes a Tradeſman again, and a Bankrupt, this is not within the Statute. March 37. per Crook. — So if a Tradeſman, when he Purchaſed, if not in Debt, or done fraudulently. March 37, 38. per Ch. Juſtice, for he muſt be an Offender; which his Intent to defraud makes him, — but, March 37. per Jones, if a Tradeſman, tho' not Offender, at the Time it is within the Statute. — But if the Father conveys to his Children, to ſecure them Money given by their Grandfather, if it can be proved, the Father had Effects of the Grandfather's in his Hands, at the Time of the Execution of the Deed, it ſhall not be avoided. 1 Mod. 76. ruled per Hale, Ch. Juſtice, upon a Trial at Bar. (l) So if upon his Wife, in Conſideration of Marriage; for a Proviſion for her and them, is a Providing for himſelf. Stil. 289. adjudged, it not being pleaded, or found to be made upon any valuable Conſideration, as a Portion, &c. (m) So if an Obligation be taken in the Name of another, to the Uſe of a Bankrupt. Noy 142. — and after Aſſignment, the Obligee cannot releaſe it. Palm. 505.

5. And by the ſame Statute, Par. 13. They may grant and aſſign, or otherways order and diſpoſe the Debts due to a Bankrupt, by which Aſſignment, or Diſpoſal, the Property, Right and Intereſt of the Debt, ſhall be ſo veſted in the Aſſignees, *&c.* (n) as if to them originally made, or due; and it ſhall not be (o) recovered or releaſed by, or attached for the Debt of the Bankrupt, but the Aſſignees ſhall have (p) (q) like Remedy for it (r) in their own Name, as the Bankrupt had. *Per* Par. 14. Provided no Debtor be prejudiced by Payment of his Debt to the Bankrupt before he became ſo.

(n) By the Act, the Privity of Contract is transferred. 1 Sand. 239. & vide 1 Sid. 327.

(o) After Judgment, the Plaintiff becomes a Bankrupt, and this Judgment is aſſigned, and after the Plaintiff takes out Execution, and the Money is levied, and brought into Court, it ſhall not be ſaid there upon a bare Surmiſe, but the Aſſignees may bring a ſpecial Scire facias, in which the Bankruptcy ſhall be tried, Monk and Morris, & al' 1 Vent. 193. adjudged, and tho' the Aſſignees had delayed ſo to do, yet becauſe it was hazardous to deliver the Money to the Plaintiff, the Court ſtopped it, ſo that the Aſſignees would forthwith take out a Scire facias, &c. 1 Mod. 93. ruled accordingly. 3 Keb. 1. 14. 68. (p) And if a Debt upon a ſimple Contract is aſſigned, yet Debt will not lie againſt the Executor of the Debtor, Morgan and Green. Cro. Car. 187. adjudged, tho' objected, it was quaſi, a Debt upon Record, and the Aſſignee enabled by Act of Parliament to ſue. 1 Jon. 223. adjudged, —— and where Wager of Law lay againſt the Bankrupt it lies againſt the Aſſignees. Cro. Jac. 105. — but the Aſſignee may have Caſe againſt the Executor, as the Bankrupt might have had. 1 Jon. 223. adjudged. (q) The Plaintiff declares upon an Aſſumpſit, for 43 l. 1 s. and ſets forth an Aſſignment of the Debts of the Bankrupt, mentionat' in quadam

quadam Secula, continent præd' Summam, 43 l. 1 s. and the Jury find he was indebted only in 41 l. 1 s. which he promiſed, &c. and that the Commiſſioners aſſigned Debita præd' in quadam Scedula content. præd' Summam, 43 l. 1 s. &c. and if this is the ſame Promiſe concludes for the Plaintiff, and becauſe the Iſſue and Verdict were concluded to the Promiſe, and the Aſſignment not in queſtion, and the Statute gives the like Remedy to the Aſſignee, as the Bankrupt had, Baker and Edmunds. All. 28, 29. it was adjudged for the Plaintiff, the Aſſignment not being laid of ſuch a Sum, as by that Name, for then perhaps it would have been a Queſtion. Stil. 62, 63. adjudged, the Aſſignment not being in queſtion, but whether that was good or not dubitatur, but Raym. 7. cited, and ſaid, Tho' the Aſſignment was not good in Strictneſs of Law, yet it was held ſo in favour of Creditors. (r) If there be a joint Bond to A. and B. and A. becomes a Bankrupt, &c. the Aſſignee can't bring an Action alone, but if aſſigned to B. he alone may bring an Action, being intituled to one Moiety in his own Right, and to the other, for the Benefit of the Creditors, by Virtue of the Aſſignment, Boylſton and Radcliff. 1 Lev. 17. arguendo, to which Windham, Juſtice, inclined, but adjornatur Raym. 6, 7. adjornatur. 1 Keb. 167. adjornatur.

6. *Per* 21 *Jac* Cap. 19. Par. 10. If the Lands, *&c.* after the Bankruptcy, are extended by the King's Accountant, the Commiſſioners, upon Oath, may examine whether upon a Contract, *&c.* originally made between the Accountant and Bankrupt, and if not, they may order and diſpoſe of the Lands.

7. And by the ſame Act, Par. 11. Whereas Bankrupts commonly, before they become ſo, convey their Goods upon good Conſideration, and yet continue the Poſſeſſion of them, and are reputed the Owners thereof, it is enacted, That if at the Time of the Bankruptcy, they have in their Poſſeſſeſſion, Order, or Diſpoſition, as Owners, the Goods of others, with their Conſent, the Commiſſioners may ſell them, *&c.*

8. And by the ſame Act, Par. 12. They may ſell any Lands whereof the Bankrupt is ſeiſed in Tail, in Poſſeſſion, Reverſion, or Remainder, whereof there is no Reverſion or Remainder in the King, of the Gift or Proviſion of the King, which ſhall bind the Iſſue in Tail, and all others, whom the Bankrupt, by common Recovery, might cut off.

(s) By this Statute they are enabled to perform the Condition, &c. but if the Mortgage is forfeited. 1 Chanc. Rep. 71. it is made a Quere, Whether the Commiſſioners may diſpoſe of the Equity of Redemption; but Serjeant Newdigate ſaid it had been ruled in Chancery, That Commiſſioners may aſſign an Equity of Redemption.

9. And by the ſame Act, Par. 13. If the Bankrupt hath granted any Lands, *&c.* upon Condition to be void upon Payment of Money, or other Performance, the Commiſſioners, (s) before the Time of Performance, under their Hands and Seals, may appoint one to tender the Money, or make other Performance, and may after ſell the Lands, *&c.*

In the Diſtribution (a) thereof.

(a) How the ſeveral Penalties, by Offenders forfeited, ſhall be levied, and diſtributed, for the Satisfaction of the Creditors, vide 13 Eliz. cap. 7. Par. 6. 1 Jac. cap. 15. Par. 12. (b) But if there be Accounts between 2 Merchants, and one of them becomes a Bankrupt, it is not the Courſe, to make the other (who, perhaps, upon ſtating the Account, is indebted to the Bankrupt) to pay the Whole, and to put him, as to what the Bankrupt owes him, in Condition with other Creditors, but to make him pay only what is due to the Bankrupt, on the Foot of the Account. 1 Mod. 215. per North. Ch. Juſtice, & vide 2 Bulſt. 26.—Secus, upon Accounts between them, after the Bankruptcy. 1 Mod. 215. per North. (c) And by this Act, Par. 10. the Creditor, not fully ſatisfied, may take his Courſe at Law, againſt the Bankrupt, for the Reſidue. (d) So that by this Act, any Creditor might come in at any Time, which made the Execution of the Statute, in Point of Diſtribution, very difficult, becauſe it was hard to find out all the Creditors, &c. 2 Chan. Rep. 154. (e) That comes in and prays the Benefit of the Act, but not to ſuch, who thro' Obſtinacy, or Careleſsneſs, neglect coming in, &c. 2 Co. 26. 2 Brownl. 311. 8 Co. 98. b. — and ſuch ſhall not be relieved in Equity. 1 Chan. Rep. 18, 19. (f) Two Partners put in each an equal Stock, and covenant the Stock ſhould pay the Debts of the Stock, and that neither of their ſeparate Debts ſhould charge the Stock; and both become Bankrupts, and one owed more ſeparately than the other. 2 Chan. Rep. 139. per North, the Creditors, on Account of the Joint Stock, ſhall not exclude the ſeparate Creditors from charging the Joint Stock; for the Covenants could not bind the Creditors, but the Reporter makes a Quere, How the ſeparate Creditors could have other Title, than thoſe under whom they claimed. (g) Where the King ſhall have only his Proportion, according to his Debt. vide 2 Sid. 177. but vide 1 Jon. 203. (h) 2 Co. 25, 26. a. (i) And therefore if the Bankrupt be ſeverally indebted to A. in 20 l. to B. in

1. *Per* 13 *Eliz.* Cap. 7. Par. 2. They are to ſell, or otherways order the Bankrupt's Lands, *&c.* for the Satisfaction and Payment of the Creditors, *viz.* (b) to (c) (d) every (e) (f) (g) Creditor a Portion, (h) rate-like, (i) according to the Quantity of his Debt.

B. in 20 l. and to C. in 5 l. the Commiſſioners cannot ſell Goods to them jointly in Satisfaction of their Debts, 2 Co. 26.——But where there is a joint Debt to ſeveral, there may be a joint Aſſignment in Satisfaction thereof, 2 Co. 26.——And where the Bankrupt is indebted to one in 20 l. and to another in 10 l. and hath a Bond of 24 l. only. Godb. 195, 196. per Curiam, it ought to be divided to every Creditor, rate and rate like, but how they muſt ſue, dubitatur.

2. (k) And by the ſame Act, Par. 4. Upon Requeſt by the Bankrupt, they ſhall declare how they have beſtowed his Lands, and pay the Overplus to the Bankrupt, *&c.*

(k) 1 Jac. Cap. 15. Par. 15. a Clauſe much to the ſame Effect.

3. *Per* 1 *Jac. Cap* 15. *Par.* 4. (l) Any Creditor, (m) within 4 Months after the Commiſſion ſued forth, and (n) until Diſtribution made, may (o) partake and (p) join with thoſe which ſued out the Commiſſion, the Creditors ſo coming in to contribute to the Charges (q) of the Commiſſion, and if they come not in within 4 Months, (r) then the Commiſſioners to diſtribute.

(l) Extends to the Sureties of the Bankrupt, that have Counterbonds to ſave them harmleſs, Osborn, & al' and Churchman, Cro. Jac. 127. adjudged, Noy 142. dubitatur, and ſaid, The Commiſſioners were Judges hereof, and that after Aſſignment to ſuch Creditors, ſuch Allegations came tarde. (m) Therefore there can be no Diſtribution till after the 4 Months, but the Commiſſioners may preſently, upon the Execution of the Commiſſion, ſell, and prepare for a Diſtribution, Hut. 37. (n) But after the 4 Months, and Diſtribution of any Part, no Creditor ſhall be received, &c. Rugle's Caſe, Hob. 287. adjudged, Hut. 38. adjudged, yet vide 1 Chan. Reports, 307. ——After the firſt Diſtribution, no Creditor can come in to diſturb it, but may come in for the reſidue, of which no Diſtribution is made, 2 Chan. Rep. 154. (o) And by this they become intereſted in the Commiſſion, and no Superſedeas thereof ought to be granted till they are ſatisfied, tho' the Creditors who prayed it, are willing it ſhould be ſuperſeded, 2 Chan. Rep. 143. and 190. it appears, that a Superſedeas was granted within the 4 Months, and therefore the Non-Petitioners might after pray a Diſcharge thereof, becauſe they cannot be blamed, for they had Time till after the 4 Months to come in. (p) Upon joining, they muſt offer to be contributory to the Charges, tho' they need not offer any particular Sum, for that is to be aſſeſſed by the Commiſſioners, Hut. 38. (q) Intended in the ſuing forth Execution, and Defence thereof, &c. Hut. 38. (r) Before this Act, the Commiſſioners might have diſtributed at any Time. 2 Chan. Rep. 154.

4. *Per* 1 *Jac. Cap.* 15. *Par.* 18. If the Bankrupt dies after a Commiſſion ſued forth, and dealt in by the Commiſſioners, and before Diſtribution, the Commiſſioners may proceed in the Execution, *&c.* (s) as if living.

(s) And if the Bankrupt dies, and after the King dies, by which, the Commiſſion is determined, a new Commiſſion may be granted, for if the Bankrupt had been living, a new Commiſſion might have been granted. 2 Chan. Rep. 193.——and in ſuch Caſe they may proceed upon the new Commiſſion, where the laſt Commiſſioners left off. 2 Chan. Rep. 194.

5. *Per* 1 *Jac. Cap.* 15. *Par.* 9. The Commiſſioners may examine upon Oath, or by other Ways, any Perſon for (t) Diſcovery of the Truth of Debts owing to ſuch Creditors as ſeek Relief, and Creditors, by Judgment, Statute, Recognizance, Specialty, or other Security, or having no Security, and having (u) made Attachments in *London*, or other Place, by Cuſtom of the Goods of the Bankrupt, whereof there is no (x) Execution or (y) Extent ſerved upon any Lands, *&c.* before he became a Bankrupt, ſhall be relieved for no more than a ratable Part of their juſt Debts, without Reſpect to any Penalty in any Judgment, Statute, *&c.*

(t) But where the Commiſſioners diſallowed the Proof of a Debt; and Chancery before Diſtribution, heard the Proof, &c. 1 Chan. Rep. 275. (u) Q. If before this Act, Commiſſioners could have ſold ſuch Goods, &c. attached, & vide Cro. Car. 150. 1 Jon. 203. (x) And if a fieri facias is taken out, and indorſed, according to the Statute, and delivered to the Sheriff, and after the ſame Day, the Defendant becomes a Bankrupt, and the Sheriff levies 400 l of the Goods of the Defendant, and pays it to the Plaintiff, yet the Commiſſioners may aſſign theſe Goods, notwithſtanding, &c. for by the Delivery of the Writ to the Sheriff, the Goods are bound in no other Manner, than before the Statute they were bound from the Teſt of the Writ, and by the Delivery of the Writ to the Sheriff, the Execution is not ſerved, or executed, 3 Lev. 67. 191, 192. adjudged per totam Curiam; and the Caſe of Baily and Bunning, 1 Sid. 271. was reſolved, only in Excuſe of the Bailiff, which vide 1 Keb. 930. 932. &c.—— but they cannot aſſign the Money, for they have to do only with the Goods, &c. of the Bankrupt, 3 Lev. 191, 192. per totam Curiam, præter Levinz, who ſaid, He thought there had been Caſes otherways, but thought it hard to maintain them, vide 2 Keb. 348. 3 Keb. 180. (y) For if after the Extent, and before the Liberate, the Conuſor becomes a Bankrupt, the Extent ſhall not be avoided. Audly and Halſey, Cro. Car. 148. adjudged, 1 Jon. 203, 204. adjudged.

(a) Pleading.

(a) When and where Bankruptcy in the Plaintiff may be pleaded in Bar of his Action, 3 Keb. 616.

1. PER 1 *Jac. Cap.* 15. *Par.* 16. In Actions againſt Commiſſioners, or others under their Authority, executing any Matter by (b) Force of the 13 *Eliz.* or that Act, the Defendants may plead not guilty, or juſtify, that it was done by the Authority of the 13 *Eliz.* or that Act, without expreſſing other Circumſtances contained in either of the ſaid Acts, without ſhewing forth the Commiſſion, to which, the Plaintiff ſhall reply, *That the Defendant did the Fact of his own Wrong*, &c.

(b) But in Treſpaſs for entering his Houſe, &c. the Defendant cannot plead not guilty, and give the ſpecial Matter in Evidence, but ought to ſet forth the Commiſſion of Bankruptcy, and all the ſpecial Matter, Lit. Rep. 356. per Curiam,——but if the Action had been for taking his Goods only, he might have pleaded, not guilty, &c. Lit. Rep. 356. Quære rationem; and Serjeant Goodwin, 180. gives the Reaſon of this Difference, becauſe neither of theſe Statutes authorize the breaking open the Houſe, but that Authority is given by 21 Jac. by which Act, no ſuch general Pleading is provided for, yet vide 4 Inſt. 278.

(c) Moor 834. Pl. 1123. S. C. adjudged upon a Motion in Arreſt of Judgment, after a Verdict for the Plaintiff, and ſaid, It ſhould be intended the Interrogatories were lawful, till the contrary appeared. 2 Bulſt. 236, 237. S. C. adjudged, the Declaration being, That the Chancellor, vigore Statut' fecit Commiſſionem, &c. tho' Coke agreed, if it had been, that the Chancellor dedit poteſtatem generally, without Reference to the Statute, it had been naught, for to grant Commiſſions, is Part of the regal Prerogative, and the more formal Pleading had been, That the King dedit poteſtatem, &c.

2. In an Action for the Eſcape of one committed by Commiſſioners of Bankrupts, for refuſing to anſwer Interrogatories, the Plaintiff ſets forth, That upon the Petition of him, and other Creditors, the Lord Chancellor, by Commiſſion, *dedit plenam poteſtatem*, to the Commiſſioners, according to the Statute, to examine, *&c.* And that the Commiſſioners offered to him Interrogatories, *&c.* And tho' it was objected, That the Office of the Chancellor is miniſterial only, and that it is the Statutes which give the Power, and it was not ſhewn what the Interrogatories were, yet, *Trin.* 12 *Jac.* between (c) *Barns* and *Cary* 1 *Rol. Rep.* 47. it was adjudged a good Declaration, for it is, *per Commiſſionem dedit, &c. juxta Statut' &c.*

Bargain and Sale.

(a) Of Lands.

(a) The Definition thereof, 2 Inſt. 672.

1. IF before the 27 *H.* 8. a Man had bargained and ſold his Lands for Money, by this only an Uſe had paſſed, and the Chancellor would have compelled an Execution thereof, according to Conſcience. 1 *Co.* 87. 100. *b.*

2. But *per* 27 *H.* 8. Cap. 10. where any Perſon or Perſons, ſtands or is ſeiſed of or in any Honours, *&c.* Lands, Tenements, Rents, Services, *&c.* to the Uſe, Confidence, or Truſt of any other Perſon or Perſons, or Body politick, by reaſon of any Bargain, Sale, Feoffment, *&c.* ſuch Perſon, or Perſons, *&c.* that have any ſuch Uſe, *&c.* ſhall be deemed and adjudged in lawful Seiſin, Eſtate, and Poſſeſſion thereof, to all Intents and Purpoſes, of or in ſuch like Eſtates, as they have in the Uſe, *&c.* and the Eſtate, Right and Poſſeſſion of him and them ſeiſed, to any Uſe, *&c.* ſhall be deemed and adjudged in him or them, which have the Uſe, *&c.* after ſuch Quality, Manner, *&c.* as they had before, in or to the Uſe, *&c.*

3. If *A.* by Indenture inrolled, bargains and ſells Lands to *B.* and his Heirs, with a Way over other of the Lands of *A.* this is void as to the Way, for nothing but an Uſe paſſes by the Deed, and there can be no

Uſe of a Thing not in *eſſe*, as a Way, Common, (b) *&c.* before they are created. *M.* 5 *Jac.* between *Beaudly* and *Brook*. *Cro. Jac.* 189. adjudged *per totam Curiam.*

(b) Q. of a Rent de novo, by reaſon of the

ſpecial Clauſe in 27 H. Cap. 10. Par. 4, 5. that if any Perſon ſhall ſtand ſeiſed to the Uſe or Intent that another ſhall have a Rent, &c. & vide 1 Jon. 179.

Inrollment.

1 *Per* 27 *H.* 8. *Cap.* 16. No Manors, Lands, Tenements, or other Hereditaments ſhall paſs from one to another, whereby an Eſtate of Inheritance of (a) Freehold ſhall be made, or take Effect, or any Uſe thereof, to be made, by reaſon (b) (c) only of any (d) Bargain and Sale, except (e) by Writing indented, ſealed, and (f) (g) inrolled in one of the Courts (h) at *Weſtminſter*, or elſe within the County, or Counties, where the Lands, *&c.* ſo bargained and ſold lie, before the *Cuſtos Rotulorum*, and 2 Juſtices of Peace, and the Clerk of the Peace of, *&c.* or two of them, whereof the Clerk of the Peace to be one, the ſame Inrollment to be made within 6 (i) Months (k) after the (l) (m) Date of the ſame Writings, indented, *&c.*

(a) This extends only to Eſtates of Inheritance, and Freehold, and therefore Bargains and Sales for any Number of Years, need not be by

Deed indented or inrolled, 2 Inſt. 671. (b) But if before Inrollment, the Bargainor levies a Fine, or makes a Feoffment to the Bargainee, and his Heirs, and after the Bargain and Sale is inrolled, the Bargainee ſhall be in by the Fine or Feoffment, by reaſon of this Word only, and the Eſtate at Common Law ſhall be preferred, 2 Inſt. 672. Hind's Caſe, 4 Co. 71. adjudged, 1 And. 285. adjudged, Hob. 272. cited, and ſaid, the latter Conveyance extinguiſhed the Uſe, without which, the Bargain and Sale operates not, 1 And. 113. adjudged. and great Streſs laid upon this Word only, Moor 337. Pl. 456. adjudged, 680. Pl. 933. adjudged, Cro. Eliz. 917. adjudged. Ow. 70. per Walmſly, Yelv. 124. becauſe by the taking of Livery, the Uſe which paſſed by the Bargain, &c. is deſtroyed, 2 And. 161. Cro. Car. 218. 2 Bulſ. 34.——but if there be a Bargain and Sale of Lands in London, the Land, by Cuſtom, paſſes without Inrollment, and the Conveyance being perfect by the Delivery of the Deed, without other Circumſtance, if a Feoffment, &c. is made to the Bargainee, the Livery of Seiſin to him is void, for he had that in Poſſeſſion before, and he is in by the Bargain, &c. Yelv. 124 & vide 2 Inſt. 676. (c) If Lands are paſſed for Money only, the Deed ought to be inrolled, but if for Money, and natural Affection, the Eſtate will paſs without Inrollment, Stil. 204. per Roll. Ch. Juſtice, 1 Lev. 56. per Twiſden, and the Diverſity taken, where natural Affection is Part of the expreſs Conſideration, and where not. (d) It may be a Bargain and Sale within this Act, tho' theſe Words are not uſed, for what ever Words, upon valuable Conſideration, would have raiſed an Uſe, of any Lands, &c. at Common Law, the ſame amount to a Bargain and Sale within this Act, as if a Man by Deed, &c. for a valuable Conſideration, covenants to ſtand ſeiſed to the Uſe of another, &c. 2 Inſt. 672. but for this, vide the Diviſions, Title Uſes. (e) Not by Print or Stamp, 2 Inſt. 672. (f) Tho' the Deed may be either in Parchment or Paper, yet the Inrollment muſt be in Parchment only, for that is implied, when an Inrollment is to be in any of the Courts of Record at Weſtminſter, and in the Clauſe of Inrollment, by the Clerk of the Peace, it is particularly provided, That he ſhall ſufficiently inroll and ingroſs in Parchment, &c. 2 Inſt. 273. (g) If ſeveral ſeal the Deed, and but one acknowledges it, and thereupon the Deed is inrolled, this is a good Inrollment within the Statute, Stil. 462. ——And after a Deed is inrolled, 'tis no Matter whether the Acknowledgment was legal or not, or by what Means it was inrolled, and he is ſtopped to ſay it was not acknowledged, 1 Leon. 184. 3 Leon. 84.—and non refert when the Deed is acknowledged, ſo that it be inrolled within the 6 Months. 2 Inſt. 675. (h) Yet if theſe Courts be adjorned to another Place, the Inrollment may be in them there, for it is confined to thoſe Courts, where-ever holden, 2 Inſt. 674. (i) Viz. Lunar, 2 Inſt. 674. Co. Lit. 135. b. But for this, vide 2 Rol. Abr. 521. Pl. 1. (k) Yet if it is inrolled the ſame Day it bears Date, it is well, for if before, it is within 6 Months, Dal. 42. per Curiam, and yet it was there ſaid, That one loſt 5 l. per Ann. becauſe ſuch Inrollment was held void, and per 2 Inſt. 674. the ſafer Way, is to inroll it after the Day of the Date, & vide 1 Leon. 184. (l) This ſhall be taken excluſive, for the Date and Day of the Date, are all one, 2 Inſ. 674. Dal. 41. but for this vide 2 Rol. Abr. 520. (m) But if the Deed hath no expreſs Date, it may be inrolled within 6 Months after the Delivery, for that is the Date, 2 Inſt. 674. and Money, by Parol, awarded to be paid within 6 Months after the Date, muſt be intended, within 6 Months after giving up the Award, 3 Bulſt. 311, 312.——But where it hath a Date, but is delivered after, tho' it can take Effect only from the Delivery, yet it muſt be inrolled within 6 Months after the Date, 2 Inſt. 674.

2. (n) Provided

(n) And therefore a Bargain and Sale of Lands in London, &c. by Word only is good, for at Common Law, a Bargain and Sale by Word only, raised an Use, and the 27 H. 8. transfers the Use into Possession, 2 Inst. 675. Poph. 48. Dal. 63. adjudged: But since 29 Car. 2. Cap. 3. Q.——and the Lands in such Cities, &c. are exempted out of the Act, and no Provision made for Inrollment in those Cities, &c. 2 Inst. 676. Dier 229. Pl. 50. Dal. 63. Yelv. 124.

2 (n) Provided this Act extends not to any Lands, *&c.* lying within any City, Borough, *&c.* wherein the Majors, *&c.* or other Officers, have used to inrol any Evidences, Deeds, or other Writings, within their Precincts or Limits.

3. *Per 5 El. Cap. 26.* Bargains and Sales of Lands, *&c.* in the County of *Lancaster*, being within 6 Months inrolled in the Chancery at *Lancaster*, or before the Judges of Assise there, of Lands, *&c.* in *Cheshire*, in the Exchequer at *Chester*, or before the Judges of Assise there, of Lands, *&c.* in the Bishoprick of *Durham*, in the Chancery at *Durham*, or before the Justices of Assise there, shall be as effectual, as if inrolled in any Courts at *Westminster*.

4. Provided this Act extends not to any Lands lying within any City, *&c.* wherein the Majors, *&c.*

Inrollment.

Relation thereof.

(a) This Statute only obstructs the Operation till Inrollment, 1 Vent. 361. arguendo. (b) Viz. What the Bargainor had at the Time of the Bargain, &c. but if one Joint-Tenant bargains and sells, and before Inrollment, the other dies, and after the Deed is inrolled, the Moiety only which the Bargainor had at the Time of the Bargain, &c. shall pass, Co. Lit. 186. a. (c) But if the Bargainee dies before Inrollment, his Wife shall not be indowed, Ow. 70. per Curiam, 150. per Curiam, Cro. Car. 217. per Lit. arguendo con. and said, It was so resolved in the Case of the Wife of Baron Frevil. (d) For this, Godb. 270. Ow. 69, 70. Dal. 41, Dier 219. Pl. 6. Cro. Car. 217. 284. 569. Hob. 165. 2 Bulst. 34. (e) And if the Bargainee dies, and after the Deed is inrolled, his Heir shall be in by Descent, have his Age, be in Ward, &c. for upon the Inrollment, the Estate settles ab initio, per 27 H. Cap. 10. only the Stat' of Inrollment says, It shall not vest, except the Deed be inrolled, and when it is inrolled, the Estate vests not by the Statute of Inrollments, but by the Statute of Uses, presently, Dimmock's Case, Hob. 136. adjudged. Cro. Jac. 408. adjudged. 1 Rol. Abr. 627. Pl. 10. Ow. 149, 150. adjudged.——A Man leases for Years, rendring Rent, and after bargains and sells the Reversion, and the Bargainee gives Notice thereof to the Lessee, and after Rent is arrear, and paid to the Bargainor, and whether it ought not to have been paid to the Bargainee, Godb. 156. dubitatur, & vide Ow. 69. and per Ow. 150. such Rent paid to the Bargainor is good, and the Bargainee hath no Remedy, because it is a Thing executed; yet vide Lat. 157. 1 Sid. 310. Cro. Car. 217. by which Books, the Bargainee shall have the Arrears,—and per Cro. Car. 217. per Lit. arguendo, the Bargainee shall present to a Church, which becomes void after the Bargain, and before Inrollment.

1. IF after 27 *H.* 8. *Cap.* 10. and before 27 *H.* 8. *Cap.* 16. a Man had bargained and sold Lands, *&c.* the same had been immediately executed. But *per* 27 *H.* 8. *Cap.* 10. it shall not, (a) except the Deed be inrolled within 6 Months, *&c.* But when the Deed is inrolled, (b) it (c) passeth (d) *ab* (e) *initio*, 2 *Inst.* 671. 674.

(f) By the Report of this Case in Ow. 69, 70. it does not appear that any Scire facias was awarded after the Inrollment, but rather the contrary, viz. that the Award of Execution was before Inrollment, and with this, the Case, as cited, 2 Inst. 674. seems to agree. (g) Cro. Car. 217, 218. S. P. con. per 2 Judges against 1. (h) If before Inrollment the Bargainor and Bargainee, grant a Rent, &c. after Inrollment, by Operation of the Statute, it shall be the Grant of the Bargainee, and Confirmation of the Bargainor, Co. Lit. 147. b. (i) Ow. 69, 70. S.C.

2. If *A.* is bound in a Recognizance, and after bargains and sells his Lands to *B.* and his Heirs, and a *Scire facias* upon this Recognizance is sued out, and thereupon is returned, that *A.* hath nothing, *&c. nec fuit inventus*, &c. and after the Deed is inrolled, and (f) another *Scire facias* is awarded against *A.* and a like Return made thereupon, and *A.* makes Default, and thereupon an Elegit is awarded, these Lands cannot he extended, for the Freehold cannot, by any Suit, be charged, without making the Tenant thereof Party thereto, and (g) upon the Matter, *B.* was Tenant of the Freehold, and not *A.* (h) for by the Bargain and Sale, the Use and Freehold pass *ab initio*, if the Deed be inrolled Between (i) *Mallory* and *Jennings*, 2 *And.* 160. adjudged *per totam Curiam.*

S. C. adjudged. 2 Inſt. 674. S. C. cited, and ſaid that it was adjudged una Voce, that A. was not ſeiſed of the Lands the Day of the Date of the Scire facias, for that when the Deed was inrolled, the Bargainee was, in Judgment of Law, ſeiſed of the Land from the Delivery of the Deed.

3. If *A.* bargains and ſells Lands to *B* and his Heirs, and before Inroll ment, *B.* reciting this Bargain and Sale to be by Indenture inrolled, bargains and ſells to *C.* and his Heirs, all the Eſtate which he had by the ſaid Inden ture inrolled, and after the firſt, and then the ſecond Deed is inrolled. *Paſch.* 2 *Jac.* between (k) *Bellingham* and *Alſop. Cro. Jac.* 52. By *Daniel* and *Kingſmill*, (l) the Lands are well conveyed to *C.* for when the firſt Inden ture was inrolled, the Eſtate was in *B. ab initio* to bargain, ſell, *&c.* and the Words in the ſecond Deed are apt enough to paſs the Land, and the Recital of the Inrollment immaterial. But *Anderſon* and *Warberton* contra, (m) for a Man can't paſs what he hath not, and till the Deed was inrolled, *B.* had nothing, and he paſſed only what he had by Indenture inrolled But *Walmſly* held, the Land paſſed not by reaſon of the Miſrecital, but that otherways it would have paſſed, and it was adjudged for the Defendant, ac cording to the Opinion of the 3 laſt Judges.

(k) 2 Inſt. 675. S. C. cited, and ſaid, it was adjudged, that the Sale by the Bargainee was good, but that in reſpect of the ſpecial manner of Penning the mean Bargain and Sale, Judgment was given againſt it. 1 Vent. 360. S. P. arguendo, and ſaid, That the Bargainee before Inrollment, might ſuffer a Recovery, and that this was warranted by common Practice, & vide 1 Vent. 361. — but yet in the Caſe of Iſham and Morris, Cro. Car. 110. Hetl. 82. it was ruled upon a Trial at Bar, that a Leaſe made by the Bargainee before Inrollment, was void, tho' the Bargain and Sale was after inrolled, but yet Q. & vide 2 Jon. 196, 197. 1 Vent. 360, 361. (l) So where the Bargainee before Inroll ment, levied a Fine, and after the Deed was inrolled. 4 Leon. 4. it was adjudged the Comſee ſhould have the Lands. (m) Hob. 136. S. C. cited, and S. P. agreed. Cro. Jac. 499. Ow. 149. Hetl. 82. S. C. cited to be adjudged.

(a) (b) Pleading.

1. IN a Replevin the Defendant ſets forth, That the Prioreſs of, *&c.* 4 *Nov.* 19 *H* 8. by Deed then inrolled, bargained and ſold to *A. &c.* and the Plaintiff in Bar, pleaded, That the Deed was *primò deliberat'* 4 *Nov.* 30 *H.* 8. and that Mean between the Date and Delivery, the Prioreſs leaſed to *B. &c. abſque hoc*, that the Prioreſs bargained and ſold to *A. ante dimiſſion' præd'* to *B. Hill* 31 *Eliz.* between (c) *Holland* and *Franklin.* 1 *Leon.* 183. 2 *Leon.* 121. adjudged upon Demurrer, That this Averment of a *primò deliberat'* ought not to be taken againſt a Deed inrolled; for by the ſame Reaſon it may be averred, that it was not delivered.

(a) Tho' the Words of the Deed are only Dedi & conceſſi, yet if for Money and inrolled, &c. it muſt be pleaded as a Bargain and Sale. 2 Leon. 122. Cro. El. 166. (b) Where in pleading a Bargain and Sale, it ought to be ſhewed it was for Money. 1 Leon. 170. & vide Moor 504. — but the Want thereof is help'd after Verdict, upon non conceſſit, for it muſt be intended proved at the Trial. 1 Lev. 308. (c) 3 Leon. 175, 176. S. C. adjudged. Ow. 138, 139. adjudged, and ſaid, It was held, the Bargainee was without Remedy, it being entred to be conveyed. 4 Nov. 19 H. 8. But I take it, the Book is miſprinted, and that it ſhould be, the Leſſee is without Remedy. Sav. 91. S. C. adjudged con. and that a Stranger ſhould not be eſtopped by the Inrollment, tho' perhaps the Parties might, and this Deed takes its Effect by the Sealing and Delivery, and not by the Inroll ment: But for this vide Title Eſtoppel, and the Pleadings after Title Faits.

2. In Debt for Rent, upon a Leaſe for Years, the Plaintiff declared, That *A.* leaſed, *&c.* and after, by Indenture, *infra ſex menſes debito modo irrotulat' juxta formam Statuti*, bargained, *&c.* to the Plaintiff, *&c. Mich.* 9 *Jac.* between (d) *Worly* and *Purly. Cro. Jac.* 291. After a Verdict for the Plaintiff, Judgment was arreſted, becauſe it was not ſhewed in what Court it was inrolled, and ſaid, That ought to appear, that the Court may know whether it was duly inrolled, and the Party may know where to ſearch for it.

(d) Yelv. 215. S. C. adjudged, per totam Curiam.

3. (e) In Debt for Rent, the Plaintiff declared upon a Leaſe made by a Stranger, who after bargained and ſold the Reverſion to the Plaintiff, *per Indenturam debito modo irrotulat' in Curia Cancellariæ. Trin.* 23 *Car.* between (f) *King* and *Somerland. All.* 19. After a Verdict for the Plaintiff, Judgment was arreſted, becauſe it was not alledged, that the Inrollment was within ſix Months, nor *Secundum formam Statuti, & debito modo* would not help it, for it might be ſo at Common Law.

(e) Cart. 221. (f) Stil. 34. S. C. a Judg ment arreſted accordingly, for debito modo may be an Inroll ment at Com mon Law.

Fol. 340.

(a) Baron and Feme.

(A) Who ſhall be ſaid to be *Baron* and *Feme*.

(a) For the general learning of what Power the Baron hath, in regard of his Feme, and the Feme in regard of the Baron, vid. & lege the Arguments in the Caſe of Manby and Scott. 1 Sid. 109, 110, &c. 1 Mod. 129, 130, &c.

1. If a Man eſpouſes his Mother, they are Baron and Feme till it be defeated. 9 H. 6. 34.

(b) Moor 226. S. P. arguendo. Cro. El. 857, 858. S. P. adjudged. 1 Rol. Abr. 357. Pl. 2. S. P. (c) And by both Laws, the Iſſue is a Baſtard. 1 Rol. Abr. 360. Pl. 1.

2. (b) If a Woman takes a ſecond Husband, living the firſt Huſband, this is a void Marriage by our Law, as (c) by the Spiritual Law, contra 9 H. 6. 34.

(d) Per 32 H. 8. cap. 38. No Reſervation or Prohibition, God's Law except, ſhall trouble or impeach any Marriage, without the Levitical Degrees, which vide explained. 2 Inſt. 683, 684, &c. (e) 1 Rol. Abr. 357. Pl. 4.

3. If a Man baptizes the Couſin of A. S. and after marries with A. S. they are Baron and Feme (d) till a Divorce. (e) 39 Ed. 3. 31. b.

(f) 1 Rol. Abr. 357. Pl. 4. S. P.

4. (f) So if a Man takes his Siſter to Wife, they are Baron and Feme till a Divorce. 39 Ed. 3. 31. b.

(g) 1 Sid. 65. S. P. per Windham. (h) Tho' de jure it cannot, yet de facto it may, S. C. (k) N. Dier 13. a. Margin, S. C. cited, and there ſaid, That the Opinion of Roy was otherways. (l) This is miſprinted in the Original, and ſhould be 52. b.

5. (g) If a Man takes A. S. to Wife, per dureſs, tho' the Marriage be ſolemnized in facie Eccleſiæ, yet it is meerly void, and they are not Baron and Feme, becauſe there is not any Conſent, and it (h) cannot be a Marriage without a Conſent, Dubitatur. (i) 11 H. 4. 14. 19 H. 7. (k) Kell. (l) 53. b. per Frowick.
and is ſo within the Statute of 3 H. 7. cap. 2. Cro. Car. 488 493. (i) Fitz. Cozone 86.

6. If a Woman, after carnal Knowledge of her Husband, enters into Religion, without the Conſent of her Husband, and the Husband after takes another Wife, this is void, becauſe he may deraign his Wife. 18 H. 6. 33.

7. So the ſecond Marriage would be void, tho' the Wife had entred into Religion by the Aſſent of the Baron, becauſe the Baron, by his Aſſent, had in a manner vowed Chaſtity.

(m) 1 Sid. 112. S. C. cited.

8. If an Idcot, à Nativitate, takes Wife, they are Baron and Feme in Law, and their Iſſue legitimate, for he may conſent to a Marriage. Trin. 3 Jac. B. R. between (m) Stile and Weſt, adjudged upon a ſpecial Verdict.

(n) 2 Inſt. 687. S. P. (o) Fitz. Baſtard, 33. S. C. Br. 25. S. C.

9. (n) If a Man takes the Order of a Deacon, and after takes Wife, this Marriage is not void, for the Iſſue is no Baſtard. (o) 21 H. 7. 39. 19 H. 7. Baſtardy 33. adjudged by Advice in the Exchequer Chamber.

(p) Moor 226. S. P. con. arguendo. 2 Inſt. 687. S. P.

10. (p) So if a Prieſt takes a Wife, this is not void, but they are Baron and Feme, (q) 21 H. 7. 39. 19 H. 7. Baſtardy, 33. per Frowick.
(q) Fitz. Baſtard 33. S. C. Br. 25. S. C.

(r) Moor 226. S. P. con. arguendo. 2 Inſt. 687. S. P. con.

11. (r) So if a Nun takes Husband, this is not void, but voidable, contra ibidem, per Vaviſor.

(s) For this vide Moor 741, 742. 2 And. 208. 6 Co. 22. b.

12. If a Man, within the Age of 14, takes a Wife above the Age of 12, this is a Marriage, and (s) they are Baron and Feme de facto, ſo that the Baron may have Treſpaſs de muliere abducta cum bonis viri. Trin. 12 Jac. B. between Bradſhaw and Fletcher, per Curiam.

13. If a Man marries a Woman that is within the Age of 12, and after the Woman at the Age of 11 Years, disagrees to the Marriage, this Disagreement is void, it being within the Age of Consent, and so they continue Baron and Feme, notwithstanding the Disagreement. Tr. 24 Eliz. adjudged, cited M. 41, 42. B. R per Coke, Co. Lit. 79. M. 41, 42 Eliz. B. R. per Curiam, between (t) Babington and Warner.

(t) Moor 575. Pl. 764. S. C. but S. P. does not appear; but per Popham and Fenner, it is there argued, that if the Woman infra annos nubiles, marries another Husband, this will be a Disagreement. N. Dier 13. a. Margin S. C. cited.

14. If a Man marries a Woman that is within the Age of 12 Years, and after the Woman at 11 Years of Age disagrees to the Marriage, and after the Husband takes another Wife, and hath Issue by her, this is a Bastard, for the first Marriage continues, notwithstanding the Disagreement of the Woman, for she cannot disagree within the Age of 12 Years, and so her Disagreement void. Trin. 35 El. B. R. adjudged, cited M. 41, 42 Eliz. B. R. per Coke, Quære.

Fol. 341.

15. If a Man of the Age of 14, takes a Woman of the Age of 10, the Baron, when the Feme comes to the Age of 12, may disagree as well as the Feme, because, in Contracts of Matrimony, each ought to be bound, and equal Election given to both. Co. Lit. 79.

16. If a Man marries a Woman that is within the Age of 12 Years, and after the Feme, within the Age of Consent, disagrees to the Marriage, and after the Age of 12 Years, marries another, now the first Marriage is absolutely dissolved, so that he may take another Wife, for tho' the Disagreement within the Age of Consent was not sufficient, yet her taking another Husband, after the Age of Consent, affirms the Disagreement, and so the Marriage avoided ab initio, M. 41, 42 El. B. R. between (u) Babington and Warner, adjudged in a Writ of Error upon a Judgment given in Banco, where the same Point was also adjudged.

(u) Moor 575 Pl. 764. S. C adjudged upon a Writ of Error, and the Judgment affirmed accordingly, because she cohabited with her second Husband, all the 2d. Marriages after the Age of Consent. But note, it does not appear by the Book, whether Marriage was at, or before, the Age of Consent. N. Dier 13. a. Margin S. C. cited.

17. If an Infant within the Age of Consent, as of the Age of 10 Years, takes A. S. to Wife, and after, when he comes to the Age of 14, they both being present together, severally disagree to the said Marriage, which Disagreement is put in Writing, and the said Infant puts his Hand thereto, and after they agree again, and live together as Man and Wife, this is a good Agreement, and so the Marriage continues, for the said Disagreement by Parol, is not such a binding Disagreement, but that they may well after agree to the first Marriage, without any new Marriage, for Affection may increase. P. 7 Jac. B. between Lee and Ashton, adjudged per Curiam.

18. But otherways it had been, if the Disagreement had been before the Ordinary, for there they could not ever agree again, to make it a good Marriage. Tr. 12 Jac B. per Warberton.

19. If a Man, within the Age of 14, takes a Wife of full Age, and after brings a Writ de muliere abducta cum bonis viri, and after comes to the Age of 14, if after he makes any Continuation of the Action, this shall be an Agreement to the Marriage, so that it cannot after be defeated. Trin. 12 Jac. B. per Curiam.

20. If Baron and Feme are divorced causa adulterii, yet they continue Baron and Feme, (x) for the Divorce is but a mensa & thoro, & Matrimonii obsequiis, my Reports. 14 Jac. (y) Motam & Motam. 44 El. (z) Steevens against Totte, Trin. 2 Jac. B. Rot. 1815. between (a) Stowel and Wikes, adjudged, and that she shall not lose her Dower by this Divorce, Quod vide Co. Lit. 33. b.

(x) What Divorces are a mensa & thoro only, and what a vinculo matrimonii, vide 1 Rol. Abr. 360. Letter G. and the Notes there. (y) 3 Bulst. 264. S. C. and S. P. admit per Curiam. 1 Rol. Rep. 426. S. C. and S. P. admit per Curiam. (z) 3 Bulst. 264. S. C. cited. 1 Rol. Rep. 426. S. C. cited. (a) Noy 108. S. C. adjudged. Godb. 345. S. C. adjudged.

21. If

(b) 1 Rol. Abr. 359. Pl. 18. vide. (c) Vide 1 Sid. 64. (d) Before the Time of Pope Innocent the Third, there was no Solemnization of Marriage in the Church, but the Man came to the Houſe where the Woman inhabited, and led her Home to his own Houſe, which was all the Ceremony then uſed. Moor 170. per Goldinham, Dr. of the Civil Law, arguendo.

21. If a Man and a Woman are married by a Prieſt, in a (b) Place (c) which is not a Church or Chapel, and without any (d) Solemnity of the Celebration of Maſs, yet this is a good Marriage, and they are Baron and Feme, contra 10 Ed. 4. B. Rot. 23. anjudged. For their Iſſue adjudged a Baſtard.

(e) Where upon ſuch Suit, the firſt Marriage is declared null and void, the Parties between whom the firſt Contract was made are Baron and Feme, without other Solemnity, per Noy. 1 Sid. 13. cited, but this was there denied per Twiſden. (f) 4 Co. 29. S.C. adjudged, but note, it appears there, that in the Sentence that A. ſhould marry B. the Marriage with C. is declared null and void, but C. was no Party to the Suit.

22. If *A.* contracts himſelf to *B.* and after marries *C.* and *B.* ſues *A.* upon this Contract, in the *Spiritual Court*, and there Sentence is given, that *A.* ſhall marry and cohabit with *B.* (e) which he does accordingly, they are *Baron* and *Feme*, without any Divorce between *A.* and *C.* for the Marriage between *A.* and *C.* was a meer Nullity. *Paſch.* 23 *Eliz.* (f) *Bunting's* Caſe. *Moor* 169. *Pl.* 303. adjudged.

Fol. 342.

(B) What Perſons ſhall be ſaid *Baron* and *Feme*.

In reſpect of their Age.

(a) Fitz. Gard. 59. S. C. Br. 7. S. C.

1. By the Law of England, the Age of Conſent to a Marriage, for a Male, is the Age of 14, ſo that he cannot marry himſelf before this Age, to make a compleat and perfect Marriage, but then he may. Lit. 22. b. (a) 35 H. 6. 41. b. for then he is Puber, and ſuch that he may engender.

2. With this agrees the Law of Scotland, Skene Regiam Majeſtatem. 43. b. againſt 2 and ſo is the Civil Law, Juſtin. Inſtitutiones.

(b) Fitz. Gard. 59. S. C. Br. 7. S. C. (c) Br. Age 41. S. C.

3. The Age of Conſent, by our Law, to a Marriage for a Female, is the Age of 12 Years, ſo that ſhe may marry her ſelf at ſuch Age, and this will be a perfect Marriage, but not before this Age. (b) 35 H. 6. 41. b. 53. (c) 8 Ed. 4. 7.

4. With this agrees the Civil Law. Juſtin. Inſtit.

5. But by the Law of Scotland, the Age of Conſent for a Female, is 14, as well as for a Male, Skene Regiam Majeſtatem, 42. b. 2.

6. A Woman cannot contrahere Sponſalia, before 7 Years of Age, by the Law of Scotland, but ſhe may after this Age, Skene Regiam Majeſtatem. 43. b. 2.

(a) The Marriage is an abſolute Gift of all Chattels, perſonal in Poſſeſſion, whether the Husband ſurvive the Wife or not. Co. Lit. 351. b. — unleſs ſhe had them in auter droit, as Executrix, Guardian in Soccage, &c. Co. Lit. 351. a. b. (b) By the Marriage he gains a Freehold in the Right of his Wife, in the Land of which ſhe

(C) (a) What (b) Things of the *Feme* the *Baron* (c) ſhall have by the Intermarriage, or Coverture;

What not:

Chattels in Action.

1. If a Statute be acknowledged to Baron and Feme, they are Joinetenants of this, and the Feme ſhall have all by Survivor. (d) 48 Ed. 3. 12. b.

ſhe is ſeiſed in Fee, but for this, and the Force and Effect thereof, vide Co. Lit. 351. a. (c) The Civil, or ſcarce any Law, gives ſo great a Power to the Husband, over the Eſtate of the Wife, as the Common Law does, 1 Sid. 111. ſaid by 3 Judges, arguendo. (d) Br. Baron and Feme 24. S. C. 1 Rol. Abr. 889. Pl. 1. S. C. with the Notes thereupon.

2. The ſame Law, if an Obligation be made to Baron and Feme, contra (e) 48 Ed. 3. 12. b.

(e) Br. Baron and Feme 24. S. C.

3. If Baron and Feme recover Land and Damages, the (f) Feme ſhall have Execution of the Damages, and not the Executor of the Baron. 48 Ed. 3. 13. (g) 28 Aſſ. 45.

(f) But where the Feme,

and where the Executors of the Baron ſhall have Execution, vide 1 Rol. Abr. 889. Letter R. (g) Fitz. Execution, 112. S. C. Br. 83. S. C. Br. Brief 293.

4. If Baron and Feme recover Damages in a real Action, they may ſue Execution jointly. (h) 28 Aſſ. 45.

(h) Fitz. Execution 112. S. C. Br. 83. S. C.

5. If a Feme ſole obligee, takes Baron, and the Baron makes a Letter of Attorney to J. S. to receive the Money, who receives it accordingly, and after the Feme dies, the Baron ſhall have an Action of Account for the Money, for by the Receipt, this was become a Thing in Poſſeſſion. (i) Trin. 39. El. B. R. per Popham.

(i) Goulſ. 160. S. C. and S. P. per Popham and Fenner, Moor 452. Pl. 618. S. C. and S. P. per Curiam.

6. If a Legacy be deviſed to a Feme, who takes Husband, and the Baron makes a Letter of Attorney to J. S. to receive the Legacy, and he receives it accordingly, this by his Receipt, is become the Chattel of the Husband. (k) Trin. 39 El. B. R. agreed.

(k) Goulſ. 160. S. C. and S. P. admitted per Curiam.

7. (l) So if the Baron and Feme had made a Letter of Attorney to J. S. to receive the Legacy, and he had received it accordingly, by this Receipt this ceaſes to be a Thing in Action, and is become a Thing in Poſſeſſion, and the Husband, or his Executor, after the Death of the Feme, may have an Account upon this Receipt againſt J. S. Trin. 39 El. B. R. between (m) Huntly and Griffith, adjudged.

(l) 1 Rol. Abr. 350. Pl. 6. like Point. (m) Goulſ. 159, 160. S. C. adjudged. Moor 452. Pl. 618. S. C. adjudged.

8. If a *Feme ſole* be poſſeſſed of a (n) Chattel real, and (o) be thereof diſpoſſeſſed, and then takes Husband and dies, the *Baron* ſhall not have this meer Right, but the Executors or Adminiſtrators of the Wife ſhall have it. *Co. Lit.* 351. a.

(n) So of Chattels perſonal, Co. Lit. 351. b. 3 Mod. 186. per Curiam.

(o) But where the Goods of a Feme ſole are in the Poſſeſſion of another by Trover, or Bailment, and ſhe marries, the Property which continued in the Wife, is veſted in the Husband, and he alone, without his Wife, may bring Detinue for them. 1 Sid. 172. 1 Keb. 641. Moor 25. Pl. 85. 1 Vent. 261.

9. So if the Wife hath but a meer Poſſibility. *Co. Lit.* 351. a.

10. The Husband ſhall not have by the Inter-marriage, Chattels (p) real, conſiſting meerly in Action, albeit he ſurvives his Wife, unleſs he recovered them in the Life of his Wife, as a Writ of Right of Ward, *valore maritagii*, Forfeiture of Ward, *&c.* whereunto the Wife was entituled before Marriage. *Co. Lit.* 351. a.

(p) So of Chattels perſonal, Co. Lit. 351. b.

11. A bare Poſſeſſion of perſonal Goods, is not, by the Marriage given to the Husband, for if Goods are bailed to a *Feme ſole*, or if ſhe finds Goods, and after marries, the Action of Detinue muſt be brought againſt both Husband and Wife. *Co. Lit.* 351. b.

(E) Chattels real.

1. If a Feme termor takes Husband, (a) yet the Term continues in her. (b) 7 H. 6. 2. (c) 9 H. 6. 52. b.

(a) And the Baron is only poſſeſſed

in her Right, Co. Lit. 351. a. (b) Fitz. Charge 1 S. C. Br. 41. S. C. (c) Fitz. Charge, 2. S. C. Br. 41. S. C.

Fol. 343.

2. Baron and Feme may be Joint-tenants for Years. (d) 47 Ed. 3. 12. b. (e) 48 Ed. 3. 13. (f) 2 H. 4. 19. b. (g) 3 H. 4. 1. b. (h) 14 H. 4. 24. b.

(d) Br. Covenant, 10. S. C. Fitz. Joinder in Action, 25 S. C. Br. Baron and Feme, 23. S. C. (e) Fitz. Brief 25. S. C. Br. 80. S. C. Br. Baron and Feme, 24. S. C. (f) Br. Debt 55. S. C. Br. Baron and Feme, 29. S. C. (g) Br. Debt. 55. S. C. Br. Baron and Feme, 29. S. C. (h) Fitz. Joinder in Action, 20. S. C. Br. Baron and Feme, S. C.

(i) Fitz. Joinder in Action, 20. S.C. Br. Baron and Feme, 42. S. C. Br. Ravishment de Gard. 15. S. C.

3. The same Law of a Ward. 48 Ed. 3. 13. (i) 14 H. 4. 24 b. they may be Joint-Grantees thereof.

(k) Co. Lit. 351. a. S. P.

4. (k) If a Feme Guardian in Soccage, takes Husband, yet the Feme continues Guardian. Com. 293. b.

(F) Of what Things, which are not given by the Inter-marriage, the Husband hath Power to dispose.

(a) Br. Baron and Feme, 24. S. C.

1. If Baron and Feme are Joint-tenants for Years of Land, the Baron may dispose of the whole. (a) 47 Ed. 3. 12. b. admit. (b) 48 Ed. 3. 13. 2 H. 4. 19. b. 14 H. 4. 24. b.

(b) Br. Baron and Feme, 24. S. C.

(c) Co. Lit. 46. b. S. P. 351. a. S. P.

2. (c) So if the Baron hath a (d) Term in the Right of his Feme, he may (e) grant over the whole. (f) 7 H. 6. 1. b.

(d) So in all Cases of Estates by Statute-merchant, Statute-staple, Elegit, Wardships, and other Chattels real in Possession. Co. Lit. 351. a. (e) Or by Outlawry or Attainder may forfeit it, Co. Lit. 351. a. (f) Fitz. Charge, 1. S. C. Br. 12. 41. S. C.

3. If a Feme Guardian in Soccage, takes Husband, the Baron by his Grant of the Ward, cannot bind the Feme, after the Death of the Baron Com. Osburn against Carden and Joye, 293. b. adjudged.

4. If a Baron be Guardian in Chivalry in Right of his Feme, he may dispose and alien the Ward of the Body to another, and this shall bind the Feme after his Death. 34 Ed. 1. Ayd. 184.

(g) March 45. like Point, agreed per Curiam, con. the Feme having before Marriage granted a Term to her own Use, 88. like Point, agreed per Curiam, the Baron, before Marriage, having covenanted not to intermeddle with it. (h) Lane 54, 55. S. C. and S. P. seems to be the better Opinion of the Book, but no Resolution, and vide Lane 113.

5. (g) If a Baron possessed of a Term for Years, grants it over in Trust, and for the Benefit of his Feme, he may after dispose or forfeit this Trust, and bar the Feme. P. 8 Jac. in Camera Scaccarii, (h) Wiche's Case, for he hath as great Power of the Use which he hath in the Right of the Feme, as he hath of a Term in the Right of his Feme.

(i) Lane 55. S. C. and S. P. by Brook, and seems to be admitted per Curiam.

6. If the Baron makes a Lease for Years to another, to the Use of his Feme, if she lives so long, for the Jointure of the Feme, the Baron cannot dispose of this Trust. Pasch. (i) 8 Jac. in Camera Scaccarii.

(k) In the Original it is semble.
(l) Lane 54, 55. S. C. and S. P. as also whether it should be forfeited by the Attainder of the Baron, dubitatur.

7. If a Baron grants over a Term in Trust, and for the Benefit of his Wife and Children, (k) it seems, he cannot dispose of the Trust of the Children, Dubitatur, (l) P. 8 Jac. in Camera Scaccarii.

(m) Moor 683. Pl. 942. S. P. adjudged.
(n) 3 Bulst. 264. S. C. cited, 1 Rol. Rep. 426. S. C. cited, Noy 45. S. C. and S. P. per Curiam, Cro. El. 908. S. C. and S. P. per totam Curiam, Moor 665. Pl. 910. S. C. and S. P. per Curiam, 2 Rol. Abr. 301. Pl. 11. S. C.

8. If Baron and Feme are divorced, causa adulterii in one of them, yet the Baron may after release a Legacy due to the Feme, (m) for the Divorce does not dissolve vinculum Matrimonii, but à mensa & thoro, 44 El. (n) Steevens and Tott, adjudged, my Reports, 14 Jac.

9. But if after ſuch a Divorce, the Feme ſues without her Husband, as ſhe may for a Defamation in the Spiritual Court, and recovers, and Penance enjoined, and expenſæ litis taxed, the Baron cannot diſcharge it, for the Penance is but to reſtore her to her Credit, and the Coſts are but depending thereupon, my Reports, 14 Jac. (o) Motam againſt Motam, reſolved per Curiam.

(o) 1 Rol. Rep. 426. S. C. adjudged, and a Prohibition denied accordingly. 3 Bulſt. 264.

S. C. adjudged, and a Prohibition accordingly denied, 2 Rol. Abr. 298. Pl. 1. 300. Pl. 10. S. C.

10. If A. promiſes B. a Feme ſole, that in Conſideration that ſhe will marry C. his Brother, that he will give to B. 10 l. if ſhe ſurvives C. and after B. takes C. to Husband accordingly, C. cannot after diſcharge A. of this Promiſe, by his Releaſe, to bind B. after his Death, becauſe the Promiſe ſtood in a Contingency, during the Life of C. the Husband, Hill. (p) 6 El. B. R. between (q) Belcher and Hudſon, Rot. 132. adjudged, where the Baron releaſed all Demands, and adjudged, that it did not bar the Feme, this is cited, P. 16 Jac. 6. in (r) Smith and Stafford's Caſe, and this is cited. Hobart's (s) Reports, Caſe 279. but there it is ſaid, that the Words will not extend to releaſe the Promiſe, without expreſs Words of Promiſe.

(p) This is miſprinted in the Original, as here, and ſhould be Hill. 6 Jac. as appears by the Report of the Caſe in 1 Brownl. Yelv. and Cro. Jac. and 2 Rol. Abr. 407. Pl. 22. (q) 1 Brownl. 19. S. C. adjudged. Cro. Jac. 222. S. C. adjudged, the Releaſe being of all Demands. Yelv. 156. S. C. adjudged, the Releaſe being of all Demands; but it is there ſaid, per Curiam, if he had releaſed all Promiſes, or all Actions, and Quarrels, which he or his Wife had, or might have, it would have been otherwiſe, 2 Rol. Abr. 407. Pl. 22 Hut. 17. S. C. cited. (r) In that Caſe, the Husband, before Marriage, promiſed his Wife, to leave her worth 1000 l. &c. and by the Marriage it was diſcharged, per Hob. 227. Hut. 17, 18. per Hob. againſt the Opinion of the other Judges. But in Noy 26. it does not appear that the Opinion of Hob. was contrary to the reſt, Cro. Jac. 571. S. C. cited accordingly, and vide Thompſon and Clerk's Caſe, Cro. Jac. 571. Palm. 99. 2 Rol. Rep. 162. and vide 2 Sid. 58, 59. Hetl. 12. Lit. Rep. 32. (s) Hob. Fol. 216. cited, to be adjudged accordingly, becauſe no Word in the Releaſe extended thereto, but ſaid it was compounded, and ſo no Judgment entred.

11. If a Leaſe be made to Baron and Feme for their Lives, the Remainder to the Executors of the Survivor of them, and the Baron grants the Term, and dies, this will not bar the Feme ſurviving, becauſe the Feme had but a Poſſibility, and no Intereſt. Co. Lit. 46. b. cited, (t) Hill. 17 El. B. R.

Fol. 344.

(t) Poph. 5. S. C. cited, Cro. El. 841. S. C. cited, 2 Rol. Abr. 48. Pl. 3. S. C. Hut. 17. S. C. cited, 4 Leon. 185. S. C. cited, 10 Co. 51. a. S. C. cited, Godb. 139. vide.

12. If a *Feme Covert* hath an Annuity for Life, the *Baron* cannot releaſe it ſo as to bind his *Feme* after his Deceaſe. *Paſch.* 40 *Eliz.* between (u) *Thompſon* and *Butler*, *Moor* 522. *Pl.* 689. adjudged.

(u) Cro. El. 721. S.C. but S. P. does not appear.

(G) What ſhall be a Diſpoſition.

1. If the Baron and Feme recovers a Term in a Writ of Covenant, after the Death of the Baron, the Feme ſhall have Execution. (a) 47 Ed. 3. 12. b.

(a) Br. Covenant 10. S. C. Fitz. Joinder in Action, 25. S. C. Br. Baron and Feme, 23. S. C.

2. (b) The Baron may forfeit the Land of the Feme, 7 H. 6. 2. b. and this ſhall bind the Feme.

(b) By Outlawry, or Attainder, Co. Lit. 351. a.

3. So if it be extended for the Debt of the Husband, this will bind the Feme, 7 H. 6. 2. b.

4. (c) If a Leaſe be made to Baron and Feme for Years, the Baron cannot deviſe the Term, for the Feme is in by Survivorſhip, before the Deviſe takes Effect, contra 2 H. 4. 19. b.

(c) Co. Lit. 351. a. S. P.

5. (d) If

(d) Co. Lit. 351. a. S. P. 184. b. S. P. 1 Rol. Abr. 346. Pl. 2. S. P.

5. (d) If the Baron hath a Term in the Right of the Feme, and the Baron grants a Rent out thereof, and dies, the Feme shall hold it discharged, for she comes Paramount the Charge. (e) 7 H. 6. 1. b. (f) 9 H. 6. 52.

(e) Fitz. Charge, 1. S. C. Br. 41. S. C. (f) Fitz. Charge 2 S. C. Br. 1. S. C.

(g) 1 Rol. Abr. 346. Pl. 4. S. P. (h) So where one Joint-Tenant enters into a Recognizance, and dies before Execution, it shall not be sued against the other. Co. Lit. 184. b.

6. (g) If the Baron be possessed of a Term in the Right of the Feme, and Damages are recovered against him, (h) Execution cannot be upon the Term of the Feme, for she comes paramount. (i) 9 H. 6. 52. b. contra (k) 7 H. 6. 2.

(i) Fitz. Charge, 2. S. C. Br. 2. S. C. (k) Fitz. Charge, 1. S. C. Br. 41. S. C.

(l) Fitz. Charge, 1. S. C. Br. 2. S. C.

7. But otherways it is if it be extended thereupon, or upon a Recognizance in the Life of the Baron. (l) 9 H. 6. 52. b.

(m) Fitz. Charge, 1. S. C. Br. 12. 41. S. C.

8. If for the Debt of the Baron, a Term of which the Baron is possessed, in the Right of the Feme be extended, and after the Baron dies, the Feme shall have the Residue, after the Extent incurred. (m) 7 H. 6. 2.

9. If the Baron grants the Herbage or Vesture of this Land, which he holds with his Feme for Years, and dies, the Grantee shall have the Herbage or Vesture. 9 H. 6. 52.

(n) Cro. El. 33. S. P. per Wanwood.

10. (n) If the Baron grants Part of the Term of which he is possessed in the Right of the Feme, and dies, the Feme shall have the Reversion, for this is not disposed of. Perkins, S. 834. D. 9 El. 264. 40. admit, Co. Lit. 46. b.

(o) Cro. El. 279. S. P. per Periam con. and that she shall have it as incident to the Reversion, Blarston and Heath, S. P. Poph. 145. per Curiam, Godb. 279. 4 Leon. 185. S. P. per Popham. (p) Vide Blarston and Heath, Poph. 145. Godb. 279.

11. (o) But if the Baron reserves a Rent upon the Grant, she shall not have it, because she comes paramount the Reservation. Co. Lit. 46. b. (p) but the Executor of the Baron shall have the Rent, contra Perkins, Sect. 834.

12. If the Baron grants the Lands which he hath in Lease, in the Right of his Feme, except Part, the Feme shall have this Part so excepted, for this is not disposed. D. 9 El. 264. 4. admitted.

(q) Moor 395. Pl. 514. S. P. cited, Cro. El. 287. S. P. adjudged, where the Baron and Feme were Joint-Tenants of the Term.

13. (q) If the Baron possessed of a Term for Years, in the Right of his Feme, makes a Lease for Part of the Years, to commence after his Death, and dies, this is a good Lease against the Feme, but she shall have the Reversion, and not the Executor of the Baron, Popham's Reports 4. adjudged.

14. If a Feme possessed of a Term, takes Husband, and they grant the Term upon Condition, and re-enter for the Condition broke, the Feme shall have the Term again.

(r) 4 Leon. 185. S. P. dubitatur. (s) Hob. 3. S. P. adjudged, 1 Rol. Abr. 345. Pl. 11. S. C.

15. (r) If a Feme possessed of a Term, takes Husband, and they grant the Term upon Condition, if their Executors or Administrators pay 10 l. to re-enter, and after the Baron pays the 10 l. this is not any Disposition, but they shall be possessed in the Right of the Feme, for tho' he paid the Money to redeem it, yet, perhaps, he received the Money when it was mortgaged. P. 12 Jac. B. between (s) Radford and Young, per Curiam.

Fol. 345.

16. If a Baron possessed of a Term in the Right of his Feme, grants it to J. S. if he lives so long, and dies, the Feme shall have this Possibility of a Reversion, if J. S. dies within the Term, and not the Executors of the Baron, Pasch. 12 Jac. B. per 2 Justices.

17. If a Baron possessed of a Term in the Right of his Feme, grants it over upon Condition, that the Grantee shall pay 10 l. to his Executors, the Baron dies, the Condition is broke, the Executors of the Baron enter, the Feme shall not have the Term, for this was a Disposition of the Term, all the Interest being granted over. Co. Lit. 46. b.

18. (t) If

18. (r) If Baron and Feme are ejected of a Term, in the Right of the Feme, and the Baron recovers in an Ejectione firmæ, brought by him, in his own Name only, this is an Alteration of the Term, and vests it in the Baron. Co. Lit. 46. b.

(r) 3 Bulst. 164. S. P. per Coke Chief Justice con.

(H) What Things the *Baron* shall have after the Death of the *Feme*.

1. (a) If a Feme having a Rent for Life, takes Baron, and dies, the Baron shall have the Arrearages incurred during the Coverture. 10 H. 6. 11, 12. Co. 4. Ognel, 51.

(a) Co. Lit. 162. b. S. P. F. N. B. 121. C. S. C. Co. Lit. 351. a. S. P.

2. (b) But by the Common Law, he shall not have the Arrears incurred before Coverture. Co. 4. Ognel 51.

(b) Co. Lit. 162. b. S. P. 351. b. S. P. 2 Bulst. 234. like Point, per Coke, arguendo.

3. (c) But (d) this is aided by 32 H. 8. Co. 4. Ognel 51.

(c) Vide Co. Lit. 162. b. 351. b. (d) And now he may bring one Action for the Arrears, both before and after the Coverture. Sharp and Pool. Kelw. 214. adjudged. N. Bendl. 263. Pl. 273. adjudged. Co. Ent. 119, 120. 4 Co. 51. a. cited.

4. (e) If a Feme leases for Years, rendring Rent, and after takes Husband, and dies, the Baron shall have the Arrearages incurred during the Coverture. 10 H. 6. 11.

(e) Moor 7. Pl. 25. S. P. adjudged.

5. If a Feme Seignioress takes Baron, the Rent incurs, and hath Issue, and dies, by which the Baron is Tenant by the Curtesy of the Seigniory, he shall have the said Arrears incurred during the Coverture. Kello incerti temporis 118. b.

6. (f) If Baron and Feme, in the Right of the Feme, be seised of an Advowson, and the Church becomes void, and after the Feme dies, yet the Baron shall present to this Church, for this cannot be granted over, yet it is not (g) meerly a Thing in Action. Co. Lit. 120.

(f) Co. Lit. 351. a. S. P. Winch 73. S. P. admitted.

(g) But of a mixt Nature, partly in Possession, and partly in Action, and such Things the Baron shall have after the Death of the Feme, altho' he doth not reduce them into Possession in her Life-time; but if the Wife survives the Husband, she shall have them, and not the Executors of the Husband, as the Avoidance of a Church, the Arrears of a Rent-service, &c. in the Right of the Wife, falling, or becoming due, during the Coverture. Co. Lit. 351. —but if the Church had fallen, &c. before the Marriage, they had been meerly in Action before Marriage, and the Husband should not have had them, altho' he survived his Wife. Co. Lit. 351. b.

7. But if a Man be bound to a Feme covert, and she dies, the Baron shall not have this Obligation, without Administration purchased, because it is a Thing in Action. Co. Lit. 120.

8. If the Baron be possessed of a Lease for Years, of Land, in the Right of the Feme, and after the Feme dies, the Interest of the Lease is presently, by Law, vested in the Husband, and he shall have it, and not the Administrator of the Feme, D. 8. Eliz. 251. 90. per Curiam adjudged. Com. Wrotesly and Adams. 192. b. Curia. b. Co. Lit. 46. b.

9. So if the Baron be possessed of a Ward in the Right of the Feme, and the Feme dies, the Interest of the Ward is cast upon the Husband, and he shall have it without taking out Administration.

10. The same Law is of the Ward of Land.

11. If a Feme possessed of a Lease for Years, takes Husband, and they join in a Grant of the Term upon Condition, That if they, their Executors, or Administrators, pay 10 l. by such a Day, it shall be lawful for them to re-enter, and after the Feme dies, and the Baron pays the 10 l. and enters, and dies, his Executor shall have the Term, and not the Administrator of the Feme, because the Interest of the Term survived to the Husband. Pasch. 12 Jac. B. between (h) Young and Radford, adjudged. Hob. Reports 4.

(h) Hob. Fol. 3. S. C. adjudged, 1 Rol. Abr. 344. Pl. 15. S. C.

(i) Fol. 346.

12. If the Baron be poſſeſſed of a Ward in the Right of the Feme, as Guardian (i) in Socage, and the Feme dies, the Baron ſhall not have it, for it belongs to the prochein Amy, D. 8 El. 251. 90. Com. Osburn againſt Carden and Joye, 294.

(k) March 45. and Lane 113. like Point where the Feme, before Marriage, granted over a Term to her own Uſe.

13. (k) If a (*) Term for Years be granted in Truſt, to the Uſe of a Feme covert, the Baron ſhall not have this (l) Truſt after the Death of the Feme. Paſch. 10 Jac. B. per Coke, (m) to be adjudged in (n) Waterhouſe's Caſe.

(*) Lit. Rep. 147. (l) Yet he ſhall have the Money, which by his Wife, in her Life-time, was actually received upon this Truſt, for by the Receipt the Husband had a Property in the Money. March 44, 45. (m) I ſuppoſe the Word cited to be omitted in the Original, as here. (n) Cro. El. 466. bis S. C. adjudged, the Term having been granted to her Uſe, before Marriage with a former Husband. Co. Lit. 351. a. where granted by her ſelf before Marriage, and S. C. cited. 4 Inſt. 69. S. C. cited, as granted by another to her Uſe before Marriage. All. 15. S. C. cited, as if granted by her ſelf before Marriage, and Roll there ſaid, it had ſince been adjudged, That, in ſuch Caſe, the Baron ſhould have it, Q. if not intended where there was a Deſign to cheat and defraud the Baron.

(o) So in Caſe of Chattels perſonal. Co. Lit. 351. b. 3 Mod. 186. per Curiam.

14. If a *Feme ſole* be poſſeſſed of a (o) Chattel real, and be thereof diſpoſſeſſed, and then takes Husband, and dies, the *Baron* ſhall not have this meer Right, but the Executors, (p) or Adminiſtrators of the Wife ſhall have it. *Co. Lit.* 351. a.

(p) But Adminiſtration of Right ought to be granted to the Baron, vide 1 Rol. Abr. 910. Pl. 1, 2. —— and per 29 Car. 2. cap. 3. it is declared, That the Statute of Diſtributions ſhall not extend to the Eſtates of Feme coverts.

15. So if the Wife hath a meer Poſſibility. *Co. Lit.* 351. a.

(q) So of Chattels perſonal. Co. Lit. 351. b. 1 Bulſt. 137.

16. The Husband ſhall not have (q) Chattels real, conſiſting meerly in Action, unleſs recovered in the Life of his Wife, as a Writ of Right of Ward, *valore maritagii*, Forfeiture of Ward, *&c.* to which the Wife was intituled before Marriage. *Co. Lit.* 351. a.

(I) What Charge of the *Baron* ſhall bind the *Feme*.

1. If a Baron, ſeiſed for Life, or in Fee, in the Right of the Feme, grants a Rent, and dies, the Feme ſhall hold it diſcharged. 9 H. 6. 52. Curia.

(a) 1 Rol. Abr. 344. Pl. 5. S. P. which vide, and the Notes there.

2. (a) So if the Baron, poſſeſſed for Years in the Right of the Feme, grants a Rent, and dies, the Feme ſhall hold it diſcharged. (b) 9 H. 6. 52. for ſhe comes paramount the Charge. (c) 7 H. 6. 1.

(b) Fitz. Charge 2. S. C. Br. 1. S. C. (c) Fitz. Charge. 1 S. C. Br. 1. S. C.

3. If Baron and Feme are Tenants for Life, and the Baron acknowledges a Recognizance, the Feme ſhall hold it diſcharged, after the Death of the Baron. 8 R. 2. Aid del Roy 114.

(d) 1 Rol. Abr. 344. Pl. 6. S. P.

4. (d) If the Baron poſſeſſed of a Term in the Right of his Feme, is condemned in a Judgment, or acknowledges a Statute, and dies, this ſhall not be extended upon the Feme. 9 H. 6. 52. b.

(e) For this vide 2 Rol. Abr. 157. Pl. 5.

5. (e) If the Baron be indebted to the King, and purchaſes Lands for Years, to him and his Wife, and dies, this Land ſhall be put in Execution for the ſaid Debt, becauſe the Baron had Power to diſpoſe of the ſaid Term. 50 Aſſ. 5. adjudged. Co. 8. Sir Gerard Fleetwood. (f) 5. Quere of this, for (g) the Execution does not relate to a Chattel.

(f) This is miſprinted, and ſhould be Fol. 171.

(g) But for this vide 2 Rol. Abr. 157. Letter A.

(K) What (a) Things the *Feme* may do without the *Baron*.

(a) Where she may execute an Authority, vide antea, under Title Authority.

1. If a Feme sole makes a Feoffment, upon Condition to re-infeoff her at what Time she will, and after takes Husband, she may require the Feoffee to re-infeoff her, without her Husband, and if the Feoffee does not do it, the Condition is broke. 35 Ass. 11. adjudged.

(L) (a) What Things they both may do, to charge the *Feme* after the Death of the Husband.

(a) Where they may lease for 21 Years, or 3 Lives, per 32 H. 8. cap. 28. and what Particulars in such Leases, are to be observed, vide Co. Lit. 44, 45. and the Sub-divisions of Leases, Title Estate.

1. If a Recovery be in an Assise against them, upon a Disseisin, (b) Execution shall be against the Feme, after the Death of her Husband, as well for the Damages, as for the Principal. 39 H. 6. 45.

(b) But where Execution shall be sued against the Feme, after the Death of the Baron, vide 1 Rol. Abr. 890. Letter T.

2. If the Baron and Feme have the same Occupation, and the Baron dies, the Feme shall be charged by the (c) Statute of Glouceſter, for the Occupation, in an Assise or Trespass. 39 H. 6. 45.

(c) Cap. 1. which vide explained. 2 Inst. 283, &c.

(M) What Things a Woman may do alone to charge her Husband.

1. The Baron, in an Account, shall not be charged by the Receipt of his Feme, unless it came to his Use. (a) 43 Ed. 3. 33.

(a) Fitz. Accompt 50. S. C.

(N) (a) What Things a Woman may do without her Husband, what not.

(a) Where she may sue, or be sued alone, when her Husband is banished by Parliament, or hath abjured. 1 Rol. Rep. 400.

1. (b) If a Feme covert levies a Fine, this will bar her, if her Husband does not avoid it during the Coverture. Co. 10. 43. 18 H. 6. 27. (c) 17 Ass. 17.

Moor 851. Pl. 1159. 3 Bulst. 188. and vide 1 Bulst. 140. by which Book she may sue, tho' not be sued, —and Co. Lit. 133. a. a Diversity where the Banishment is perpetual, and where only temporal. (b) Hob. 225. S. P. 7 Co. 8. a. S. P. but for this, vide 2 Rol. Abr. 20. Pl. 1. and the Notes there. (c) Fitz. Estoppel 135. S. C. Br. Coverture 77. S. C. Br. Fines levy. 75. S. C.

2. But if he avoids it, she, and her Heirs shall have it. Co. 10. 43. (d) 17 Ass. 17.

(d) Fitz. Estoppel 135. S. C. Br. Coverture 77. S. C. Br. Fines levy 75. S. C. Latch 10. S. C. cited, but the Year misprinted.

Fol. 347.

3. (e) Quere, If a Feme covert suffers a common Recovery, if this binds the Feme after the Death of the Husband, if he does not avoid it during Coverture?

(e) Vide 2 Rol. Abr. 395.

4. If

(f) For this, vide 1 Rol. Abr. 748. Pl. 18. 759. Pl. 10. and the Notes there.

4. If a Feme covert appears to an Action, and after is outlawed, her Husband and she may reverse it, (f) because it was without her Husband. (g) 18 Ed. 4. 4.

(g) Br. Error 173. Br. Joinder in Action 88. S. C.

(O) What Things a Woman may be said to do with her Husband.

(a) Where a Feme covert may be a Disseisoress or not, vide 1 Rol. Abr. 660. Pl. 3. 5. and the Notes there, — but if Baron and Feme present to a Church, to which they have no Right, this gains nothing to her. March 90. (b) Fitz. Maintenance de brief. 31. S. C. Br. Pernor de Profits 15. S. C.

1. If they are (a) Disseisors, the Feme cannot take the Profits with her Husband, but the Baron alone in his own Right, and the Right of his Feme. (b) 39 H. 6. 44. Curia.

(c) 1 And. 221. S. P. admit per Curiam.

2. (c) If Baron and Feme lease for Years the Land of the Feme, (d) this is the (e) Lease of (f) both. (g) 7 H. 4. 15.

(d) But if after the Death of the Baron, the Feme disagrees thereto, this in Judgment of Law, is become ab initio, the Lease of the Baron only, Therefore and Therefore. 1 And. 220, 221. adjudged. Sav. 109, 110, &c. adjudged, and well reported. 3 Co. 27. b. 28. a. Co. Ent. 710. Pl. 12. 1 Leon. 204. adjornatur, but in the last Book, this Point is not clearly stated. (e) But if not by Deed, and rendring Rent, it is void, quoad the Feme, per Dier 91. b. Cro. El. 656. Cro. Jac. 563. Hut. 102. but vide 2 Co. 61. a. (f) And stands good, till avoided by the Feme, and her Heirs, but shall not be avoided by a Stranger, who is no way privy. 2 Rol. Abr. 89. Pl. 6. vide. (g) Fitz. Brief 227. S. S. Br. Baron and Feme. 31. S. C.

(h) Cro. Jac. 617. bis S. P. ruled con. per 3 Judges 1 doubting, Yelv. 1. S. P. the Letter of Attorney being to seal and deliver it upon the Land, ruled, per Curiam con. 2 Brownl. 248. S. P. ruled per totam Curiam con.

3. (h) If *Baron* and *Feme* seal and subscribe an Indenture of Lease of the Lands of the *Feme*, and make a Letter of Attorney to *J. S.* to deliver it upon the Land in their Names, which he doth, in both their Names, accordingly; this is a good Letter of Attorney for both, and the Lease well delivered, and it is the Lease of both, during the Husband's Life. *Mich.* 5 *Car. Cro. Car.* 165. ruled *per totam Curiam*, in Ejectment, the Plaintiff having declared upon a Lease made by the *Baron* and *Feme*.

(P) What Things done by *Baron* and *Feme*, shall bind the *Feme*.

(a) For this vide Hob. 225.

1. (a) Where the Feme is examined by Writ, she shall be bound, else not. Co. 10. 43.

(b) For this vide 2 Rol. Abr. 20. Pl. 1. 3. and the Notes there.

2. (b) Baron and Feme levy a Fine, this will bar the Feme. 18 Ed. 4. 12.

3. If Baron and Feme suffer a common Recovery, this binds the Feme, for she is examined in this. Co. 10. 43. 23 H. 8. S. 37. Com. Eyer and Snow, 515.

(c) Such Deed, by the Common Law, shall be inrolled only for the Husband, but tho' inrolled for both, it bindeth her not. 2 Inst. 673. — otherways, if by Custom. 2 Inst. 673. and then she must be examined, else the Custom is void. Hob. 225. and vide 34 H. 8. cap. 22. (d) A Feme covert cannot be examined without Writ. 2 Inst. 673.

4. (c) Baron and Feme acknowledge a Deed to be inrolled, this does not bind the Feme, because she is (d) not examined by Writ. Co. 10. 43.

5. If *Baron* and *Feme*, by Fine, *sur concessit*, grant Lands to *J. S.* for 99 Years, and warrant the said Lands to *J. S.* during the said Term, and the *Baron* dies, and *J. S.* is evicted by one that hath a prior Title, he may thereupon bring Covenant against the *Feme*, notwithstanding she was *co-*

vert at the Time when the Fine was levied. *Mich.* 21 *Car.* 2. between (e) *Wooton* and *Heale*, 2 *Sand.* 177, 180. *per totam Curiam*, without any Scruple; but Judgment was given againſt the Plaintiff, upon a Fault in the Declaration.

(e) 1 Sid. 466. S. C. and S. P. per Curiam, and that the Action lies upon the Word Conceſſit in the Fine, 1 Mod. 290, 291. S. C. and S. P. per Curiam. 2 Keb. 684. 703, &c.

(Q) (a) What Actions the *Baron* may have alone, without his *Feme*, (b) yet in the Right of his *Feme*.

(a) Q. the Diverſity between a Writ of Raviſhment of Ward, and a Writ of Right of Ward. Ow. 83.

1. **The Baron may have an Action alone, upon** (c) **5 R. 2. for entring into the Land of the** Feme. (d) 38 H. 6. 3. **adjudged.**

(b) He may have alone a Writ of Forfeiture of Marriage, for a Forfeiture accruing during the Coverture. Ow. 82, 83. adjudged, but the ſureſt way is to join his Wife, Ow. 83. (c) Not ſo upon the 8 H. 6. for the Writ ſays, Quod erpulit, & diſtrinxit, &c. N. Bendl. 29. Pl. 42. Moor 5. Pl. 15. 2 Vent. 195. cited. (d) Br. Baron and Feme 57. S. C. Br. Action upon the Statute 17. S. C.

2. (e) **He ſhall have a** (f) Quare impedit **alone.** 38 H. 6. 3. b. **agreed** contra (g) 28 H. 6. 8.

(e) Ow. 82. S. P. per Dier, Lit. Rep. 13. S. P. per 2 Judges, 375. S. P. dubitatur, & adjornatur. Co. Lit. 351. a. S. P. ſaid, as ſome hold, and vide Winch. 73. 2 Bulſt. 14. S. P. Jenk. Rep. 2, 3. S. P. 1 Bulſt. 110. vide. (f) So he may have a Darrain Preſentment, Jenk. Rep. 3. (g) Fitz. Quare impedit 85. S. C. Br. 8. S. C. Fitz. Joinder in Action. 13. S. C.

3. **So in Treſpaſs, for taking Charters of the Inheritance of the** Feme. (h) 38 H. 6. 4. (i) 8 H. 5. 9. b. **adjudged.**

(h) Br. Baron and Feme, 57. S. C. (i) Fitz. Brief 890. S. C.

4. **So in a Writ of Forger of falſe Deeds of the Inheritance of the** Feme. (k) 38 H. 6. 4. dubitatur.

(k) Br. Baron and Feme 57. S. C.

5. **In all Caſes where the** Feme **ſhall not have the Thing when it is recovered, neither alone to her ſelf, nor jointly with her Husband, but the** Baron **only ſhall** (l) **have it, there the** Baron **alone, without his** Feme, **ſhall have an Action to recover it, as in the Caſes aforeſaid.**

(l) As where Damages only are to be recovered, 1 Rol. Rep. 360. per Coke, 2 Bulſt. 14.

6. (m) **The** Baron **ſhall have Treſpaſs alone for a Treſpaſs** (n) **upon the Land of his** Feme. (o) 38 H. 6. 3. b. 7 Ed. 4. 6.

(m) 1 Bulſt. 21. S. P. per Curiam. (n) But for a perſonal Tort done to the Feme, as a Battery, &c. they muſt join. 1 Rol. Rep. 360. Yelv. 89. 1 Brownl. 205.—and the Judgment muſt be, that the Baron and Feme ſhall recover, notwithſtanding the Baron only is to have the Damages. Godb. 369. (o) Br. Baron and Feme 57. S. C.

7. **The** Baron **alone may have a** decies tantum, (p) **for taking of Money in an Aſſiſe brought by him and his Wife.** 40 Ed. 3. 33. b. **adjudged,** R. Nota, **this is a popular Action. But otherways it is** econtra.

(p) So if Baron and Feme are impleaded, and one doth maintain for Champerty, the Baron may have the Action alone, or they may join. 2 Inſt. 563.

8. (q) If a *Feme ſole* hath a Rent-charge, and Rent is arrear, and ſhe marries, and the *Baron* diſtrains for this Rent, and thereupon a Reſcous is made, this is a *Tort* to the *Baron* himſelf, and he may have an Action alone. *Hill.* 38 *Eliz.* between (r) *Fenner* and *Plaſhet*, *Cro. Eliz.* 459. *bis* adjudged.

(q) Ow. 82. S. P. per Dier. (r) Moor 422. Pl. 584. S. C. adjudged.

9. Or may join his Wife therein, becauſe it ariſes upon a Duty due unto her before Coverture. (s) *Cro. El.* 459. *bis per Curiam.*

(s) Moor. 422. S. C. and S. P. per Curiam.

10. If a *Feme ſole* hath Right to have Common for Life, and ſhe takes Husband, and he is hindred in taking the Common, he may have an

Action alone, without his Wife, (t) it being only to recover Damages. *Mich.* 10 *Jac.* between *Baker* and 2 *Bulſt.* 14. adjudged.

(t) The Baron ſeiſed of a Houſe for the Life, and in the Right of his Feme, leaſed for Years to the Defendant, who burnt the Houſe, and the Baron alone brought an Action for this, and whether it lay dubitatur, becauſe the Damage was done to the Eſtate of the Feme, and if ſhe dies, the Baron is not chargeable over in Waſte, in regard of which only, any Action lies, becauſe it was the Folly of the Plaintiff, that he made no ſpecial Proviſion againſt Waſte. Cro. El. 461. bis.

11. If *A.* demiſes a Houſe to *B.* for Years, and *B.* covenants to repair the ſaid Houſe during the Term, and after *A.* grants the Reverſion to *Baron* and *Feme*, and the Heirs of the *Baron*, &c. the *Baron* may have an Action alone upon this Covenant, for therein Damages only are to be recovered. *Trin.* 13 *Jac.* betweed (u) *Bret* and *Cumberland*, *Cro. Jac.* 319. adjudged.

(u) 3 Bulſt. 163, 164. S. C. adjudged, becauſe the Baron may alone diſcharge it, 1 Rol. Rep. 359, 363. S. C. adjudged, becauſe this Action lies at Common Law, and is not, by the Statute, given to the Aſſignee, & vide 1 Rol. Abr. 348. Pl. 5. Poph. 137. S. C. but S. P. does not appear.

12. (x) The *Baron* (y) may bring an Action alone for the Battery, carrying away and detaining of his Wife *per quod ſolamen, & conſortium*, of his ſaid Wife *amiſit*, becauſe this Action is founded upon the ſpecial Damage done to himſelf, and will be no Bar in another Action brought by *Baron* and *Feme*, or by the *Feme* after the Death of the *Baron*, for the ſame Battery, *Hill.* 2 *Car.* between *Young* and *Pridd*, *Cro. Car.* 89, 90. adjudged, and affirmed *per totam Curiam*, upon a Writ of Error in *Camera Scaccarii*.

(x) Cro. Jac. 538. S. P. adjudged, 2 Rol. Abr. 556. Pl. 16, 17. 1 Jon. 440. S. P. adjudged, Lit. Rep. 339. S. P. cited. 2 Rol. Rep. 51. S. P. adjudged. (y) Where an Action is brought for Words ſpoke of, or other Tort done to the Wife, and founded upon the ſpecial Damage of the Husband, ſhe muſt not join. 1 Sid. 346. 1 Lev. 140.

13. If a Bond is made to a *Feme Covert*, during Coverture, conditioned to pay Money to the *Feme*, the *Baron* alone may bring an Action upon this Bond. *Mich.* 6 *Will. & Mar.* 3 *Lev.* 403. adjudged upon a Demurrer to the Declaration, and a Caſe was cited by *Powel*, where upon a Judgment obtained by *Baron* and *Feme*, the *Baron* only ſued a *Scire facias* for the Damages and Coſts, and had Judgment.

(R) Ought to join.

1. BAron and Feme muſt join (a) in Detinue for Charters concerning the Inheritance of the Feme, (for the Feme ſhall have them again when they are recovered) (b) 38 H. 6. 4. agreed.

(a) So, per Noy 70. ſhe ſhall join in Trover for a Deed, by which a Rent-charge was granted to her dum ſola, tho' it came to the Hands of the Defendant after Coverture, for otherways, if the Husband ſhould recover alone, and die, his Executors and not the Feme, would have Execution for the Damages. Q. (b) Br. Baron and Feme, 57. S. C.

2. (c) In an Avowry for Rent in the Right of the Feme, they ought to join. 15 Ed. 4. 10. (d) 4 H. 6. 14.

(c) For this vide 1 Rol. Abr. 318. Pl. 1, 2. and the Notes there. Lit. Rep. 375. (d) Fitz. Avowry 6. S. C.

3. (e) They ought to join in Actions (f) due to the Feme (g) before Coverture.

(e) Moor 422. ſame Rule, per Curiam, Diverſity where due before, and where after Coverture. Ow. 82. Lit. Rep. 13. 1 Keb. 440. (f) In Conſideration that A. will marry his Daughter, B. aſſumes to give her as much as he gives any other of his Daughters, &c. and becauſe this Promiſe was made before Marriage, whether the Baron and Feme muſt not join in an Action thereupon, 1 Sid. 25. dubitatur. (g) A Diverſity where Debt is brought for Rent incurred before, and where after Coverture, 2 Bulſt. 234. per Coke.

4. (h) For a Battery, or other perſonal *Tort* done to the Wife, they muſt join, and if the Wife dies, the Action dies with her, *Trin.* 4 *Jac.* between (i) *Huggins* and *Butcher*, *Yelv.* 89. ſaid *arguendo*, *& conceſs. per Curiam*.

(h) 1 Rol. Rep. 306. S. P. per Coke, Ch. Juſtice, Lit. Rep. 285. S. P. per Richardſon, Ch. Juſtice. (i) 1 Brownl. 205. S. C. and S. P. ſaid arguendo, Noy 18. S. C. and S. P. per Tanfield.

5. If

5. If *Baron* and *Feme* are diſſeiſed of the Lands of the *Feme*, they muſt join in an Action for the Recovery of the Land. *Paſch.* 8 *Jac.* 1 *Bulſt.* 21. *per Curiam.*

6. (k) In an Action upon a *Trover* before Marriage, and a *Converſion* after, the *Baron* and *Feme* ought to join, for this Action, as Treſpaſs, *&c.* diſaffirms the Property. *Hill.* 15 and 16 *Car.* 2. between (l) *Powes* and his Wife, and *Marſhal*, 1 *Sid.* 172. adjudged *per Windham* and *Twiſden* clearly.

(k) 1 Vent. 261. S. P. and objected they could not join, becauſe the Converſion was after Marriage; but adjudged they muſt join, becauſe the Trover, which was the Inception of the Action, was before Marriage. But Hale ſaid, The Baron might join his Wife, or not, at his Election. 1 Rol. Rep. 45. S. P. cited to have been adjudged, that they cannot join. 2 Lev. 107. per Curiam, it is good both ways. (l) 1 Keb. 641. S. C. adjornatur.

7. But the *Baron* (m) ought alone to bring a *Replevin*, *Detinue*, *&c.* for theſe Actions admit and affirm a Property in the *Feme* at the Time of the Marriage, which, by Conſequence muſt have veſted in the *Baron*. *Hill.* 15 and 16 *Car.* 2. 1 *Sid.* 172. *per Windham* and *Twiſden.*

(m) But per 1 Vent. 261. per Curiam, the Feme may join.

(S) (a) May.

Fol. 348.

(a) Not for perſonal, or other Wrongs done to them both, unleſs where they

1. (b) **BAron and Feme aſſign Auditors to the Receiver of the Feme, before Coverture, and he is found in Arrears, they ought to join in Debt thereupon, for the Debt was before Coverture, and is only put in certain by the Auditors.** (c) 15 Ed. 4. 9.

have a Joint Intereſt, and they have Wrong in Reſpect thereof. March. 47. Cro. Car. 553. 1 Jon. 440. 2 Rol. Rep. 51. Cro. Jac. 355. 1 Rol. Rep. 108. 2 Mod. 66. 1 Vent. 328. 2 Vent. 29. Hard. 166. Stil. 128. Cro. Car. 175. 1 Lev. 3. 2 Lev. 20. (b) All. 73. S. P. per Mainard, arguendo, and agreed per Rol. Ch. Juſtice, Stil. 473. like Point, per Clyn. Ch. Juſtice. (c) Goulſ. 160. ſeems to be S. C. cited, but the Year of the King miſprinted.

2. **If a Rent be due to a Feme, before Coverture, as Tenant in Dower, ſhe and her Husband** (d) **ought to join in an Avowry.** (e) 4 H. 6. 14.

(d) For this vid. 1 Rol. Abr. 318. Letter N. 1 Bulſt. 135, 136, &c. Cro. Jac. 283. and Q. if ſince 32. H. 8. Cap. 37. there is any Difference where the Avowry is made for Rent due before, and where after Marriage. (e) Fitz. Avowry 6.

3. If *A.* leaſes to *B.* for Years, rendring Rent, and after grants his Reverſion to *Baron* and *Feme*, and *B.* attorns, and then Rent is arrear, and the Term expires, the *Baron* may bring an Action alone for this Rent, becauſe this Action is grounded upon the Duty, and not upon the Nature of their Eſtate, and the Money muſt come into the Purſe of the *Baron*; and there is no Difference where *Baron* and *Feme* are (f) Joint Leſſors, and where (g) Joint Purchaſors. *Hill.* 11 *Jac.* between (h) *Nooth* and *Wiond*, 2 *Bulſt.* 233, 234. adjudged *per totam Curiam.*

(f) And then it was never queſtioned, but the Baron might bring the Action alone, but when brought by both, it hath been doubted,

1 Bulſt. 21. per Yelverton, & vide Lit. Rep. 13. Palm. 207. (g) But in that Caſe, 2 Bulſt. 234. per Dod. he muſt bring the Action generally, and not ſhew himſelf to be Aſſignee; but yet 1 Rol. Rep. 52. it appears the Action was ſo brought, and yet held, per Curiam, to be only Surpluſage. (h) 1 Rol. Rep. 52. S. C. adjudged.

4. So, altho' the Term was not expired, (i) *Hill.* 11 *Jac.* 2 *Bulſt.* 234. the better Opinion of the Judges, as may there be collected by their Arguments. But note, at the Beginning of the Caſe, *viz.* at another Day, *Houghton* ſaid, it had been agreed, that the Wife muſt have joined, if the Term had continued.

(i) 1 Rol. Rep. 52. S.C. and S. P. (as by that Reporter) the Court ſeemed to ſay.

(T) In

(T) In what Actions they may join.

1. (a) Where the Feme after the Death of the Baron, is to have the Action to punish the Tort done in the Life of her Husband, there the Baron and Feme may join. (b) 15 Ed. 4. 10.

(a) This Rule will hold, tho' Damages only are to be recovered in the Action. Hob. 189. Cro. Car. 417. (b) Br. Baron and Feme 50. S. C.

2. Baron and Feme may join in a Writ of (c) Reſcous, (d) Where the Baron claims the (e) Seigniory in the Right of the Feme. (f) 15 Ed. 4. 9. b. adjudged.

(c) 1 Rol. Rep. 312. but as the Book is miſprinted, 311. like Point, admitted in an Action upon an Eſcape, upon an Arreſt, upon a Bond made to the Wife. (d) So where he diſtrains for the Arrears of a Rent-charge, grown due to the Wife before Marriage, &c. Fenner and Plaſhet. Cro. El. 459. big, per Curiam, Moor 422. Pl. 584. per Curiam. But vide this Caſe, Antea 709. Pl. 8, 9. (e) So where Baron and Feme leaſe for Years, rendring Rent, &c. and the Baron diſtrains, &c. Lit. Rep. 375. cited arguendo. (f) Br. Baron and Feme 50. S. C. Br. Joinder in Action, 36. S. C.

3. (g) (h) If a Stranger cuts Trees upon the Land of the Feme, they may join. (i) 15 Ed. 4. 9. b.

(g) So they may join in Treſpaſs. Quare clauſum fregit, 1 Bulſt. 110. 2 Vent. 195. adjornatur, & vide Lit. 375. (h) Lit. Rep. 285. like Point, per Richardſon, Ch. Juſtice, and Yelv. con. 375. S. P. arguendo. (i) Br. Baron and Feme 50. S. C. Br. Joinder in Action 36. S. C.

4. They may join in an Action upon 5 R. 2. for the Land of the Feme, admit. 18 Ed. 4. 2. b.

5. If A. by Indenture conveys Lands to B. in Fee, and covenants with him, his Heirs, and Aſſigns, to make any other Aſſurance thereof upon Requeſt for the better Settling thereof upon B. his Heirs, and Aſſigns, and after B. conveys it to C. in Fee, who conveys to D. and his Wife, and the Heirs of D. and after D. requires A. to make another Aſſurance, according to the Covenant, and he refuſes it, the Baron alone, without his Feme, cannot have an Action of Covenant againſt A. as Aſſignee of B. (k) becauſe he and his Wife are Aſſignees, and therefore ought to join in the Action, P. 14 Car. B. R. between (l) Midlemore and Goodale, per Curiam, adjudged upon a Demurrer, intratur H. 12 Car. Rot. 228.

(k) But perhaps it is otherways where the Covenant is ſuch, of which an Aſſignee might take Advantage at Common Law. 3 Bulſt. 164, 165. 1 Rol. Rep. 360. vide Antea 710. Pl. 11. (l) Cro. Car. 503. 505. S. C. adjudged, 1 Jon. 406, 407. S. C. adjudged.

6. (m) If the *Baron* be (n) poſſeſſed of a Rectory for Years, in the Right of his *Feme*, he and his *Feme* (o) may join in an Action, upon the 2 *Ed.* 6. for not ſetting forth of Tithes; for the Poſſeſſion of the *Baron* is in the Right of the *Feme*, and the Action is given, by the Statute, to the Proprietor. *Paſch.* 39 *Eliz.* between (p) *Beadle* and *Sherman*, *Cro. Eliz.* 608. 613. adjudged and affirmed upon a Writ of Error.

(m) 1 Jon. 325. S. P. adjudged per totam Curiam, (abſente Richardſon) but ſaid in an Action for Tithes ſevered from the 9 Parts, the Feme cannot join. (n) So if ſeiſed in the Right of the Feme, or in Jointure with her, Moor 912. Pl. 1298. adjudged and affirmed upon a Writ of Error. (o) They muſt join, for the Husband is not the Proprietor intended within the Statute, but the Wife, per 1 Brownl. 9. the better Opinion of the Book; ſed adjornatur. (p) 13 Co. 47. S. C. adjudged and affirmed upon a Writ of Error. Moor 912. Pl. 1228. S. C. adjudged, and by that Report it does not appear what Eſtate in the Rectory the Feme had, 2 Inſt. 650. S. C. cited, 2 Mod. 270. S. C. cited, Jenk. Rep. 279. S. C. ſaid to be adjudged, That the Baron might have the Action alone.

7. (q) If *A.* in Conſideration that *B.* a *Feme Covert*, will cure a certain Wound, aſſumes, and promiſes to *B.* to pay unto her 10 *l.* if *B.* does cure it accordingly, ſhe may join with her Husband in an *Aſſumpſit* for this Money, (r) for this Promiſe ariſing upon a Matter of Skill and Performance of the Wife, ſhe is the Cauſe of the Action, and ſuch an Action will ſurvive to the Wife, *Trin.* 3 *Jac.* between (s) *Braſhford* and *Buckingham* and his Wife, *Cro. Jac.* 77. 205. Judgment affirmed accordingly in *Camera Scaccarii.*

(q) 2 Sid. 128. like Point, and per Glyn Ch. Juſtice, it may be in the Name of both, or of the Husband alone. (r) But whatever the Conſideration be, where there is an expreſs Promiſe made to the Wife, ſhe may join. Cro.

Cro. El. 61. adjudged. 1 Rol. Rep. 250. Rol. Abr. 32. Pl. 12. they may join, or not. at the Election of the Baron, yet vide 1 Bulſt. 21. which I take not to be Law. (s) 1 Sid. 25. S. C. cited to be adjudged, That they ought to join.

8. If a *Feme ſole* is poſſeſſed for Years of a Cloſe, to which, Time out of Mind, there hath been a Way through the Cloſe of *J. S.* next adjoining, and *J. S.* erects a Building, *ex tranſverſo viæ præd'* ſo that ſhe cannot uſe the ſaid Way, and after ſhe marries, the *Baron* and *Feme* may join in an Action for the Stoppage during the Coverture, declaring, That after the ſaid Marriage, (t) they could not uſe the ſaid Way *&c.* becauſe the Wrong was done to the *Feme*, and the (u) *Baron* had the Cloſe in her Right. *Paſch.* 11 *Car.* between (x) *Baker* and *Breerman*. *Cro. Car.* 419. adjudged.

(t) For inclosing 20 Acres of Waſte, in which the Feme had Common, ita quod, they could not, as before, take the Profits with their Cattle, &c. and becauſe a Feme covert cannot have Cattle, Lit. Rep. 284, 285. the Court inclined for the Defendant, but it does not appear what Judgment was given. (n) So in an Action for not grinding at the Wife's Mill. Hob. 189. — So where the Feme had Right to all the Lop of certain Trees, during Life, and the Owner cut them down, Tregmiel and Reeve, Cro. Car. 437, 438. adjudged. 1 Jon. 376. in which laſt Book, it is ſaid, the Exception was, that the Action was brought by the Baron alone, and yet adjudged for him. 2 Mod. 270. cited arguendo, as if adjudged, that ſhe muſt join. (x) 1 Jon. 367. S. C. but S. P. does not appear. 2 Mod. 217. S. C. cited arguendo, as if adjudged that ſhe muſt join.

9. (*) If *A.* in Conſideration that *Baron* and *Feme* had intermarried, at his Requeſt, aſſumes and promiſes (y) to them, to pay unto the *Feme* 8 l. *per Annum*, during the Coverture, *&c.* notwithſtanding the whole Benefit redounds to the Husband, yet in an Action thereupon, they may join, *a fortiori*, becauſe it is an Executory Promiſe, and hath Continuance, and is not to be done *unica vice* only. *Hill.* 23 *Car.* between (z) *Hilliard* and *Hambridge*. *All.* 3. 6. adjudged.

(*) 2 Rol. Rep. 237. S. P. adjornatur. (y) So in Caſe of a Bond made to them both after Coverture. All. 37. per Curiam. Br. Baron and Feme 55. Lit. Rep. 13. Stil. 9. — So if made to the Feme only. 3 Lev. 403. (z) Stil. 9. S. C. adjudged con. niſi, &c.

10. (a) Or the *Baron* may bring the (b) Action alone. *Hill.* 23 *Car. All.* 36. *per Curiam.*

(a) And this ſhall be looked upon as a Refuſal as to her. 2 Mod. 217. (b) So in Caſe of a Covenant made to them both, for he may refuſe quoad her, and bring the Action alone. 2 Mod. 217. adjudged.

(U) Actions againſt (a) *Baron* and *Feme*.

(a) Againſt Baron and Feme, for retaining and keeping the Servant of the Plaintiff. 2 Lev. 63. and yet a Feme covert can't make a Retainer, or Contract, but perhaps the receiving and keeping the Servant, without any Contract, is a Treſpaſs of which a Feme covert may be guilty. (b) But in a Debt, upon a Devaſtavit againſt Baron and Feme Executrix, it ſhall not be laid quod devaſtaverunt, for a Feme covert cannot waſte, &c. 2 Lev. 145. (c) 1 Rol. Abr. 6. Pl. 7. S. C. which vide, and the Notes there. (d) 1 Rol. Abr. 6. Pl. 6. Margin, S. C.

What may be againſt both.

1. If a Trover and Converſion of Goods be brought againſt Baron and Feme, in which it is ſuppoſed, that they found the Goods, and (b) converted them to their own Uſe, this is not good, for preſently, by the Converſion of the Feme, it is to the Uſe of the Baron, and not to the Uſe of the Feme. Tr. 8 Car. B. R. between (c) Reames and Humphrys, adjudged in Arreſt of Judgment. Intratur, Hill. 7 Car. Rot. 1202. and then was cited one (d) Neves's Caſe, where ſuch a Judgment was reverſed in Camera Scaccarii for this Error.

(X) What ought.

1. Debt for Rent, upon a Leaſe for Years, made to Baron and Feme, ought to be brought againſt both. (a) 17 Ed. 4. 7. 2 H. 4. 19. b. dubitatur, (b) whether it may be brought againſt the Feme.

(a) Br. Baron and Feme 6. S. C. (b) An Aſſumpſit lies not againſt Baron and Feme, upon a Promiſe made during the Coverture, for quoad the Feme, the Promiſe is meerly void. Palm. 313.

2. But 43 Ed. 3. 11. b. is, that it lies against both, because it is for the Benefit of the Feme, and so. (c) 3 H. 4. 1.

(c) Br. Debt 55. S. C. Baron and Feme 29. S. C.

3. The same Law, where it is brought upon a Lease for Life, made to them, the Action shall be brought against both. (d) 3 H. 4. 1.

(d) Br. Debt 55. S. C. Baron and Feme 29. S. C.

4. If Goods are bailed to a *Feme sole*, or if she finds Goods, and after marries, *Detinue* must be brought against both, for the bare Possession of these personal Goods, is not by the Marriage given to the Husband. *Co. Lit.* 351. b.

Fol. 349.

(Y) What Things a Woman may make good after the Death of her Husband, and how, & *econtra.*

1. If an Obligation be made to Baron and Feme, the Feme may refuse it after the Death of her Husband. (a) 4 H. 6. 6. (b) M. 5 Jac. B. adjudged, and by such Waiver this is made an Obligation to the Baron only.

(a) Fitz. Debt 24. S. C. Br. Obligation 35. S. C.

(b) Noy 152. Norton and Glover. S. C. (as I suppose) adjudged, and that the bringing an Action as Administratrix to the Baron, was a sufficient Election and Waiver, &c.

2. If Baron and Feme join in a Lease for Life, of the Lands of the Feme, rendring Rent, the Feme may (c) make it good by Agreement, after the Death of her Husband. (d) 10 H. 6. 24. b. and shall have the Rent.

(c) Where by Acceptance of the Rent. 1 Rol. Abr. 475. Pl. 1. vide, and the Notes there. (d) Fitz. Reseit 61. S. C. Br. 130. S. C.

3. (e) The same Law, (f) if they join in a Lease for Years. (g) 10 H. 6. 24. b.

(e) 2 And. 3. S. P. arguendo. (f) And if she accepts the Rent, must answer in Covenant, as another Lessor, upon the Eviction of the Lessee. 1 Mod. 291. arguendo. (g) Fitz. Reseit 61. S. C. Br. 130. S. C. 3 Leon. 171. S. C. cited.

(Z) For what Things created during the Coverture, the *Feme* shall be charged after the Death of her Husband, by her Agreement or Disagreement.

1. If Baron and Feme accepts a Fine, rendring Rent, if she agrees to the Estate, after the Death of the Baron, she shall be charged with the Rent. 50 Ed. 3. 9. b.

2. If a Lease for Years be made to Baron and Feme, rendring Rent, after the Death of the Baron, if the Feme agrees to the Lease. Debt lies against her for all the Arrearages incurred in the Life of the Baron. (a) 2 H. 4. 19. b. 3 H. 4. 1.

(a) Br. Debt 55. S. C. Br. Baron and Feme 29. S. C.

3. But after the Death of the Baron, she may disagree to the Lease. (b) 2 H. 4. 19. b.

(b) Br. Baron and Feme 29. S. C.

4. If a Lease for Years be made to *Baron* and *Feme*, and the *Baron* doth Waste, and dies, and the Wife agrees to the Estate, (c) an Action of Waste lies against her, for she is in from the Lessor, and if the Action had been brought against *Baron* and *Feme*, the Writ should have been *quod fecerunt vastum*, for it was the Waste of the *Feme*, as well as of the *Baron*. 2 *Inst.* 303.

(c) But for this vide 2 Rol. Abr. 827. Pl. 3, 4.

(A) What Things a *Feme* ſhall have after the Death of her *Baron*.

What Actions.

1. (a) A Feme ſhall have Treſpaſs after the Death of her Baron, (b) for Trees cut upon her Land during the Coverture. (c) 18 Ed. 4. 15. 39 H. 6 45.

(a) Lit. Rep. 285. like Point per Richardſon, Ch. Juſtice, and Yelv. con. Peters and Roſe, like Point. 2 Rol. Rep. 264. adjudged. Palm. 313. adjudged. (b) For a Battery, or other perſonal Tort done to the Feme, Higgins and Butcher. Yelv. 89. 1 Brownl. 205. (c) Br. Treſpaſs 341. S. C.

2. The Feme ſhall have Raviſhment of Ward by Survivorſhip, where the Ward was joint to Baron and Feme. (d) 43 Ed. 3. 10.

(d) Fitz. Brief 561. S. C. Br. Baron and Feme 14. S.C.

3. So ſhe ſhall have an Ejectment of Ward by Survivorſhip. (e) 43 Ed. 3. 10.

(e) Fitz. Brief 561. S. C. Br. Baron and Feme 14. S.C.

4. If a Baron pulls down a Houſe, which he hath in the Right of the Feme, and gives away the Timber, the Feme ſhall not have an Action for this after the Death of her Baron. 43 Ed. 3. 26. b.

(B) What (a) perſonal Things.

(a) What Things ſhe ſhall have for her paraphernalia, vide 1 Rol. Abr. 911. and the Notes there.

1. If an Obligation be made to Baron and Feme, the Feme ſhall have it by Survivorſhip. (b) 43 Ed. 3. 10. (c) 4 H. 6. 6. M. 5 Jac. B. 6. adjudged upon Demurrer. Tr. 10 Car. in Cam. Scaccarii, between Spark and Fairemaner, adjudged in a Writ of Error.

(b) Fitz. Brief 561. S. C. (c) Fitz. Debt 24. S. C. Br. Obligation 35. S. C.

2. So the Feme ſhall have a Recognizance by Survivorſhip. (d) 43 Ed. 3. 10.

(d) Fitz. Brief 561. S. C.

3. But if Goods are given to Baron and Feme, the Feme ſhall not have them by Survivorſhip, but the Executor. (e) 43 Ed. 3. 10.

(e) Fitz. Brief 561. S. C.

4. If a Stray happens within the Manor of the Wife, and the Husband dies before Seiſure, the Wife ſhall have it, for the Property was not in the Wife before Seiſure. Co. Lit. 351. b.

(C) Things real.

1. If a Leaſe for Years be made to Baron and Feme, the Feme ſhall have it by Survivorſhip. (a) 43 Ed. 3. 10.

(a) Fitz. Brief 561. S. C. Br. Baron and Feme 14. S. C.

2. The ſame Law of a Ward. (b) 43 Ed. 3. 10.

(b) Fitz. Brief 561. S. C.

(D) Real.

Fol. 350.

1. (a) If a Feme ſeiſed of a Rent-ſervice, takes Husband, and after the Husband dies, the Feme ſhall have the Arrearages incurred during the Coverture. 15 Ed. 4. 10.

(a) Co. Lit. 351. a. S. P.

2. If

2. If a Feme leases for Life, reserving Rent, and after takes Husband, after the Death of the Baron, the Feme shall have the Arrearages incurred during the Coverture, and not the Executor of the Baron, because this issues out of the Freehold. 11 R. 2. Account 49.

(b) Denbyn and Brown. S.P. Book 887. Pl. 1248. adjudged. Hob. 208. admitted per Curiam. Cro. El. 791. S. P. adjudged.

3. (b) If Baron and Feme are seised of a Rent-service for their Lives, the Rent incurs, and after the Baron dies, the Feme shall have the Arrearages incurred during the Coverture. 29 Ed. 3, 40. adjudged.

4. If Baron and Feme lease for Years, rendring Rent, if the Feme, after the Death of the Baron, agrees to the Lease, she shall have the Arrearages incurred during the Coverture. 7 Ed. 4. 7. b.

5. If a Feme leases for Years, reserving a Rent, and after takes Baron, who dies, the Feme shall have the Arrearages incurred during the Coverture, and not the Executor of the Baron.

(c) 1 Rol. Abr. 342. Pl. 7. like Point.

6. (c) If a Feme leases for Life, reserving a Rent, and takes Husband, and during the Coverture, a Receiver receives the Rent of the Lessee, (it does not appear by whom he was made Receiver, but it seems to be intended, that he received it for the Baron and Feme) and after the Baron dies, the Executor of the Baron shall have the Writ of Account against the Receiver, and not the Feme, for this was a Chattel and Duty in the Baron by the Receit. 11 R. 2. Account 49. adjudged.

7. If the Ward of the Body and Land of another be granted to Baron and Feme jointly, and the Baron dies, during the Nonage, the Feme shall have the Ward. 2 Ed. 3. 42. per Mutt.

8. If a Rent-charge be granted to A. a Woman, and to B. for Years, and they intermarry, and after Arrearages incur, and after the Baron dies, the Feme shall have the Residue of the Rent, and also the Arrearages, in a Writ of Annuity, because they participate of the Nature of the Principal, and the Executor of the Baron shall not have the Arrearages. Mich. 22 Jac. B. R. between Carew and Burgoyne, per Curiam, upon a Demurrer, which Intratur, Trin. 18 Jac. Rot. 1187. vide 12 R. 2. Breve 639.

(E) In what (a) Cases the (b) Act of the (c) *Feme*, during Coverture, shall charge the *Baron*.

(a) If a Feme covert, pretending her self to be sole, marries a second Husband, he shall have no Action against the first, because this Wrong is founded upon

1. If a Feme covert borrows of a Man Money, and with it cloaths her self better than doth belong to her Estate, tho' this comes to the Use of the Baron, because his Feme of Necessity ought to be cloathed, yet because it is beyond her Degree, the Baron is not chargeable with it. (d) 11 H. 6. 30. b.

the Communication and Contract of the Wife, which will not bind the Husband. 1 Sid. 375. adjudged; besides, this is Felony, and therefore, &c. per Twisden. 1 Lev. 247. adjudged. (b) where the Wife's Receipt of the Husband's Money will not bind him. 1 Leon. 320. Cro. Jac. 617. — So if before the Tenant hath Notice of her Marriage, she receives Rent upon a Lease made by her self before Marriage, Sir Paul Tracy and Dutton. Cro. Jac. 617. bis adjudged. Palm. 206, 210. — But where a Wife is subpenaed as a Witness, the Charges must be tendred to her. 1 Leon. 123. Cro. El. 131. (c) Where a Sale by her in open Market, if the Buyer knows her to be so, is meerly void, and will not change the Property, unless for such Things as she usually trades for, or by the Consent of her Husband. 2 Inst. 713. (d) 1 Sid. 114. S. C. cited.

2. So if a Monk of an Abby, will borrow and build the Abby, and do more Things than the Abby can well bear, the Abby shall not be charged with this, tho' it comes to the Use of the House. (e) 11 H. 6. 30. b.

(c) Fitz. Debt 168. S. C.

(f) Fitz. Debt 168. S. C.

3. But otherways, if a Monk borrows and employs it for the necessary Use of the House, it will charge the House, dubitatur. (f) 11 H. 6. 30. 12 H. 6. 5.

4. If a Feme buys a Thing of another, this will not charge the Husband, (g) unless it comes to the Use of the Husband. (h) 20 H. 6. 21. b.

(g) But if specially found, yet the Baron shall not be charged, for this is but Evidence that the Baron did assume, but not binding Evidence

Evidence, 1 Sid. 121. 127. per 7 Judges.——but may be contradicted by other Proofs, as that he gave his Wife ready Money, &c. 1 Sid. 127. by 7 Judges. (h) Fitz. Debt 41. S. C. 1 Sid. 114. S. C. cited.

5. **So if it comes to the Use of the Husband, if the Contract was not to the Use of the Husband.** (i) 20 H. 6. 22.

Fol. 351.

(i) Fitz. Debt. 41. S. C.

6. (k) **But if the Contract was to the Use of the Husband, and it came to the Use of the Husband, it will charge him.** (l) 20 H. 6. 22.

(k) Cro. Jac. 258. S. P. admitted per Curiam. (l) Fitz. Debt. 41. S. C.

7. (m) **If a Woman buys Things for her** (n) (o) **necessary Apparel, without the Consent of her Husband, yet her Husband** (p) **shall be bound to pay it.** M. 13 Jac. B. **Sir** Thomas Gardiner's **Case**, per Curiam.

(m) 1 Brown. 47. S. P. tho' the Husband knew nothing of them. All. 61. S. P. adjudged, and vide the Case of Bill and Lake, Lit. Rep. 307. Hut. 105. bis 1 Sid. 124. cited, vide Jenk. Rep. 4. (n) So of necessary Diet, Lodging, &c. All. 61. per Curiam. (o) The Husband bound to maintain his Wife with Necessaries, 1 Sid. 120. by all the Judges of England, agreed de re, tho' they differed de modo. (p) But if the Husband allows the Wife a Stipend for these Things, and that is paid her, he shall not be charged, per All. 61. per Curiam.

8. **But otherways it is, if it be not necessary,** per Curiam, **in the** said **Case** of Gardiner. vide (q) D. 6. 7 El. 234. 17.

(q) Hut: 106. S. C. cited, 1 Sid. 114. S. C. cited, 124. S. C. cited.

9. **If a** Feme Covert **be a common Taverner, and sells Wine, and a Man delivers several Tuns of Wine to her to sell, without the Assent of the** Baron, **the** Baron **is not chargeable for this in an Account,** 13 R. 2. Account 50. **(it seems to be intended, that she was a common Taverner, without the Assent of her Husband.)**

10. **If the** Baron **takes a Distress, and puts it in the Pound, and the Owner comes to the Pound, and there finds the Wife, the** Baron **being absent, and tenders to the Wife Pledges, and prays a Deliverance, and the** Feme **delivers it to him,** (r) **this will be a good Discharge for the Owner in a** parco fracto **brought against him.** (s) 30 Ed. 3. 23.

(r) But the Feme cannot licence a Stranger to enter into her Husband's House, Tayler and Fisher, Cro. El. 245. per Curiam, 3 Leon. 267. the better Opinion of the Book. (s) 3 Leon. 267. S. C. cited.

11. If the Wife buys any Thing for her self, Children, or Family, and the *Baron* does any Act, precedent, or subsequent, whereby (t) he shews his Consent, tho' he shall not be charged upon an *Assumpsit* in Law, yet he may be charged, by reason of his *Assumpsit* in Fact. *Pasch.* 15 *Car.* 2. between *Manby* and *Scott*, 1 *Sid.* 120. agreed by all the Justices of *England*.

(t) And 2 Lev. 16. per Hales, it was ruled, that the Baron is not chargeable for the Necessaries of his Wife, without some Evidence of his Assent.

12. If a Woman (u) (x) departs from her Husband, without his Consent, and during her Absence, the Husband prohibits several Persons, and among the rest, *J. S.* to trust her, and after she makes a Request to cohabit again with her Husband, and he refuses to receive her, and yet *J. S.* sells to her Silk and Velvet, to the Value of 40 *l.* which is found suitable to the Estate and Degree of her Husband, yet the Husband shall not be charged, for there is no innate and uncontrolable Power in the Wife to charge the Husband for Necessaries. *Pasch.* 15 *Car.* 2. between (y) *Manby* and *Scott*, 1 *Sid.* 109, 110, *&c.* adjudged in the *Exchequer-Chamber*, by 8 Judges against 3, but *Atkins*, 1 of the 8, agreed with the 3, if there had been no special Prohibition, and 1 *Mod.* 128. *Bridgeman*, Ch. Justice, 1 of the 8, held, that admitting otherways, *viz.* that the Husband was liable, yet he might make such special Prohibition to a particular Person, and it would excuse him.

(u) By this she voluntarily puts her self out of his Family and Care, 1 Sid. 229, 230. by some of the Judges, 1 Mod, 129. per Hide Ch. Justice, in his Argument. (x) He must not plead this special Matter, but perhaps may give it in Evidence upon the general Issue, 2 Vent. 155. (y) 1 Mod. 124, 125, &c. adjudged in the Exchequer, Tyrrel, Twisden, and Mallet dissenting, 1 Keb. 69. 80, 87, &c. S. C. adjudged, 1 Mod. 9. S. C. cited, and said to have been adjudged, That the Husband must pay for the Wife's Apparel, unless she elope, and he gives Notice

tice not to truſt her, 1 Vent. 42. S. C. cited, and ſaid to have been adjudged, That the Husband ſhould pay for Apparel ſuitable to her Degree. 2 Vent. 155. S. C. cited, and ſaid to have been reſolved chiefly upon the expreſs Prohibition. 1 Lev. 4, 5, &c. adjudged by all the Judges in the Exchequer-Chamber, except 3.

(F) In what (a) Actions the *Baron* ſhall be charged during the Coverture:

Becauſe of the *Feme*.

1. (b) IF a Feme ſole (c) binds her ſelf in an Obligation, and takes Husband, the Baron ſhall be charged for this during her Life. 20 H. 6. 22. b.

(a) Where the Baron might have been charged or not, upon an Indictment or Information for the Recuſancy of his Wife, vide Parker and Curſon, Cro. Jac. 529. 2 Rol. Rep. 90. and Dr. Foſter's Caſe, 11 Co. 56. 2 Bulſt. 324. 1 Rol. Rep. 88. and vide Cro. Jac. 480. 3 Bulſt. 87.——A Feme Covert, not indictable for a Barreter, 2 Rol. Rep. 39.——1 Sid. 410. dubitatur, whether a Feme, without her Baron, might be indicted for Foreſtalling. (b) 3 Mod. 186. S. P. agreed per Curiam. (c) So upon an Aſſumpſit made by the Feme, before Marriage. Moor 468. Pl. 668. admit per Curiam.

2. So if a Man enters into an Obligation, and after enters into Religion, the Abby ſhall be charged for this, during the Life of the Monk. 20 H. 6. 22. b.

(d) So the Baron ſhall be charged for a Treſpaſs done by his Wife during the Coverture. 1 Sid. 113. Kelw. 61. a. b.

3. The ſame Law of a (d) Treſpaſs. 20 H. 6. 22. b.

(G) In what Actions the *Baron* ſhall be charged after the Death of the *Feme*:

Becauſe of the *Feme*.

(a) Kelw. 125. a like Point. (b) So in Caſe of a Feme Leſſee for Years Payn and Mynſhall, Raym. 6. adjudged, 1 Keb. 20. 22. adjudged, 3 Mod. 189. ſaid arguendo, 3 Lev. 25, 26. adjudged. (c) For this vide 4 Co. 49. b. Co. Lit. 162. b. (d) Fitz. Debt 33. S. C. Br. Debt. 181. S. C. 1 Rol. Abr. 592. Pl. 3. S. C.

1. (a) IF a Feme (b) Leſſee for Life, rendring Rent, takes Husband, and dies, the Baron ſhall be charged in an Action of Debt, for the Rent incurred during the Coverture, (c) becauſe he took the Profits out of which the Rent ought to iſſue. (d) 10 H. 6. 11. Curia.

2. If a Feme be indebted to another, and takes Husband, and dies, the Baron ſhall not be charged in Debt for this, after the Death of the Feme, becauſe this was but in Action. 10 H. 6. 10. 12. 20 H. 6. 22. b.

(e) For this vide 2 Rol. Abr. 827. Pl. 10, 11.

3. (e) If a Feme Leſſee for Life, takes Baron, and dies, the Baron ſhall not be charged for Waſte during the Coverture, for he was never Leſſee. Co. 5. Foliambe, contra 10 H. 6. 13.

4. The Baron ſhall have Treſpaſs after the Death of the Feme, for a Treſpaſs done upon the Land in Leaſe to the Feme, during the Coverture. 10 H. 6. 11. b.

(f) But where there is a Judgment in the Life of the Feme, it is clear the Baron ſhall be liable, Cro. Car. 519. 1 Sid. 337. & vide Moor 761. Pl. 1056. 3 Mod. 189.

5. If A. takes B. an Executrix, to Wife, againſt whom an Action of Debt is after brought, as Executors, and Judgment given againſt them, to recover, de bonis Teſtatoris, and thereupon a Fieri facias iſſues to levy the Debt and Damages, and the Sheriff thereupon returns a Devaſtavit, and after the Feme dies, whether Execution upon this Judgment may be ſued againſt the Baron, (f) there not being any Judgment upon the Return of the Devaſtavit, to recover de bonis propriis, Mich. 9 Car. B. R. between (g) Trotman and James, dubitatur, Intratur, Tr. 9 Rot. 715.

(g) 3 Mod. 189, 190. S. C. cited arguendo, and ſaid, The Husband ſhall not be charged, unleſs there is an Award of Execution, de bonis propriis.

6. If

6. If there be a Judgment in Debt againſt a *Feme ſole*, and ſhe marries, and dies, the *Baron* ſhall not be charged therewith, for he is not liable to her Debts before Coverture, unleſs recovered in her Life-time. *Hill.* 3 *Jac.* between *Obrian* and *Ram.* 3 *Mod* 186. agreed *per Curiam.*

7. If there be Judgment in Debt upon a Bond againſt a *Feme ſole*, and ſhe marries, and after upon 2 *Scire facias's* againſt the *Baron* and *Feme*, and *Nihils* returned. Judgment is thereupon had againſt the *Baron* and *Feme*, and ſo it reſts for a Year and a Day, and then the Wife dies, a *Scire facias* will lie againſt the *Baron*, to ſhew Cauſe why Execution ſhould not go againſt him upon the firſt Judgment, for the Award of Execution was abſolute againſt the *Baron* and *Feme*, and ſo it became his Debt, whereas before it was only the Debt of the Wife. *Hill.* 3 *Jac.* between *Obrian* and *Ram*, 3 *Mod.* 186, *&c.* adjudged upon a Writ of Error, upon a Judgment in *Ireland*, and that Judgment affirmed accordingly.

(H) What Actions the *Baron* ſhall have after the Death of the *Feme.*

Fol. 352.

Becauſe of the *Feme.*

1. If a Feme, having a Rent for Life, takes Husband, the Baron ſhall have an Action of Debt, for the Rent incurred during the Coverture, after the Death of the Feme. 10 H. 6. 12. 11.

2. If the Baron takes a Seigniorefs to Wife, he ſhall have, after the Death of the Feme, Ravishment of Ward, and Ejectment of Ward, if ouſted in the Life of the Feme of a Ward fallen in the Life of the Feme. 10 H. 6. 11.

3. So he ſhall have Debt for Relief fallen in the Life of the Feme, 10 H. 6. 11. b.

Pleading.

The Declaration by them.

1. IN Treſpaſs by *Baron* and *Feme*, they may declare, That the Defendant broke their Cloſe, *& herbam ipſorum adtunc, & ibidem creſcentem meſſuit & ſuccidit. & in fœnum compoſuit, & viginti carectat' fœni* (a) *inde provenien' cepit & aſportavit*, for as they may join for breaking their Cloſe, and cutting their Graſs, ſo may they for the Hay coming of it. *Paſch.* 30 *Eliz.* between (b) *Cookſon* and his Wife, and *Caſtline*, *Cro. El.* 96. adjudged after a Verdict for the Plaintiffs.

(a) So when they declared, Quare clauſum fregit, herbam ſuam meſſuit, & fœnum ſuum aſportavit, 1 Leon. 105. it was adjudged well, becauſe of the clauſum fregit & herbam meſſuit, tho' for the Hay alone they could not join. (b) N. Dier 305. Margin S. C.

2. But if it had not been for Hay *inde provenien'* it had been otherways, for then it might be intended for Hay lying upon the Land before, (c) for which they could not join. *per Cro. Eliz.* 96. *per Wray.*

(c) So they cannot declare for breaking their Cloſe, and carrying away their Corn, for it ſhall not be intended, that they were Joint-Tenants of the Corn before Coverture, or that the Feme had it as Executrix. Cro. El. 133. adjudged, and the firſt Judgment reverſed accordingly, but note, it does not appear whether it was after Verdict or not, N. Dier 305. Margin, and vide 1 Keb. 944.

(d) Stil. 236. S. P. after Verdict, per Rol. Ch. Juſtice, con.

3. (d) In Treſpaſs by *Baron* and *Feme*, they declared for a Battery of the *Feme*, *& quod* the Defendant *alia enormia eis intulit*, and tho' objected the *Feme* cannot join for a Wrong done to the *Baron*, yet becauſe the (e) *alia enormia, &c.* was but Form, and only in Aggravation of Damages, and altered not the Subſtance of the Declaration. *Hill* 20 *Jac.* between *Thomlins* and *Hoe*, *Cro. Jac.* 664. after a Verdict for the Plaintiff, it was adjudged for them, and affirmed upon a Writ of Error.

(e) For this vide 1 Sid. 225. Stil. 202.

(f) Palm. 339. S. P. ſeems to be admitted, 3 Mod. 120. like Point by 3 Judges againſt 1.

4. (f) In (g) Treſpaſs by *Baron* and *Feme*, (h) for beating the *Feme*, they may declare, That it was (i) *ad damnum ipſorum*, (k) notwithſtanding a *Feme Covert* can have no Damages, for this Action will ſurvive. *Mich.* 20 *Car.* 2. between (l) *Horton* and his Wife, and *Byles*, 1 *Sid.* 387. adjudged, and ſaid, *per Curiam*, it could not be otherways.

(g) So in Debt upon a Bond made to the Feme dum ſola, for the Non-payment to her dum ſola was to her Damage, as the Non-payment ſince is to the Damage of the Baron, Stil. 134. adjudged, and ſaid, it is the uſual way of Declaring in ſuch Caſe. (h) So for Words ſpoke of the Feme, March 212. adjudged. (i) Vide Cro. Jac. 473. 644. Stil. 155. 2 Keb. 387. (k) But where ſhe joins with her Baron, they both ſhall habe Judgment to recover, Jenk. Rep. 28. (l) 2 Keb. 434. S. C. adjudged, and ſaid it was ſo in all Caſes, where the Action and Damages ſurvive.

The Plea.

(a) Tampion and Newſon S. P. Cro. Jac. 288. adjudged, and that it was not aided by any of the Statutes of Jeofails, Yelv. 210. adjudged.

1. (a) IF in Treſpaſs againſt *Baron* and *Feme*, for an Aſſault and Battery, the *Baron* juſtifies for an Aſſault made upon his *Feme*, and the *Feme*, by her ſelf, pleads, *De ſon Aſſault Demeſne*, and the Plaintiff replies, *De injuria ſua propria ſine tali cauſa*, this laſt is no good Iſſue, becauſe the *Feme* (b) (c) cannot plead (d) by her ſelf. *Paſch.* 8 *Jac.* between *Watſon* and *Thorp*, and his Wife, *Cro. Jac.* 239. adjudged after a Verdict for the Plaintiff, and entire Damages being given upon both Iſſues, the Court awarded a Repleader for the whole.

(b) Vide 2 Rol. Rep. 90. Cro. Jac. 530. (c) In Battery they juſtifie, and conclude, & hoc parata eſt verificare, and whether it was not Error, Cro. Car. 594. upon a Writ of Error, dubitatur, & adjornatur. (d) Yet ſhe muſt join with her Huſband, for where in Battery the Baron and Feme made Defence, and the Baron, for his ſaid Feme, ſaid, She was not guilty after a Verdict, for the Plaintiff he could not have Judgment. Hetl. 10.

(c) Carpenter and Welſh, S. P. 1 Rol. Rep. 216. adjudged, becauſe Surpluſage and void, quoad the Baron, and good as to the Feme, 3 Bulſt. 62. by which Book it appears not how the Plea was, but the Jury found, quod ipſi ſunt inde culpabiles, and adjudged for the Plaintiff, and affirmed upon a Writ of Error, Hob. 126. S. P. cited to have been adjudged con. Cro. Jac. 530. vide Cox and Cropwel, like Point, in Trover, becauſe no Tort is ſuppoſed in the Baron, Noy 41. adjudged con. Cro. Eliz. 883. adjudged con. Cro. Jac. 5. 6. adjudged con. and affirmed upon a Writ of Error.

2. (e) In an Action againſt *Baron* and *Feme*, (f) for Words ſpoke by the *Feme*, they may plead, *Quod ipſi non ſunt inde culpabiles*, and this will make a good Iſſue, for the Wrong done by the *Feme* charges both. *Trin.* 11 *Car.* between *Needler* and *Symnel*, *Cro. Car.* 417. adjudged after a Verdict for the Plaintiff.

(f) In Debt againſt them, they may plead, Quod non debent, becauſe by the Declaration charged, quod debent, Noy 41. per Curiam.

Fol. 353.

(a) What ſhall be ſo in particular Actions, vide the Pleadings after the reſpective Actions.

(a) Bar.

(A) (c) Action.

(c) If a Man brings Treſpaſs for taking his Horſe, and is barred in that Action, yet if he can get the

1. IN an Action upon the Caſe, upon an Aſſumpſit, to pay a certain Sum upon Requeſt, for ſuch a Thing bought, if the Plaintiff be barr'd by Verdict, upon non Aſſumpſit modo & forma pleaded, yet in a new Action for the ſame Sum, for the ſame Thing, if the Count be upon an Aſſumpſit to pay the Sum at ſeveral Days, the firſt Verdict and Judgment ſhall not be any Bar thereof, tho' it be averr'd to be the ſame Contract, for it cannot be the ſame Contract, this being to be paid at ſeveral Days; My Reports, 14 Jac. (d) Payne againſt Selle.

Horſe into his Poſſeſſion, the Defendant is without Remedy, for notwithſtanding the Recovery, the Property is ſtill in the Plaintiff. 2 Mod. 319. per Curiam. (d) 1 Rol. Rep. 391. S. C. adjudged.

2. But (e) otherways it had been if he had recovered in the firſt Action; my Reports (f) 14 Jac. (but Quere, for (g) it ſeems that this cannot be the ſame Promiſe.

C. and S. P. per Coke & Concell' per Dod'.

(e) But vide 2 Mod. 294. (f) 1 Rol. Rep. 392. S. (g) In the Original it is ſemble, &c.

3. If a Man grants a Rent to another, payable at a certain Day and covenants to pay the Rent accordingly, if the Grantee after recovers in an Action of Covenant for the Non-payment of the Rent. (h) this will be a Bar of any Action after for the Rent, (i) for in the Action of (k) Covenant, he ſhall recover all the Rent in Damages. Mich. 7 Jac. B. between Strong and Wats, per Curiam.

(h) So a Recovery or Bar in an Aſſumpſit, willbe a good Bar in Debt, for the ſame Thing. 4 Co. 94. b. reſolved. Yelv. 84. Cro. Jac. 110. Cro. El. 240. (i) But in an Aſſumpſit, the Defendant cannot plead an Account brought for the ſame Money, to which he had tendered his Law, becauſe Damages are recovered in an Aſſumpſit, but not in an Account, per Moor 458. Pl. 633. but Q. vide Cro. Jac. 110. (k) So where an Action is brought upon a ſpecial Aſſumpſit, to pay Rent. Cro. Car. 415. Cro. El. 67.

4. If A. demiſes Lands to B. for Life, with Warranty, and after a Warrantia Chartæ is brought upon this Warranty by B. againſt A. and after B. brings an Action of Covenant againſt A. upon the ſame Warranty, and aſſigns for Breach, that the ſaid A. before the Leaſe to B. demiſed it for Years to J. S. who hath entred and evicted him; it is no Bar of this Action of Covenant, that B. hath a Warrantia Chartæ (l) depending upon the ſame Warranty, becauſe this Action is grounded upon the Eviction of a Chattel, Scilicet, a Leaſe for Years, in which there cannot be any Voucher, Rebutter, or Warrantia Chartæ, Hobart's Reports 5. between (m) Rudge and Pincomb, adjudged.

(l) Where one Action ſhall abate becauſe there is another depending, vide the Sub-diviſions of Abatement, Title Writ. (m) Hob. Fol. 3. S. C. adjudged and affirmed upon Error in Camera Scaccarii. 1 Rol. Rep. 25, 26. S. C. adjudged and affirmed upon Error. Yelv. 139. S. C. adjudged.

5. If A. an Informer, exhibits an Information againſt B. upon the Statute for taking of Farms, and the ſame Day C. exhibits an Information for the ſame Cauſe againſt B. in this Caſe, the Defendant may plead the Truth of the Caſe to both, and bar them, for in as much as there is not any Precedency of Suit, to attach it in either of them, the Court cannot give Judgment for either of them, Hobart's Reports 171. between (n) Pie and Cook, per Curiam.

(n) Hob. Fol. 128. S. C. and S. P. per Curiam, Moor 864. Pl. 1193. S. C. and S. P. per Curiam, and ſaid it was like 2 Replevins by 2 Perſons, at the ſame Time, for one taking, the Defendant ſhall anſwer neither of them, ——but if a Writ bears Date the ſame Day a former abated, it will be preſumed to have been purchaſed after Abatement of the firſt. All. 34. per 2 Judges.

6. (o) If *A* and the other Executors of *B.* bring Debt upon a Bond and the Defendant pleads, that before the Purchaſe of this Writ, the ſaid *A* as Adminiſtrator of *B.* brought Debt upon the ſame Bond againſt the Defendant, who then pleaded, that *B.* made Executors, who adminiſtred. *&c.* and the Plaintiff then (p) replied, that Adminiſtration was committed to him, *pendente lite*, between the Executors, upon which the Defendant then demurred, and it was adjudged for him, and ſo now pleads this Matter by way of Eſtoppel, and demands Judgment, if, (q) as Executor, he ſhall have an Action upon the ſame Bond, againſt the ſame Defendant; this is no good Plea, for by the firſt Judgment, the Plaintiff was only barr'd as to the Action of the Writ, *viz.* to have one as Adminiſtrator, but this Miſtake of his Action is no Bar nor Eſtoppel, to bring his true Action. *Paſch.* 1 *Jac.* (r) *Robinſon*'s Caſe. 5 *Co.* 32, 33. adjudged.

(o) 2 Mod. 319. S. P. arguendo, becauſe no Bar to the Right, but the firſt Action abated, becauſe miſconceived. — So where Judgment is given upon the Manner, not Matter of the Plea. 2 Lev. 210. (p) According to the Report of the Caſe. Cro. Jac. 15. he did not know that he was Executor. (q) Palm. 443. vide. (r) Cro. Jac. 15. S. C. adjudged, and ſaid, that the Rule in perſonal Actions, once barr'd, and always barr'd, muſt be intended where it is a Bar to the Right, not where the Action is only miſconceived, as in this Caſe. 6 Co. 8. S. C. cited, and ſaid by the firſt Plea, the Defendant gave to the Plaintiff an Action, as Executor, of which the Plaintiff might not know before.

7. So if barred in a Formedon in Deſcender, a Man may bring a Formedon in Remainder or Reverter. (s) 5 *Co.* 33. a.

(s) 2 Mod. 43. S. C. cited, and like Point, ſaid.

8. In Debt for Rent, upon a Leaſe for Years, the Defendant may plead in Bar, a Covenant, that the Leſſee ſhall deduct ſo much for Charges; for the Covenant being in the ſame Deed, and executory, and pleadable in

Bar, there ſhall not be a Circuity of Action. *Mich.* 16 *Car.* 2. between *Johnſon* and *Carre.* 1 *Lev.* 152. adjudged.

(B) Action.

Bar by (a) (b) (c) Judgments.

(a) Where Judgment in one ſort of Action will be a Bar in another Sort, vide 2 Rol. Abr. 105. Letter Q. — Where a (d) Fol. 354. Judgment in a foreign Attachment ſhall be pleaded in Bar of other Actions. vide 1 Rol. Abr. 555. Letter L. (b) If in Caſe for Eſtovers, the Plaintiff is barr'd, becauſe the Houſe to which, &c. is fallendown, this is a temporal Bar only, but if in an Aſſiſe, or Quod permittat, Quere if not perpetual and binding, tho' the Plaintiff rebuilds his Houſe. Hob. 39, 40. (c) Where and how the Defendant may inforce the Plaintiff to enter up his Judgment, to the End he may plead it to another Action, vide Latch 216. (e) 2 Mod. 42. S. C. cited.

1. IN an Action upon the Caſe, if A. the Plaintiff declares, whereas he, magnam Curam de negotiis in lege of B. the Defendant, habuiſſet, & a permultis periculis ipſum preſervaſſet, and whereas the Plaintiff at the Requeſt of the Defendant, eidem Defendenti promiſiſſet to take to Wife the Daughter of the Defendant, the Defendant did aſſume to pay to the Plaintiff 1000 l. and upon (d) non Aſſumpſit pleaded, the Jury find for the Defendant, and Judgment is given accordingly, and after A. brings another Action, and declares, that in Conſideration that the Plaintiff, ante tunc, at the Requeſt of the Defendant, magnam Curam de negotiis in lege of the Defendant habuiſſet & ipſum Defendentem a multis periculis preſervaſſet, and to the Defendant adtunc at his Requeſt, promiſiſſet ducere in uxorem ſuam filiam Defendentis, the Defendant did aſſume to pay to the Plaintiff 1000 l. cum inde requiſitus eſſet; the Judgment in the firſt Action, is not any Bar of this Action, becauſe the Promiſe is a collateral Promiſe, and the Defendant promiſed to pay the 1000 l. generally, without any Requeſt, which is to be paid within a convenient Time, but in the laſt Promiſe it is to be paid upon Requeſt, which Requeſt is Part of the Promiſe, and a ſpecial Requeſt ought to be alledged, with the Time and Place of Requeſt, this being a collateral Promiſe, but this is not to be alledged in the firſt Promiſe, becauſe no Requeſt is mentioned to be Parcel of the Promiſe, and therefore theſe two Promiſes differ materially, and therefore the Judgment in the firſt Action, is not any Bar of this laſt Action. Mich. 22 Car. B. R. between (e) Leach and Bromſil, adjudged upon Demurrer.

(f) So tho' he had him not in Execution, for by the Judgment tranſit in rem judicatam. per Yelv. 68. Cro. Jac. 74. (g) Yelv. 67, 68. S. C. adjudged. Moor 762. Pl. 1060. S. C. adjudged.

2. If in *Trover* for Plate, the Defendant pleads, That the Plaintiff had before brought his Action for the ſame Plate againſt *J. S. &c.* and had Judgment to recover 20 *l.* Damages, and (f) had *J. S.* in Execution for the ſame, and avers it to be the ſame Converſion, *&c.* this is a good Plea, for by the Judgment, the Damages which before were uncertain, are reduced to a Certainty, and therefore he ſhall not demand the Uncertainty again, and by the Judgment, the Property of the Goods is altered. *Hill.* 2 *Jac.* between (g) *Brown* and *Wooton. Cro. Jac.* 73. adjudged.

(h) But for this vide 5 Co. 86. 6 Co. 45. Cro. Car. 75. and infinite other Books to the ſame Purpoſe. (i) Yelv. 67, 68. S. C. and S. P. per Curiam, Moor 762. Pl. 1060. S. C. and S. P. per Curiam.

3. But a Judgment in Debt, againſt one Obligor, upon a joint and ſeveral Obligations, and the Body taken in Execution, is (h) no Plea to an Action brought againſt the other Obligor. (i) *Hill.* 2 *Jac. Cro. Jac.* 73. *per Curiam.*

(k) So if in Debt upon an Obligation, a Man is barred by Judgment, ſo long as that Judgment continues in Force, he can have no Action upon the ſaid Obligation. 6 Co. 46. a.

4. If a Man hath Judgment in *B.* upon an Obligation, he ſhall not afterwards bring an Action of Debt upon the ſame Obligation, (k) ſo long as the ſaid Judgment remains in Force, for by this Judgment, the Specialty is turned into a Matter of Record. *Mich.* 3 *Jac. Higgen*'s Caſe. 6 Co. 44, 45. adjudged.

5. Otherways, if in the County-Court by *Juſtices*, for that Court not being of Record, he may, upon the ſame Obligation, have Debt in a Court of Record. 6 Co. 45. a.

6. If in Debt upon a Bond, the Defendant pleads, That the Plaintiff brought another Action in *London*, upon the ſame Bond, to which the Defendant

fendant there pleaded *non eſt factum*, and it was found for him, upon which it was entred, that the Defendant ſhould recover Damages againſt the Plaintiff, & *quod eat inde ſine die*; this is no Plea, becauſe the Judgment was not *quod querens nil capiat per breve*, and ſo no ſuch Judgment was given as to bar the Plaintiff in another Suit. *Trin.* 9 *Jac.* between (l) *Level* and *Hall*. *Cro. Jac.* 284. adjudged.

(l) 1 Brownl. 81. S. C. and S.P. adjudged, becauſe, as there ſaid, this was only a Trial, and no Judgment. 2 Mod. 294, 295. S. C. cited.

7. If in Debt againſt Executors, they plead a Judgment obtained againſt one of them as Adminiſtrator, this is a good Bar, for tho' he might have pleaded in Abatement to the firſt Action, (m) yet he was not obliged ſo to do, and this Recovery againſt him was upon the Right of the Debt. *Hill.* 20 21 *Car.* 2. between *Parker* and *Amys*. 1 *Lev.* 261. adjudged.

(m) Vide 1 Lev. 200. and Cro. El. 41.

8. If in an Action upon the Caſe, the Declaration is inſufficient, and the Defendant pleads an ill Plea, but Judgment is given againſt the Plaintiff, upon the Inſufficiency of his Declaration, but by Miſtake entred *quia placitum pred', &c. bonum & ſufficiens, in lege exiſtit, &c. ideo conſideratum, &c. quod quer' nil capiat per billam*, (n) whereas it (o) ought to have been entred, *quod Defendens eat inde ſine die*, and the Plaintiff brings a new Action, and declares aright, and the Defendant pleads the former Judgment, reciting the Record *verbatim*, this is no good Plea, for without queſtion, the Plaintiff having only committed a Miſtake in his Declaration, he may ſet it right in a ſecond Action. *Trin.* 27 *Car.* 2. between (p) *Lepping* and *Kedgewin*. 1 *Mod.* 20. adjudged *per totam Curiam*.

(n) Cro. Car. 545. vide where the Entry was ſo, and the Plaintiff brought a new Action.

(o) Where Judgment is given for the Tenant or Defendant, upon a Plea in Bar, or to the Writ, &c. the Judgment is all one, viz. quod eat inde ſine die, and ſhall have Reference to the Nature or Matter of the Plea, and ſo be taken to go in Bar, or to the Writ. Co. Lit. 363. a. 8 Co. 62. b.

(p) 2 Mod. 42, 43. Rozal and Lampen ſeems to be S. C. adjornatur.

9. But if a Declaration be faulty, but the Defendant takes no Advantage thereof, but pleads a Plea in Bar, upon which the Plaintiff takes Iſſue, and the Right of the Matter is found for the Defendant, the Plaintiff ſhall have no other Action, (q) for he is (r) eſtopped by the Verdict. *Trin.* 27 *Car.* 2. 1 *Mod.* 207. *per Curiam*.

(q) Vide Kelw. 20. a.

(r) But where a Man ſhall be eſtopped by a Verdict. vide 1 Rol. Abr. 866. Letter G. 876. Letter X.

10. So if a Declaration be faulty, and the Plaintiff demurs to the Plea in Bar, (s) by which he confeſſes the Fact, if well pleaded, he is eſtopped thereby, and ſhall have no other Action. *Trin.* 27 *Car.* 2. 1 *Mod.* 207. *per Curiam*.

(s) What is confeſſed by a Demurrer, vide the Subdiviſions of Demurrer, Title Pleading.

11. But if the Plea is not good, it can be no Eſtoppel, but the Plaintiff may have another Action. *Trin.* 27 *Car.* 2. 1 *Mod.* 207. *per Curiam*.

(C) Action upon the Caſe.

Bar.

1. If the Defendant be found not guilty, in an Action upon the Caſe, for Words, yet this Verdict, if no Judgment be given thereupon, ſhall be no Bar of another Action upon the Caſe for the ſame Words. Mich. 9 Jac. B. between (a) Jacob and Sowgate, per Curiam.

(a) Antea 171. Pl. 6. S. C. 2 Brownl. 122. S.C. adjudged. 1 Brownl. 11. S. C. adjudged.

2. In an Action upon the Caſe, upon a Promiſe, if the Plaintiff declares, That in Conſideration that he demiſed to the Defendant, a Houſe for a Year, for certain Rent, and delivered the Key thereof to him, the Defendant did aſſume, at the End of the Year, either to deliver the Poſſeſſion, or give 5 l. to the Plaintiff, and for the Non-delivery of the Poſſeſſion, or Payment of 5 l. the Action is brought; it is no Plea in Bar of this Action, for the Defendant to ſay, That the Plaintiff had nothing in the Houſe at the Time of the Demiſe, for if it ſhould be admitted, yet the Delivery of the Key and Poſſeſſion, is a ſufficient Conſideration to bind the Defendant, either to re-deliver the Poſſeſſion, or give 5 l. Mich. 13 Car. B. R. between Page and Lownes, adjudged upon Demurrer.

3. If

3 If in *Trover* for certain Sheep, the Plaintiff declares, That the 25th Day of *March*, in the Year, *&c.* he was poſſeſſed thereof, and loſt them, and that the ſame, the laſt Day of *April*, in the ſame Year, came to the Hands of the Defendant, who, the ſame Day, converted, *&c.* And the Defendant pleads, That the Plaintiff had before brought Treſpaſs againſt the Defendant, and *J. S. Quare ceperunt & abduxerunt* the ſaid Sheep, and thereupon counted of a Taking the 14th of *April*. in the ſame Year, to which the Defendants then pleaded a Judgment againſt *J. N.* who was poſſeſſed of the ſaid Sheep, and that by Virtue of a *Fieri facias* thereupon, the ſaid Sheep were ſold to the Defendant, *&c.* whereupon Iſſue being joined, it was found for the Plaintiff, and 2*d.* Damages given, upon which, the Plaintiff had Judgment for the ſaid 2*d.* Damages, and 6 *l.* Coſts, and avers the Taking and Driving, for which the ſaid Recovery in Treſpaſs was had, and the Converſion in this Action to be all one, *&c.* and to this Plea, the Plaintiff replies, and confeſſes the ſaid Action and Recovery of 2*d.* Damage, *&c.* but ſays, The ſaid 2*d* Damage was not given for the Value or Converſion of the ſaid Sheep, *abſque hoc*, that the ſaid Taking and Driving, whereupon the ſaid Judgment was had, is the ſame Treſpaſs, *quoad* the Converſion of the ſaid Sheep, of which the Plaintiff now declares; this is a good Replication, and the Plaintiff ſhall recover; for the Damage being ſo ſmall, cannot be preſumed to be given for the Value of the ſaid Sheep, for if ſo, the Plaintiff muſt, for 2*d.* only, loſe his Property in the ſaid Sheep, therefore it ſhall be preſumed, and may be averr'd, that this Damage was given for the Chaſing and Driving, and that the Plaintiff had the Sheep again, and after loſt them, *&c.* and the rather, becauſe, in Time, the Converſion is ſuppoſed ſo long after the Chaſing and Driving. *Paſch.* 2 *Car.* between (b) *Laicon* and *Barnard*, *Cro. Car.* 35, 36 adjudged by 3 Judges, but *Yelverton* contra, and ſaid, *cepit & abduxit*, implies the Defendant had them, and *ouſted* the Plaintiff of his Poſſeſſion, and the Damage, tho' ſmall, muſt be intended to have been given for the Sheep, and if ſo, no Action lies for the Converſion afterwards.

(b) Hut. 81. S. C. adjudged, and ſaid that Yelverton at firſt hæſitavit, but afterwards agreed, Stil. 202. S.C. cited. and ſaid, per Rol. Ch. Juſtice, it will be hard to maintain this Judgment, for abduxit implies the Owner had them not again.

4. If in an Action upon the Caſe, the Plaintiff declares againſt the Defendant, That he falſly and maliciouſly did procure a Commiſſion of Bankrupt to iſſue out againſt the Plaintiff, *&c.* by Virtue whereof, the Defendant broke his Shop, and took away his Goods and Shop-Books, whereby he was diſcredited, and loſt his Trade, to his Damage, *&c.* and the Defendant pleads, That the Plaintiff had before brought an Action of Treſpaſs, for the breaking his Shop, taking his Goods *&c.* and upon that Action had recovered Damages, *&c.* this is no good Plea, for this Action is not brought for the ſame Thing as the former was, in which no Damage could be recovered for the Scandal upon which this Action is grounded; and for the ſame Fact, a Man may have ſeveral Actions in different Reſpects, and in divers Manners, may recover Damages for the ſame Thing. *Hill.* 21 *Car.* between *Watſon* and *Norbury*. *Stil.* 3, 4. 201, 202. adjudged *per totam Curiam.*

5. If in *Trover* for certain Goods, the Defendant pleads, That the Plaintiff hath before brought Treſpaſs, *vi & armis* for the ſame Goods, and (c) upon not guilty pleaded, a Verdict and Judgment thereupon was given for the Defendant, *&c.* this is no good Plea, (d) becauſe this Action will in many Caſes lie, where Treſpaſs will not, and ſo it may very well be preſumed, that the Plaintiff at firſt only miſtook his Action, and brought Treſpaſs, where his Evidence would ſerve in *Trover* only. *Mich* 34 *Car.* 2. between (e) *Put & alios*, and *Rawſtern. Raym.* 472. adjudged by *Pemberton*, *Jones*, and *Raymund*, *Dolbin hæſitante.*

(c) But where the Defendant pleaded, That the Plaintiffs, and another, who is ſince dead, had brought Treſpaſs againſt B. and C. for the ſame Dr, who juſtified the Taking, as a Heriot, in the Right of the now Defendant, and upon Demurrer, it was then adjudged againſt the Plaintiff, &c. this is a good Plea, becauſe by the Demurrer, the Property of the Dr was admitted in the Defendant, in whoſe Right the Juſtification was made, &c. and tho' the Defendant is a Stranger to the Record, yet being privy to the Treſpaſs, he may plead it. Cro. El. 668. by Walmſly and Kingſmill, contra Anderſon and Glanvil. But Walmſly agreed, if the Bar had been upon not guilty pleaded, the Plaintiff might have had a new Action, becauſe then it would not appear but that the Verdict was upon the Miſprizal of the Nature of the Action. Co. Ent. 39. (d) So in an Account, the Defendant cannot plead, that Trover was brought for the ſame Thing, and upon Not guilty a Verdict was given for the Defendant, &c. for tho' he might not convert, &c. as the firſt Action ſuppoſed, yet he may be accountable, according to the Suppoſal of this. Moor 463. Pl. 653. adjudged. (e) 3 Mod. 1, 2. S. C. adjudged by the ſame 3 Judges, Dolben very much doubting. 2 Mod. 318, 319. S. C. by which Report, the Defendant juſtified

fied in the firſt Action for a Heriot, and Judgment for him upon Demurrer, by which the taking for a Heriot being confeſſed, the Property was altered, and Trover would not lie, and therefore the former Judgment a good Plea, and ſo that Book ſays it was adjudged; but that the Reporter ſeems to have miſtaken the Principal Caſe, for that of Fenner's, Cro. El. 667. which was cited, and in which there was ſuch Plea. 2 Vent. 169, 170. S. C. cited, and that in the firſt Action, non cul' was pleaded, &c. and ſaid, per Curiam, That by the Averments, which in every ſuch Plea muſt be made, it muſt appear to the Court, that the Matter was the ſame, and if not, but the Plaintiff in his former Action was barr'd only by Miſtake of the Nature of his Action, the Averment might be traverſed.

6. If in *Trover* for certain Goods, the Defendant pleads, That the Plaintiff had before brought an Action of Treſpaſs, *Quare vi & armis*, &c. *cepe-runt & aſportaverunt*, &c. againſt the ſame Defendants, for the ſame Goods; to which the Defendants pleaded then not guilty, and upon a ſpecial Verdict, which the Defendant in their Plea ſet forth *verbatim*, the Court then gave Judgment, That the Plaintiff, *nil capiat per billam*, and that the Defendants *irent inde ſine die*, and avers, the Goods in both Declarations to be the ſame, and the taking and carrying away, *&c.* ſuppoſed in the ſaid Action of Treſpaſs, and the coming to the Hands of the Defendant, *&c.* in this Declaration, to be the ſame, and the Cauſe of Action the ſame, *&c.* this is a good Plea; for tho' *Trover* will lie in many Caſes where Treſpaſs will not, yet upon the Matter here diſcloſed in Pleading, it appears, the Plaintiff was before barred, not by Miſtake of his Action, but upon the Right and Merits of the Cauſe, *Paſch.* 2 *Will & Mar'* between *Letchmore* and *Toplady*, 2 *Vent.* 160, 170. *per Curiam*, but yet becauſe the Caſe of *Put* and *Rawſtern* had been adjudged, as before, (which the Court now thought to be the ſame with this Caſe, by reaſon of the Averments, which in that Caſe were, or might have been made) and upon the Importunity of the Plaintiff's Counſel, Day was given to the next Term, to be further argued.

(a) (b) Barretors.

Fol. 355.

1. 1 ED. 3. Cap. (c) 15. **Conſervators of the Peace, who are not Barretors, ſhall be aſſigned in every County.**

(a) For the Derivation of the Word Letter K. 82.

vide 8. Co. 37. a. Co. Lit. 368. b. (b) For Indictments thereof, vide 2 Rol. Abr. 79. Pl. 5, 6. (c) This is miſprinted in the Original, as here, and ſhould be Cap. 16.

2. 34 Ed. 3. Cap. 1. (d) **Juſtices of Peace ſhall have Power to reſtrain the Offenders, Riotors, and all other Barretors.** 2 R. 2. Cap. 7.

(d) And they have Power and Authority, without any ſpecial Commiſſion of Oyer and Terminer, Barns and Conſtantine, Cro. Jac. 32. per Curiam, Yelv. 46. per Curiam, but vide 2 Rol. Rep. 151. con.

(A) (a) Who ſhall be ſaid a Barretor.

(a) Vide the Caſe of Barretry, 8 Co. 36. b. 37. a. 3 Mod. 97, 98. 3 Inſt. 175.

1. **IF a Man proſecutes an infinite Number of Suits, which are his own proper Suits, againſt others,** (b) **yet he ſhall not be a Barretor by this, for if they are falſe, the Defendants ſhall have Coſts againſt him, and if ſuch Perſon ſhall be a Barretor, then he that ſues for Cauſe may be comprehended, but he that ſtirs up** (c) **Suits among his Neighbours, is a Barretor.** Mich. 11 Jac. B. R. Some's Caſe, per Curiam.

(b) But if a Man deſigns not the Recovery of his own Right, this muſt be but meerly to ruin and oppreſs his Neighbours, it is Barretry, per 3 Mod. 98. (c) But in many Caſes, and more than once or twice, ſo that he may be proved a Common Barretor, 8 Co. 27. b.

2. A common Sollicitor, who ſollicits Suits, is a common Barretor, and may be Indicted thereof, becauſe it is no Profeſſion in Law, *Trin.* 14 *Jac.* in *Camera Stellata*, between *Oliver* and *Blanchflower*, it was ſo held by *Coke*, Chief Juſtice, and the Lord Chancellor.

3. A common Barretor, is a common Mover, and Exciter or Maintainer of Suits, Quarrels, or Parties, either in Courts, whether of Record, or not, or in *Pais*, in Diſturbance of the Peace, by taking and detaining Poſſeſſions of Houſes, *&c.* Goods, *&c.* in Controverſy, by Force, Subtilty, or Fraud, and often in Suppreſſion of Truth and Right, and by falſe Inventions, and ſowing of Calumnies, Rumours, and Reports, by which Diſſention and Diſquiet ariſes amongſt Neighbours. 8 Co. 36. b.

4. If *A.* brings an Action againſt *B.* for 4000 *l.* (whereas, in Truth, *A.* owes *B.* 200 *l.* and *B.* owes *A.* nothing) and thereupon *B.* is brought before a Judge, to give Bail to the Action, and *C.* who is a Barreſter at Law, is there preſent, ſolliciting this Suit for *A.* this is Maintenance in *C.* but not Barretry, unleſs *C.* knew that *A.* had no Cauſe of Action. *Hill.* 1 *Jac.* 2. between the *King* and 3 *Mod.* 97. the Chief Juſtice, at the firſt, inclined accordingly: but it appearing upon Evidence, that *C.* did entertain *A.* in his Houſe, and brought ſeveral Actions in his Name, where nothing was due, *C.* was found guilty of Barretry.

Fol. 356.

(a) (b) Baſtard.

(a) For the Derivation of the Word, vide Co. Lit. 343, b.
(b) For Baſtard eigne & mulier puiſne and the Learning thereof, vide 1 Rol. Abr. 624. Letters D. and C.

1. If a Man dies, and his Wife hath Iſſue born 40 Weeks and 8 Days after his Death, as if he dies the 23d of March, and the Iſſue is born the 9 Jan. following; this Iſſue ſhall be legitimate, for by Nature it may be legitimate, and the Law has not appointed any certain Time for the Birth of legitimate Infants. Mich. 17. Jac. B. R. (c) between upon Evidence at the Bar, which concerned the Heir of one Andrews, reſolved per Curiam. In which Caſe Dr. Paddy, and Dr. Momford, 2 Phyſicians, being ſworn, informed the Court, That by Nature, ſuch Iſſue may be legitimate; for they ſaid, That the exact Time of the Birth of an Infant, is 280 Days from the Conception, Scilicet 9 Months and 10 Days after the Conception, accounting it per Menſes Solares, Scilicet, 30 Days to each Month; but it is natural alſo if the Birth be at any Time within 10 Months, Scilicet, within 40 Weeks; for by ſuch Account, 10 Months and 40 Weeks are all one. But by Accident an Infant may be born (d) after the 40 Weeks, or before: And in the Caſe at the Bar it was proved, That the Wife longed for Things in the Life of her Husband, and the Husband died of the Plague, ſo that he was ſick but one Day before his Death; and that the Father-in-Law of the Woman perſecuted her, and uſed her with great Inhumanity, and cauſed her to lie in the Streets for ſeveral Nights; and that the Woman was in Travel 6 Weeks before ſhe was delivered, but that it was interrupted by the ſaid Uſage of her Father-in-Law; and that ſhe was delivered within 24 Hours after ſhe was received into a Houſe, and well uſed, which was good Proof of the Legitimation; tho' it was proved of the other Part, That the Woman was a lewd Woman of her Body, and upon Evidence, the Jury found him legitimate. Nota, at the Trial, one Chamberlain, a Man-Midwife informed the Court, upon his Oath, That he had known a Woman delivered of one Child, and within a Fortnight after, of another; and the Drs. ſaid, the Birth is ſooner or later, according to the Nutriment that the Mother hath for it. 1 H. 6.

(c) Alſop and Bowtrel, Cro. Jac. 541. S. C. adjudged, Godb. 281. S. C. adjudged, Palm. 9, 10. S. C. adjudged, Lit. Rep. 178. S. C. cited.

(d) Cro. Jac. 542. ſeveral Authors cited to prove it might be at 11 or 14 Months end, & vide Stil. 277. at the Bottom.

3. Rolf ſaid, a Woman might be enſeint for 7 Years.

2. Bracton Lib. 5. Fol. 417. b. Si partus naſcatur poſt mortem patris, (qui dicitur Poſtumus) per tantum tempus quod non ſit veriſimile quod poſſit eſſe defuncti filius, & hoc probato, talis dici poterit baſtardus.

(e) Cro. Jac. 541. S. C. cited.

3. (e) 18 Ed. 1. Rot. 13. in B. R. with Mr. Bradſhaw, Johannes de Radewell, brought an Aſſiſe verſus Radulphum & Henricum, coram Johanne de Vallibus Willielmo de Malam & Sociis ſuis itinerantibus apud Bedfordiam. This Aſſiſe was brought there the 15 Ed. 1. and after in 18 Ed. 1. The Parties and Recognitors of the Aſſiſe came coram Rege, and the Aſſiſe found inter alia, that after the Death of Robert the Husband of Beatrice, the Mother of the ſaid Henry, the ſaid Beatrice came into the Court of the ſaid Radulph, (of whom the Land is held by the Service of Chivalry) & predicta Beatrix preſens in Curia quæſita an eſſet pregnans necne, juramento aſſerebat ſe non eſſe pregnantem, & ut hoc omnibus liqueret, veſtes ſuas uſque ad tunicam exuebat, & in plena Curia ſic ſe videri permiſit; & dicunt quod per aſpectum corporis non apparebat eſſe tunc pregnans; upon which Evidence the ſaid (f) Radulph, the Lord, took the ſaid John for his Heir, &c. & quia invenitur per veredictum juratorum aſſiſæ captæ coram prefatis Juſtitiariis itinerantibus quod pred. Henricus natus fuit per undecim dies poſt (g) ultimum tempus legitimum mulieri-

(f) Fol. 365.

(g) But note, it does not appear by this Record what is ulti-

bus pariendi conſtitutum, ita quod pred Henricus dici non debet filius præd. Roberti ſecundum legem & conſuetudinem Angliæ uſitata imo dici debet ſecundi viri pred. Beatricis ſi forte ſe nupſerit alicui infra undecim dies poſt mortem primi mariti ſui, ut ſi extra matrimonium baſtardus; & quia per veredictum juratorum invenitur quod pred. Robertus non habuit acceſſum ad predictam Beatricem per unum menſem ante mortem ſuam, per quod magis preſumitur contra predictum Henricum, & plane invenitur in Recordo, quod predictus Johannes ſtetit in ſeiſina ut frater & hæres pred. Roberti per unum annum & amplius, & per voluntatem & aſſenſum pred. Radulphi Capitalis Domini, &c. conſideratum eſt quod pred. Johannes recuperet ſeiſinam ſuam de pred. tenementis per viſum Juratorum, & pred. Radulphus & Henricus in miſericordia. Vide 8 Ed. 2. quod vide Rotulo Parliamenti 6 Ed. 3. Membrana 4. Nota, **the Jury found the Husband languiſhed of a Fever long before his Death.**

mum tempus legitimum, &c. per Cro. Jac. 541.—but Co. Lit. 123. it is ſaid, legitimum tempus in this Caſe appointed by Law, at the fartheſt is 9 Months, or 40 Weeks, but that a Woman may be delivered before that Time.

4. Britton Fol. 166. **The Manner is ſhewn, how a Jury of Women ſhall be impannelled by the Sheriff, after the Death of the Husband,** (h) **upon** (i) **the Complaint of the next Heir, and the Feme ſhall be viewed by them,** (k) **and after ſhall be put in one of the King's Caſtles, to be kept from Company, and if ſhe hath not a Child within 40 Weeks after the Death of her Husband, or if ſhe be not found enſeint,** (l) **let her be puniſhed by Fine and Impriſonment, and the Lords of the Fee, as ſoon as may be, without Delay, may take the Homage of the Heirs; and if ſhe hath a Child within the 40 Weeks, then let this Infant be received to the Inheritance, if another Heir cannot aver this Child to be by another than her Husband, where, &c. vide this.**

(h) For the Writ de ventre inſpiciend' and the Proceedings therein, vide Reg. 227. a. Co. Lit. 8. b. Dame Coulloughby's Caſe, Moor 523. Pl. 692. Cro. El. 566. Theaker's Caſe, Cro. Jac. 685. Winch. 71. (i) Upon his Suggeſtion in Chancery, Moor 523. (k) Upon the firſt Writ, the Sheriff having returned in B. that ſhe was with Child, &c. a Writ iſſued thence, commanding him to keep her in ſuch a Houſe, &c. Cro. El, 566.—But where married again, the Court would not grant ſuch a ſecond Writ to remove her from her Husband, but left her with him, he entring into Recognizance, that ſhe ſhould not be removed from the Houſe where they then inhabited, and that one or two of the Women, return'd by the Sheriff, ſhould ſee her every Day, &c. Cro. Jac. 686. Winch. 71. (l) Thus is the Original, but, perhaps, to make it better Grammar, it ſhould be, ſhe ſhall be puniſhed, &c.

5. **If a Man hath a Wife, and dies, and after within a ſhort Time, the Woman marries again, and within 9 Months a Child,** (m) **ſo that the Infant may be the Child of the firſt or ſecond Husband, in this Caſe, if it cannot be known by Circumſtances, the Infant may elect the firſt or ſecond Husband for his Father.** Co Lit. 8.

(m) But where the Iſſue was born 40 Weeks and 11 Days after the Death of the firſt Husband, it was taken to be the Iſſue of the laſt, Palm. 10. cited.—where born 7 Months after, taken to be the Iſſue of the firſt, tho' the Feme married again within a Week after the Death of her Husband. Theaker's Caſe, Cro. Jac. 685, 686. Lit. Rep. 177, 178.

6. If *A.* marries *B.* and after they are divorced, *cauſa Frigiditatis* of the ſaid *A.* ſo that for 3 Years after the ſaid Marriage, the ſaid *B. remanſit virgo intacta propter perpetuam impotentiam, &c.* and after *A.* marries *C.* by whom he hath Iſſue in the Life of *B.* this Iſſue is legitimate, for by the Divorce the Marriage was diſſolved, and if the ſecond Marriage is voidable, yet it continues till it is diſſolved, which cannot be after the Death of the Parties) *Mich.* 40 and 41 *Eliz.* between (n) *Webber* and *Bury*, adjudged upon a ſpecial Verdict, in which were found all the Examinations, *&c.* proving the perpetual Diſability of *B.* upon which the Spiritual Judge founded his Sentence; and after this Judgment was affirmed upon a Writ of Error in *B. R.*

(n) Jenk. Rep. 208. S. C. adjudged. Moor 225, 226, &c. Pl. 366. S. C. adjudged. 2 Leon. 169, 170, &c. S. C. adjudged, and affirmed upon Error. 1 And. 185, 186. S. C. adjudged.

(A) (a) Who ſhall be ſaid to be a Baſtard.

1. **If a Man having one, takes another Wife, and hath Iſſue by her, living the firſt Wife, this Iſſue is a Baſtard.** (b) 18 H 6. 31. (c) 18 Ed. 4. 30. b. Co. 7. Kenn. 44. for the ſecond Marriage is void 38 Aſſ. 24 **adjudged.**

(a) Who ſhall be ſaid to be Baron and Feme, and of Conſequence their Iſſue no Baſtard, vide 1 Rol. Abr. 340. Letter A. (b) Fitz. Replication 8. S. C. (c) Br. Baſtardy 43. S. C.

2. (d) **If a Man marries his Coſin within the Degrees, the Iſſue between them is no Baſtard, till a Divorce comes, for the Marriage is not void.** 18 H. 6. 34. b.

(d) 1 Rol. Abr. 340. Pl. 2. S. P.

3. (e) **So it is if the Brother marries his Siſter.** 18 H. 6. 32. 39 Ed. 3. 31. b.

(e) 1 Rol. Abr. 340. Pl. 4. S. P.

4. So

4. So if a Man marries his Coſin within the Degrees of Spiritual Affinity, the Iſſue is no Baſtard till a Divorce. (f) 39 Ed. 3. 31.

(f) 1 Rol. Abr. 340. Pl. 3. S. C.

5. If a Man hath Iſſue by A. and after intermarries with her, yet this Iſſue is a Baſtard by our Law. (g) 47 Ed. 3. 14. b. (h) 11 H. 8. 48. (i) 18 Ed. 4. 30. 39 Ed. 3. 31. b. 38 Aſſ. 24.

(g) Br. Baſtardy 6. S.C. (h) Fitz. Baſtardy 6. S. C. Br. 12. S. C. (i) Br. Baſtardy 43. S. C.

6. And ſo he is a Baſtard by the Common Law of Scotland, Skene Regiam Majeſtatem, Lib. 2. Cap. 5. Verſ. 2, 3.

7. An Ideot, à Nativitate, may conſent to a Marriage, and his Iſſue ſhall be legitimate. Trin. 3 Jac. B. R. between Stile and Weſt, adjudged upon a ſpecial Verdict, for a ſmall Queſtion.

Fol. 358.

8. If the Husband be gelt, ſo that it is apparent, that he cannot by any Poſſibility get a Child, if his Wife hath Iſſue ſeveral Years after, this will be a Baſtard, tho' it was begot within Marriage, becauſe it is apparent, that it cannot be legitimate. Hill. 14 Jac. in Camera Stellata, between Done and Edgerton, Plaintiffs, and 2 Hintons and Starky Defendants; ſo held by the Chancellor and Mountacute, but Hobert econtra.

(B) Who ſhall be ſaid a Baſtard, and who a Mulier.

1. By the Law of the Land, a Man cannot be a Baſtard, who is born after Eſpouſals, unleſs it be by ſpecial Matter. (a) 40 Ed. 3. 16. b. (b) 21 Ed. 3. 39. (c) 39 Ed. 3. 31. (d) 31 Aſſ. Pl. 10. 2 Ed. 3. 29. b. per Herle & Tond.

(a) Fitz. Baſtardy 9. S.C. (b) Br. Baſtardy 18. S. C. (c) Fitz. Baſtardy 6. S. C. Br. 12. S. C.

(d) This is miſprinted in the Original, as here, and, I ſuppoſe, ſhould be 39 Aſſ. Pl. 10. which vide Fitz. Baſtardy 18. Br. 37.

2. If a Woman be groſly enſeint by A. and after A. marries her, and the Iſſue is born during the Marriage, this is a Mulier, and not a Baſtard. (e) 44 Ed. 3. 12. b. 45 Ed. 3. 28.

(e) Fitz. Baſtardy 10. S. C. Br. 5. S. C.

3. So if a Woman be groſly enſeint by one Man, and after another marries her, and after the Iſſue is born, this is a Mulier, becauſe it is born during the Marriage, and no Iſſue can be taken by whom ſhe was, enſeint, becauſe that cannot be known. (f) 1 H. 6. 3. contra (g) 44 Ed. 12. b. 45 Ed. 3. 28. contra 18 H. 6. 31. b. ſo altho' the Iſſue be born within 3 Days after the Marriage. 18 Ed. 4. 3.

(f) Fitz. Baſtardy 3. S. C. Br. 5. S. C. (g) Fitz. Baſtardy 10. S. C. Br. 5. S. C.

4. (h) If a Feme Covert hath Iſſue in Adultery, yet if her Husband be able to beget Children, and is within the 4 Seas, this is no Baſtard. Hill. 14 Jac. in Camera Stellata between Done and Edgerton, Plaintiffs, and 2 Hintons and Starky, Defendants, agreed by the Judges and the Chancellor. (i) 39 Ed. 3. 14.

(h) Co. Lit. 244 S. P. (i) Br. Baſtardy 21. S. C.

5. If a Wife elopes, and lives in Adultery with another, and during this, Iſſue is born in Adultery, yet this is a Mulier by our Law. (k) 1 H. 6. 3. 43 Ed. 3. (l) 18 b. 20. (m) 18 Ed. 4. 30. Hill. 14. Jac. in Camera Stellata, agreed per Curiam, in the Caſe of Edgerton, before cited. (n) 39 Ed. 3. 14. (o) 38 Aſſ. 14. contra 40 Ed. 3. 16 b. (p) 33 Aſſ. 8. (q) but the Baron ought to be within the 4 Seas, ſo that by Intendment he may come to his Wife, otherways the Iſſue is a Baſtard. (r) 40 Ed. 3. 20. (s) 33 Aſſ. 8.

(k) Fitz. Baſtardy 1. S.C. Br. 26. S. C. (l) This is miſprinted in the Original, (as here) & ſhould be 19. b. which vide Br. Baſtardy 4. (m) Br. Baſtardy 43. S. C. (n) Fitz. Baſtardy 8. S. C. Br. 21. S. C. (o) Br. Baſtardy 35. S. C. (p) Fitz. Baſtardy. 16. S. C. (q) Co. Lit. 244. n. S. P. (r) This is miſprinted in the Original, (as here) and ſhould be 43 Ed. 3. 20. which vide Br. Baſtardy 4. (s) Fitz. Baſtardy 16. S. C.

6. So if a Feme Covert goes into another County, and takes Husband, and hath Iſſue by him, the firſt Husband being within the Seas, the Iſſue is a Mulier, (t) 7 H. 4. 9. b.

(t) Br. Baſtardy 8. S. C. Fitz. 4. S. C.

7. But otherways it is, if the Baron be over the Seas. (u) 7 H. 4. 9. b.

(u) Br. Baſtardy 8. S. C. Fitz. 4. S. C.

8. If the Feme hath Iſſue, the Baron being over the Seas for 7 Years before the Birth, the Iſſue is a Baſtard by our Law. (x) 19 H. 6. 17. b.

(x) Br. Baſtardy 20. S.C.

9. If a Feme Covert hath Iſſue, the Baron being over the Seas 6 Years before the Birth, this is a Baſtard by our Law. 18 H. 6. 34.

10. So if the Feme hath Iſſue, the Baron being over the Sea 3 Years before the Birth and 3 Years after the Birth, the Iſſue is a Baſtard. 18 H. 6. 32. b.

11. (y) If a Man hath been ſo long over the Sea, before the Birth of the Iſſue, which his Wife hath in his Abſence, that the Iſſue cannot be

(y) This Caſe is not ſo literally tranſlated, as moſt others are, yet in Senſe and Meaning is the ſame.

be his Iſſue, this is a Baſtard. Hill. 14 Jac. Camera Stellata, between Done and Edgerton, Plaintiffs, and 2 Hintons and Starky, Defendants, reſolved by the Judges and Chancellor.

12. Contra 13 Ed. 2. Baſtardy 25. where it was found the Father was in Ireland when the Son was begotten, yet the Plaintiff was nonſuit, which is, that he is no Baſtard.

Fol. 359.

13. If a Woman hath Iſſue, her Husband (z) being within the Age of 14, the Iſſue is a Baſtard. (a) 1 H. 6. 3. b.

(z) If under the Age of Procreation. Co. Lit. 244. a. (a) Br. Baſtardy 26. S. C.

14. If a Woman hath Iſſue, her Husband being but of the Age of 3 Years, the Iſſue is a Baſtard. 18 H. 6. 31. becauſe it appears, ſhe cannot have Iſſue at this Age: So if ſhe hath Iſſue, the Huſband being but 6 Years of Age at the Birth. 18 H. 6. 34.

15. So if ſhe hath Iſſue, the Husband being but 7 Years of Age at the Birth, this Iſſue is a Baſtard. (b) 38 Aſſ. 24. per Tanke.

16. (c) So if ſhe hath Iſſue, the Baron being only of the Age of 8 Years at the Birth, for it cannot be intended by Law, that it was begot by the Baron. (d) 38 Aſſ. 24. per Tanke, (e) 29 Aſſ. 54. adjudged.

17. So it is if the Baron be but of the Age of 9 Years at the Time of the Birth of the Iſſue. (f) 29 Aſſ. 54. Quere.

(b) Br. Baſtardy 36. S. C. (c) Co. Lit 244. a. S. P. (d) Br. Baſtardy 36. S. C. (e) Br. Baſtardy 32. S. C. (f) Br. Baſtardy 32. S. C.

18. P. 10 Ed. 1. B. Rot. 23. Foxcroft's Caſe, one R. being infirm, and in his Bed, was married to A. a Woman, by the Biſhop of London, privately, in no Church nor Chapel, nor with the Celebration of any Maſs, the ſaid A. being then big by the ſaid R. and within 12 Weeks after the Marriage, the ſaid A. was delivered of a Son, and adjudged a Baſtard, and ſo the Land eſcheated to the Lord by the Death of R. without Heir.

(C) Who ſhall be ſaid a Baſtard, who not.

What.

1. A Baſtard is (a) nullius filius, neither of Father nor Mother. 41 Ed. 3. 19.

(a) Co. Lit. 78. a. 173. a.

(D) Baſtard by our Law, and Mulier by the Civil.

1. If A. hath Iſſue by B. and after they inter-marry, yet the Iſſue is a Baſtard by our Law, (a) 47 Ed. 3. 14. b. 11 H. 4 84. but a Mulier by the Civil Law. 11 H. 4. 84. Bracton. Lib. 5. Fol. 416, 417.

(a) Br. Baſtardy 6. S. C.

2. If the Parents are divorced, cauſa Conſanguinitatis, they not having Notice thereof at the Marriage, the Children had before, are Baſtards by our Law, and Muliers by the Civil Law. 18 Ed. 4. (b) 24. b.

(b) This is miſprinted in the Original, (as here) and ſhould be 29. b. which vide Br. Baſtardy 43. 1 Rol. Rep. 212. cited.

3. If a Man hath Iſſue by a Woman, and after marries the ſame Woman, the Iſſue (c) by our Law is a Baſtard, and (d) by the Spiritual Law a Mulier. 18 Ed. 4. 30.

(c) This Diverſity manifeſtly appears by 20 H. 3. cap. 9. where to the Requeſt of the Biſhops, that ſuch Iſſue might inherit, quia Eccleſia tales habet pro legitimis, Comites & Barones una voce reſponderunt quod nolunt leges Anglie mutare, &c. which vide, with the Comment. 2 Inſt. 96, 97. (d) By Force of a Conſtitution by Pope Alexander 3. made Anno 6 H. 2. 2 Inſt. 97.

4. Such Iſſue is a Baſtard by our Law, yet he ſhall be called the Son of them in our Law, (e) for a Remainder limited to him by ſuch Name is good. (f) 41 Ed. 3. 19. Co. 6. 65.

(e) For this vide 2 Rol. Abr. 43. Pl. 8, 9. 10, 11, &c. and the Notes there. (f) Br. Grants 17. S. C.

(E) Baſtard by the Spiritual Law, and Mulier by our Law.

1. If a Man marries a Woman groſsly big by another, and within 3 Days after ſhe is delivered, in our Law the Iſſue is a Mulier, and by the Spiritual Law a Baſtard. (a) 18 Ed. 4. 30. (b) 1 H. 6. 3.

(a) Br. Baſtardy 43. S. C. (b) Br. Baſtardy 26. S. C. Fitz. 1. S. C.

(c) Br. Baſtardy 4. S. C. (d) Fitz. Baſtardy 5. S. C. (e) 7 Co. 44. a. S. P. Fol. 360. (f) Br. Baſtardy 4. S. C. (g) Fitz. Baſtardy 9. S. C.

2. So (c) 43 Ed. 3. 20. gives a Limitation, Scilicet, that it ſhall be a Mulier, if the Baron be within the 4 Seas, ſo that he may come to his Wife. contra (d) 11 H. 4. 14. b.

3. (e) If a Woman elope, and hath Iſſue in Adultery, the Iſſue is a Mulier in our Law, and by the Spiritual Law a Baſtard. 18 Ed. 4. 30. (f) 43 Ed. 3. 19. b. 20.

4. But 40 Ed. 3. 16. is, that if a Feme continues in Adultery, and hath Iſſue, this is a Baſtard in our Law.

5. But by the Law of the Land, a Man cannot be a Baſtard, that is born after Marriage, unleſs by ſpecial Matter. (g) 40 Ed. 3. 16. b.

(F) Baſtard by both.

(a) Br. Baſtardy 43. S. C.

1. A Man who hath a Wife, takes another Wife, and hath Iſſue by her, this Iſſue is a Baſtard by both Laws, for the ſecond Marriage is void. (a) 18 Ed. 4. 30. b. Co. 7. Kenn 44. 18 H. 6. 31.

(G) (a) What (b) Divorce baſtards the Iſſue.

(a) Where ſuch Sentence of Divorce is given in the Spiritual Court, the Iſſue ſhall be perpetually bound, ſo long as that ſtands in Force, and ſhall not at Common Law be admitted to make any Proof to the contrary, Ken's Caſe. 8 Co. 43. b. adjudged. Jenk. Rep. 289. adjudged. Cro. Jac. 186. adjudged. (b) Where it is a Vinculo matrimonii, becauſe they were not juſtæ nuptiæ. Co. Lit. 235. a. Cro. Car. 462. arguendo.—Otherways if a Menſa & thoro only, which ariſes from a Cauſe ſubſequent to the Marriage, as Adultery, &c. and diſſolves not the Marriage. Co. Lit. 235. a. Cro. Car. 462. arguendo. (c) Co. Lit. 235. a. S. P. (d) Vide Ant. 700. where the Marriage with another, after ſuch a Contract, is a meer Nullity, and by a Decree for Conſummation of the firſt Contract, &c. they become Baron and Feme, without a formal Divorce, and vide 2 Leon. 173. (e) Per 32 H. 8. cap. 38. No Divorce could be upon any Pre-contract, after Marriage ſolemnized in the Face of the Church, and conſummate with bodily Knowledge, or Fruit of Children, but quoad this Matter, this was repealed per 2 and 3 Ed. 6. cap. 23. and the whole Act per 1 and 2 P. M. cap. 8. Paragraph 20. and the 32 H. 8. quoad ſo much only as was not repealed by 2 and 3 Ed. 6. was revived per 1 El. cap. 1. Paragraph 11. ſo that quoad this Matter. the 32 H. 8. ſtands repealed.

1. (c) (d) A Divorce (e) cauſa Pre-contractus, baſtards the Iſſue. 47 Ed. 3. Pl. 78. 18 H. 6. 34.

(f) Co. Lit. 235. a. S. P. (g) Per 32 H. 8. cap. 38. No Reſervation, or Prohibition, God's Law except, ſhall trouble or impeach any Marriage, without the Levitical Degrees, which vide explained. 2 Inſt. 683, 684, &c.

2. (f) So cauſa (g) Conſanguinitatis. 47 Ed. 3. Pl. 78. contra 29 Ed. 1. Baſtardy 21. Curia.

(h) Co. Lit. 235. a. S. P. (i) Co. Lit. 235. a. S. P. 5 Co. 98. b. S. P. (k) For this manner of Divorce, vide Webber and Bury. 5 Co. 98. b. Moor 225, 226, &c. Pl. 366. 2 Leon. 169, 170, &c. 1 And. 185, 186.

3. (h) So cauſa Affinitatis. 47 Ed. 3. Pl. 78.

4. (i) So cauſa (k) Frigiditatis. 47 Ed. 3. Pl. 78.

(l) So a Divorce cauſa Adulterii, does not baſtard the Iſſue. 1 Rol. Abr. 341. Pl. 20.

5. But a Divorce (l) cauſa Profeſſionis, does not baſtard the Iſſue. 47 Ed. 3. Pl. 78.

6. A Divorce for Cauſe of Spiritual Affinity, baſtards the Iſſue. 39 Ed. 3. 31. b. as if the Baron hath baptized the Couſin of the Feme.

7. A Divorce *cauſa Metus*, baſtards the Iſſue. *Co. Lit.* 235. a.

(H) At what Time the Divorce being made, it ſhall baſtard the Iſſue.

(a) 7 Co. 44. b. S. P. Jenk. Rep. 268. S. P. 289. S. P. 1 Brownl. 42. S. P. 5 Co. 98. b. S. P. Co. Lit. 33. a. at the Bottom S. P. (b) But *econtra*, a Sentence of Divorce given in the Life of the Parties, may be repealed after their Death. 7 Co. 44. b. (c) This is miſprinted in the Original, (as here) and I ſuppoſe ſhould be 39 Aſſ. Pl. 10. which vide Fitz. Baſtardy 18. Br. 37.

1. (a) If Baron and Feme continue Baron and Feme for all their Lives, the Iſſue cannot be a Baſtard by a (b) Divorce after their Death, for the Divorce in the Spiritual Court is pro peccatis, which cannot be after their Death, and therefore ſuch Divorce there is only to diſinherit the Iſſue, which they cannot do. 39 Ed. 3. 31. b. 32. for by ſuch Means every one might be diſinherited. (c) 31 Aſſ. Pl. 10.

2. As the Iſſue cannot be a Baſtard after the Death of the Baron and Feme, by a Divorce, for cauſe of Spiritual Affinity, for the Cauſe aforeſaid. 39 Ed. 3. 31. b. 32. (d) 31 Aſſ. Pl. 10.

(d) This is miſprinted in the Original, (as here) and I ſuppoſe ſhould be 39 Aſſ. Pl. 10. which vide Fitz. Baſtardy 18.

3. If A. takes B. to Wife, and hath Iſſue by her, and after they are divorced, becauſe they were within the Age of Conſent at the Time of their Marriage, and after diſagreed, and A. takes C. to his Wife, who dies, and after takes D. to his Wife, by whom he hath Iſſue, and dies, upon the Suit of the Iſſue of B. the Eccleſiaſtical Commiſſioners, upon a Commiſſion directed to them, cannot examine the Marriage between A. and C. becauſe they are dead, for by this Examination, the Inheritance would be drawn in queſtion, which is not lawful after they are dead. Mich. (e) 8 Jac. B. Kenn's Caſe reſolved, and a Prohibition granted.

(e) 7 Co. 44. S.C. and S. P. may be inferred. Jenk. Rep. 289. S. C. and S. P. may be inferred.

4. If A. takes B. to his Wife, within the Age of Conſent, and after, at the Age of Conſent, they diſaſſent, and marry themſelves elſewhere, and have Iſſue, and die, it cannot after be examined in the Eccleſiaſtical Court, whether they did conſent, at the Age of Conſent, before their Diſſaſſent, becauſe they cannot baſtard the Iſſue after their Death, Englefield's Caſe, by all the Juſtices reſolved, and a Prohibition granted in Chancery thereupon, cited Trin. 11 Jac. B.

5. If Adminiſtration be committed to the Uſe of the Wife of the Teſtator, and after a Libel is preferred in the Eccleſiaſtical Court, ſurmiſing, that (f) ſhe was not the Wife of the Teſtator, becauſe they were married within the Age of Conſent, and that at the Age of Conſent, they did diſſaſſent, a Prohibition ſhall be granted, becauſe after their Death they ſhall not baſtardiſe the Iſſue. Trin. 11 Jac. B. Lanner's Caſe.

(f) Fol. 361.

(I) (a) Trial.

(a) For the Trial of Baſtardy, vide 2 Rol. Abr. 586. and the Notes there.

1. 18 ED. 1. Libro Parliamentorum 2. upon the Petition of William de Valenciis, and his Wife, to have the Bull of the Pope directed to the Archbiſhop of Canterbury, allowed for the Examination of a Sentence of Legitimation of Dioniſe, the Son, Willielmi de Monte Caniſio, upon Oyer of the Bull, it is there ſaid, Quod bulla illa finaliter tendit ad jus Succeſſionis hæreditariæ terminandum, cum de ſucceſſione hereditaria nemo debeat cognoſcere niſi Curia Regis, vel Curia Eccleſiaſtica ad Mandatum Curiæ Domini Regis, & etiam ſi bulla procederet manifeſte eſſet contra conſuetudinem hactenus in regno uſitatam. & quia Dominus, Rex nuper providit quod appellationes non fiant vel cauſæ agentur in Curia Chriſtianitatis de iis quæ a Curiis Regis ibi ſunt demandata, propter multa inconvenientia quæ exinde ſequerentur, & etiam quia placita de ſucceſſione ita ordinata ſe habent, quod primo per brevia Domini Regis incipere debent in Curia Regis, & de Curia illa ſi neceſſe fuerit, mitti ad Curiam Chriſtianitatis, & non e converſo, & quia multa placita & innumerabilia temporibus retroactis in Curia Regis placitata, & etiam judicia ſuper eiſd. reddita irritarentur, & reverſarentur ſi bulla iſta procederet, &c. thereſore diſallowed.

(K) How it ſhall be tried, and how not, and by whom.

1. GEneral Baſtardy ought to be tried by the Biſhop, and not per Pais, 18 Ed. 4. 30.

2. The Ordinary cannot try Baſtardy, without a Command by the King's Writ, upon a Suit in a temporal Court. Da. 1. Baſtardy 55. 39 Ed. 3. 31. b. per Thorpe.

3. When Iſſue is joined upon Baſtardy, before it ſhall be awarded to the Ordinary to be tried, Proclamation ſhall be made thereof in the ſame Court, and after the Iſſue ſhall be certified into Chancery, where Proclamation ſhall be made once in every Month, for 3 Months, and after the Chancellor ſhall certify it to the Court where the Plea is depending,

depending, and after it ſhall be proclaimed again in the ſame Court, That all thoſe, whom this Plea does concern, ſhould go to the Ordinary to make their Allegations. 10 H. 6. cap. 11.

(a) In the Original it is al miſe de Partys.

4. If the Biſhop certifies Baſtardy, unleſs this comes in at the (a) Motion of the Parties, this is nothing to the Purpoſe. 7 H. 6. 32. b.

(L) In what Actions it may be tried.

1. IT may be tried by the Biſhop in an Action of Treſpaſs, or other perſonal Action, as well as in Aions real. (a) 14 H. 4. 36. (b) 19 H. 6. 17. b.

(a) Br. Baſtardy 14. S. C. (b) Fitz. Trial 6. S. C. Poſt 2 Rol. Abr. Pl. 30, 31.

2. It may be tried in an Aſſiſe, as well as in a præcipe quod reddat, or other Writ in the right. 38 Ed. 3. 27. adjudged. (c) 38 Aſſ. 14. adjudged. (d) 27 Ed. 3. 82. b.

(c) Br. Baſtardy 35. S C. Br. Certificate d'Eveſq; 27. S. C. (d) Fitz. Aſſiſe 11. S. C.

3. (e) Baſtardy ought to be certified under the Seal of the Ordinary, for it is not ſufficient to be certified under the Seal of the Commiſſary. (f) 20 H. 6. 1.

(e) By whom Baſtardy ſhall be certified. vide 2 Rol. Abr. 588. Letter U. (f) Br. Certificate d'Eveſq; 1. S. C.

(M) Who ſhall take Advantage of the Trial of Baſtardy, and of what Trial, & *econtra*.

Fol. 362.

1. IF a Man be certified a Mulier by the Ordinary, this is not any Eſtoppel, becauſe he may be a Baſtard by our Law notwithſtanding, for if he was born before Marriage, and after the Marriage was had, the Ordinary will not certify him to be a Baſtard, but a Mulier. (a) 18 Ed. 4. 29. b. 30. (b) 11 H. 4. 84. 18 Ed. 3. 33. b. 34. adjudged. 30 Ed. 3. 8. b. 26 Aſſ. 64. (c) 7 H. 6. 37. but Judgment ſhall be given in the Action in which the Certificate is made, according to the Certificate. (d) 40 Ed. 3. 40. 30 Ed. 3. 8. b. adjudged. 18 Ed. 3. 34. admit and 34. there after adjudged contra. (e) 7 H. 6. 37. b.

(a) Br. Baſtardy 23. S.C. (b) Fitz. Baſtardy 6. S. C. Br. 12. S. C. (c) Fitz. Eſtoppel 21. S. C. Br. 78. Br. Certificate de Eveſq; 9. S. C. Br. Baſtardy 19. S. C.

(d) Br. Baſtardy 2. S. C. (e) Fitz. Eſtoppel 21. S. C. Br. 78. S. C. Br. Certificate d'Eveſq; 9. S. C. Br. Baſtardy 19. S. C.

2. If between Strangers, another be tried a Baſtard per Pais, this will not bind him who is ſo tried, becauſe he is a Stranger to the Trial, and cannot have an Attaint. (f) 40 Ed. 3. 37. b. Doctor and Student. (g) 68. b.

(f) Br. Trial 9. S. C. Fitz. Trial 44. S. C. (g) This, by my Edition, ſhould be 69. b. but however it is the 2d. Part, cap. 5.

3. But otherways it is of him that is privy to the (h) Attaint, Doctor and Student 68. b.

(h) I ſuppoſe ſome Words have been omitted by the Printer of the Original, and that it ſhould be privy to the Iſſue, and may have an Attaint.

4. If a Man be certified a Baſtard by the Ordinary, he ſhall be perpetually bound againſt all the World, to (*) avoid a contrary Certification, and becauſe it is the higheſt Trial thereof, Doctor and Student 68. continues of Record. (i) 40 Ed. 3. 38. (k) 11 H. 4. 84.

(i) Br. Trial 9. S. C. Fitz. Trial 44. S.C. (k) Fitz. Baſtardy 6. S. C. Br. 12. S. C.

(*) In the Original it is, pur avoider, tho' perhaps, it ought to be, pur aver.

5. And ſo if the Party who is certified a Baſtard, is a Stranger to the Suit. (l) 11 H. 4. 84. (l) Fitz. Baſtardy 6. S. C. Br. 12. S. C.

6. If a Man be certified a Baſtard by the Ordinary, in a perſonal Action, he ſhall be bound perpetually, as well as in Actions real. (m) 19 H. 6. 18. b. (m) Fitz. Trial 6. S. C.

7. If a Man be certified a Mulier by the Ordinary, in an Action between himſelf and J. S. this ſhall not bind Strangers thereto, but they may ſay that he is a Baſtard. 23 Aſſ. 5. adjudged, (n) 27 Ed. 3. 82. b. adjudged. (n) Fitz. Aſſiſe 11. S. C.

(N) At what Time the Trial ſhall bind.

1. IF a Man be certified a Baſtard, yet this ſhall not bind before Judgment given thereupon, in an Action between him and the other. 18 Ed. 3. 34.

2. If the Defendant be certified a Baſtard by the Ordinary, yet the Certificate will loſe its Force, if the Plaintiff be after Nonſuit, for then the Certificate is not of Record. 18 Ed. 3. 34.

3. But after Certificate of Baſtardy in the Tenant, if the Tenant dies, by which the Writ abates, yet the Certificate ſhall ſtand in Force. 18 Ed. 3. 34.

(a) (b) By-Laws.

Fol. 363.

(a) For the Definition thereof vide Moor 583.

(b) For the Uſefulneſs and Neceſſity of By-Laws, vide Moor 583, 584.

1. 15 H. 6 Cap. 6. it is enacted, That no Maſters, Wardens, or People of Guilds, Fraternities, and other Companies incorporate, ſhall make or uſe any Ordinance which ſhall be to the Diminution or Diſinheritance of the Franchiſes of the King, or others, nor againſt the common Profit of the People, nor any other Ordinance of Charge, &c. but this is expired, as 19 H. 7. Cap. 7. where it it is enacted, That no Ordinance ſhall be made in Diminution or Diſinheritance of the Prerogative of the King, nor other, nor againſt the common Profit of the People, unleſs they are examined and approved by the Chancellor, Treaſurer of England, Chief Juſtices of either Bench, or 3 of them, or both Juſtices of Aſſiſe, in their Circuit where the Ordinance is, &c. nor ſhall reſtrain any to ſue to the King againſt ſuch Ordinances.

2. 3 H. 7. Cap. 9. An Ordinance made in London, upon Pain that no Freeman of the City ſhall go or come to any Fair, or Market, out of the City of London, with any manner of Wares, &c. to ſell or barter, to the Intent that all Buyers, and Merchants, ſhould reſort, to the ſaid City to buy, &c. and this Ordinance was void by the Statute, becauſe of the great Damage which was likely to come by it.

3. 12 H. 7. Cap. (c) 16. A By-Law made by the Merchant-Adventurers, That none ſhould ſell or buy at the 4 Marts within the Dominions of the Duke of Burgundy, before Compoſition made by Fine with the ſaid Merchant-Adventures, contrary to the Liberty of every Engliſhman, and to the Liberty of the ſaid Mart, and therefore enacted, That this Ordinance ſhall be void. (c) This is miſprinted in the Original, (as here) and ſhould be Cap. 6.

4. If an Ordinance be made by a Corporation, which hath Power to make it by Cuſtom or Charter, if the Ordinance be reaſonable and lawful, it may be put in Execution without any Allowance by the Chancellor, Treaſurer, or others, &c. according to the Statute of 19 H. 7. Cap. 7. Co. 5. Chamb. Lond. 63. b. (but it ſeems that they forfeit the Penalty of the Statute, and it does not make the Ordinance void.)

(A) What ſhall be ſaid a good (a) By-Law.

Vide ſeveral Caſes. *Co.* 8. (b) The Caſe of the City of *London.*

(a) By-Laws muſt ever be ſubject and ſquared to the Rule of the general Law of the Realm, as ſubordinate to it, Hob. 211.

(b) 2 Brownl. 278. 284. S. C.

1. ED. 6. Incorporated the Town of St Albans, by the Name of Mayor, &c. and granted to them Power to make Ordinances, and after, when the Term was appointed to be there, by the Aſſent of A. and other Burgeſſes, they aſſeſſed a Sum upon every Inhabitant,

bitant, for the Charges in Erection of Courts there, and ordained, That if any refused to pay, &c. they should be imprisoned. This is not a good Ordinance to imprison Men if they do not pay, (c) because it is against the Statute of Magna Charta nullus liber homo, &c. but they might have inflicted a reasonable Penalty, but (d) not Imprisonment; which Penalty they might have limited to be levied by Distress, or for it to have an Action of Debt. Co. 5. (e) Clark's Case adjudged, 64.

(c) For this vide 2 Inst. 54.

(d) For setting up a Tavern in Birchin-Lane, against the Will of the Mayor and Commonalty, &c. March 15.

(e) Moor 411. Pl. 563. seems to be S. C. adjudged, by which Book the By-Law was, That if any gave opprobrious Words to the Mayor, he should be imprisoned, &c. and per Curiam, such a By-Law is not lawful, but a By-Law to disfranchise the Offender, had been good. Moor 580. S. C. cited arguendo.

Fol. 364.

2. King Charles made the (f) Souremakers of London a Corporation, and gave to them Power to make Ordinances, and they made an Ordinance, That none should use the Trade, till he was free of the Corporation, and that if any who was not free, did use it, he should forfeit 40 s. for every Week which he did use it, and to be committed for it; and after they committed J. S. for using the Trade, and not paying 40 s. contrary to the Ordinance; this is not lawful to imprison him. Hill. 14 Car. B. R. Hardcastle's Case, per Curiam, resolved upon an Habeas Corpus, and he delivered accordingly.

(f) So is the Original, of which I know not the English.

3. A By-Law by a Corporation of Weavers in a Town, to restrain Apprentices educated in the same Trade, within the same Town for 7 Years after the making of the By-Law, is utterly void, Hobart's Reports, (g) 285.

(g) Hob. Fol. 211. S. C. Brownl. 49. S. C. and S. P. seems to be per Curiam, Hut. 6. S. C. and S. P. adjudged, Moor 869. Pl. 1205. S. C. adjudged.

4. A new Corporation, not having any (h) (i) Prescription to appropriate to themselves, and exclude others, ca. not make a By-Law to exclude all Persons from using an Art or Trade in their Town, to which they were not Apprentices in the same Town, tho' they have served as Apprentices to it in another Place. Hobart's Reports, (k) 285. between Norris and Stapes.

(h) But a By-Law founded upon Prescription, or Custom, may restrain a Man from the Exercise of his lawful Trade, for this, vide Raym. 294. Cart. 69. 2 Brownl. 178. 182.

(i) And tho' they have a Prescription, yet this shall not be carried further by a By-Law, than the Prescription warrants, Cart. 68. &c. 114, &c. Bridge. 140, 141. 2 Browul. 177, 178, &c.

(k) Hob. Fol. 211, 212. S. C. Hut. 5, 6. S. C. but as to S. P. no Opinion delivered. Moor 869. Pl. 1205. S. C. and S. P. adjudged.

5. King Edw. 3. by his Letters Patents, gave Authority to the Mayor and Commonalty of London, to make By-Laws among them, for the better Government of the City, and this was confirmed by Act of Parliament, and after a By-Law was there made, That no Carman, within the City, should go with his Cart, without a Licence of the Guardians of such an Hospital, and that if any one did to the contrary, that then he shall forfeit 15 s. for every Time, this is a void (l) By-Law because it is in Restraint of the Liberty of the Trade of a Carman, and so against Reason; for this tends only to the (m) private Benefit of the Guardians of the Hospital, and is in Nature of a Monopoly. Trin. 42 Eliz. B. R. between Payn and Haughton, adjudged.

(l) But yet if the Major, &c. of L. having, Time out of mind, had the Right to order and dispose of Cars, &c. to the End the Streets may not be pestered with Cars, &c. make a By-Law, That but 420 Cars, &c. shall be permitted to work for Hire, within the City, and the Liberties thereof, and that the Precedent, &c. of Christ's-Hospital, shall have the Regulation, &c. thereof; and that 20 s. Admittance, and 17 s. and 4 d. yearly shall be paid, &c. to the Use of the Poor of the said Hospital, this, quoad the Fine and Rent, is void, but in all Things else, a good By-Law, Player and Mere, Raym. 288, &c. 328. adjudged, 1 Sid. 284. adjudged, because a Multitude of Cars, by the Stoppage of the Streets, may prove a publick Nusance, and vide 1 Keb. 463. 496. 3 Keb. 10.

(m) All By-Laws ought to be for the common Benefit of, &c. and not for the private Benefit of a particular Man, &c. Goulf. 79. Moor 580.

6. So if the Merchant-Taylors of London, by Force of a Charter of the King, which gives to them Authority to make By-Laws, make a By Law, That no Merchant shall put (n) his Cloth to be dressed, but at a Cloth-Worker's of their Company, this is a void By-Law, for it is against Reason, and the general Liberty of the Subject, to be (o) restrained from (p) putting his Work to whom he pleases. (q) Trin. 42 El. B. R. adjudged.

(n) By the Report of this Case in Moor and 2 Inst. ubi infra, the Ordinance was only that he should put one Moiety, &c.

(o) 3 Mod. 159. vide.

(p) So a By-Law in London, That none shall bring any Sand, nor sell nor use any within the City or Suburbs, but that only which is taken out of the River of Thames, &c. is void, because it is against Reason, that a Freeman should be restrained from mer-

merchandizing and ſelling, and this may concern the Inheritance of ſome, who may have Sands in their Land, Godb. 106, 107. adjudged. Raym. 293. cited. (q) Davenant and Pardis, Moor 576, 577, &c. 591. Pl. 766. S. C. adjudged per totam Curiam, 2 Inſt. 47. S. C. 11 Co. 86. S. C. cited. Cart. 116. S. C. cited.

7. If the Corporation of Taylors in Ipſwich, by Force of the King's Patent, which gives them Power to make By-Laws for their better Government, ſo that they, according to the Law of England, make a By-Law, That none ſhall (r) exerciſe the Trade of a Taylor in Ipſwich, qui non fuerit allocatus per legale Warrantum vel authoritatem datam, by the ſaid Corporation, or 3 of the Maſters and Wardens, nor ſhall ſet up any Shop for this Art; nor ſhall exerciſe it, (s) until ſuch Time as they have preſented themſelves to the Maſter, &c. or 3 of them, or proved that they have ſerved in this Trade as an Apprentice for 7 Years, and if any does contrary, that he ſhall forfeit 3 l. to the ſaid Corporation, this is a void By-Law, becauſe by this, none ſhall exerciſe this Trade without their Allowance, and therefore, (t) becauſe it is not known what Proof is ſufficient (u) within the By-Law. P. 12 Jac. B. R. (x) the Corporation of Ipſwich adjudged.

(r) If a Servant makes Cloaths for his Maſter, Miſtreſs, or their Children, this is no exerciſing the Trade of &c. 1 Rol. Rep. 4. 11. Co. 54. a. Godb. 253. and vide (u) Fol. 365.

Bridg. 141. 8 Co. 129. a. (s) Per 28 H. Cap 5. No Apprentice or Journey-man, ſhall by Oath, or Bond, be compelled not to keep any Shop, &c. without Licence of the Maſter, &c. (t) The Proof cannot be by Oath, for they have no Power to adminiſter ſuch Oath, and if the Proof muſt be by Indentures and Witneſſes, perhaps the Corporation would not allow thereof, for which the Party would have no Remedy; beſides, by the By Law they are made Judges in their own Cauſe, which is unreaſonable. Godb. 254. 1 Rol. Rep. 5. and vide Bridge. 142. (x) 11 Co. 53, 54. S. C. adjudged. 1 Rol. Rep. 4, 5. S. C. adjudged. Godb. 252, 253. S. C. adjudged.

8. If an Ordinance be made in London, by the Common Council, (who have Power by Cuſtom, which is among other Cuſtoms confirmed by Act of Parliament, by general Words) That if any Freeman, Citizen, or Stranger, within the City, ſhall put any broad Cloth to Sale within the City of London, before it be brought to Blackwell-Hall to be viewed and ſearched, ſo that it may appear to be ſaleable and that Hallage be paid for it, Scilicet, 1 d. for every Cloth, that he ſhall forfeit for every Cloth 6 s. and 8 d. this is a good Ordinance, as well to bind Strangers as Freemen, becauſe it is made to prevent Fraud and Falſity in Cloth, and for the better Execution of the Statutes without Deceit, and the 1 d. for Hallage, is but a reaſonable Recompence of Charge (y) for the Benefit which the Subject hath by it. Co. 5. (z) Chamb. Lond. 62. reſolved.

(y) In the Original it is Charge and Benefit, &c. but I take it to be miſprinted.

(z) Moor 580. S. C. cited *argu-endo*, 3 Leon. 264, 265. S. C. imperfectly reported.

9. If a By-Law be made in London, That none ſhall make a Hot Preſs, nor uſe it within the City, under the Penalty of 10 l. for the making thereof, and 5 l. for the Uſe thereof, this is a good By-Law, becauſe the Uſe of theſe Preſſes is dangerous for Fire, and deceitful, in much as this makes Cloths and Stuffs better to the Eye than they are in Truth. Hill. 13 Jac. B. R. Edward's Caſe adjudged upon a Habeas Corpus.

(a) Where by ſuch By-Law, the Common may be regulated, but not abſolutely taken away, vide 3 Leon. 264. and that Regulation is in the Nature ture of a By-Law, as that Commoners ſhall not put in their Cattle till ſuch a Day, &c. 1 Leon. 190. 1 And. 234. Cart. 178. Dal. 95. 3 Leon. 38.

10. If there hath been a Court (which is called Curia legalis) held by the Lord of a Manor, Time out of Mind, in a great Moor, Part of the Manor, (in which many Men have Common) for the better ordering of the Common there, at which Court all the Commoners ought to appear by the Cuſtom; and there hath uſed to be a Homage ſworn by the Steward, which Homage hath uſed to preſent all Oppreſſions and Offences in the Common, and to make By-Laws and Ordinances, for the better ordering of the Common; which Ordinances the Commoners ought to obey, under a reaſonable Penalty, upon them to be aſſeſſed, to be forfeited to the Lord, &c. and the Homage ſworn, make a By-Law, That no Commoner ſhall put his Sheep within a Part of the Moor, under the Pain of 3 s. 4 d. to be forfeited to the Lord, and this By-Law is publiſhed and proclaimed in Court: This is a good By-Law, and ſhall bind all the Commoners, becauſe this By-Law aroſe out of a Cuſtom which began by Conſent of Parties. Alſo, this does not (a) take away all the Common, for he may have Common (b) for other Cattle, and that more abundant; alſo, he is not reſtrained as to Sheep in all the Moor, but only in one Part, and this is in Nature of an Act of Parliament, as Time and Occaſion requires, as perhaps by Inundation, or other Occaſion, it may be

(b) A By-Law was made, That no Tenant ſhould

should keep in the Commons of the Manor, any Steers above the Age of one Year, under the Penalty, &c. and because this tended to bind the Inheritance in the Common, quoad this manner

be inconvenient for Sheep; and at another Court, when the Occasion is taken away, it may be altered: And this shall bind as well Homagers, as other Commoners. And this is not like the Case of D. 15 El. 322. and (c) 2 H. 4. 24. b. because there the Commoners had their Common at the Will of the Lord only, and in this Case the Commoner ought to take (d) Notice of this By Law, without any particular Notice given to him, or otherways he shall forfeit the Penalty, because he ought to appear at the Court, and the Custom is alledged to be, that if the By-Law be proclaimed, that it shall bind all Commoners, and this is a personal Thing, ergo, Trin. 14 Car. B. R. between (e) Tinteny and James, per (f) Curiam, adjudged in a Writ of Error, upon a Judgment in Banco, where it was adjudged upon Demurrer accordingly. Intratur, Trin. 9 Car. Rot. 234. this concerned Sir John Stowel, and his Manor of Somerton, in the County of Somerset.

(f) Fol. 366.

of Cattle, it was adjudged void, Latton and Erdbury, 1 And. 234. adjudged, 1 Leon. 190. adjudged, because it is against common Right, where a Man hath Common for all commonable Cattle, to restrain him to one kind of Cattle, &c. (c) Fitz. Custom 10. S. C. Br. 12. S. C. 1 Rol. Abr. 560. Pl. 4. S. C. (d) What Notice of a By-Law is requisite to be given, vide Hob. 212. (e) Cro. Car. 497, 498. S. C. adjudged, 1 Jon. 421. S. C. but S. P. does not appear. Cart. 178.

11. If a By Law is made by the Company of Vintners in *London*, That every Fellow of the said Company, who shall be chose and admitted to be a Livery-man, shall pay 31 *l.* 13 *s.* 4 *d.* *&c.* this is a good By-Law, for this being a Degree of Preheminence, to which Men of Substance only are raised, and there being a Necessity for Money to support the Honour and Reputation of the Company; were the Sum more or less, it could not make the By-Law void, while it binds only the Members of the Corporation; for when a Man doth agree to be of a Company, he doth thereby submit himself to the Laws thereof. *Pasch.* 33 *Eliz.* *Taverner*'s Case, adjudged upon a Mandamus, to admit him to the Livery, according to his Election, it being return'd, that he refused to pay, *&c.*

12. If in *London* there is an Act of Common Council made, That the Bricklayers shall not plaister with Lime and Hair, but with Lime and Sand only, and that Plaistering with Lime and Hair shall belong to the Plaisterers, under the Penalty of, *&c.* (admitting this before to have been Part of the Trade of a Bricklayer) the By-Law is void, for tho' they have *regimen personarum* in their Manufactures, yet this Power extends only to their Demeanor in their Trade, and not to annex that to one Trade which before belonged to another. *Mich.* 21 *Jac.* The Case of the Bricklayers. *Palm.* 395. *per Curiam.*

13. When any Trade by its Excrescence, tends to a Nusance, and so may prove of publick Inconvenience, it may be restrained by a By-Law, as the Multitude of Taverns, *&c.* may be restrained. *Pasch.* 18 *Car.* 1 *Sid.* 284. *per Curiam.*

(g) March 15. S. P. per Curiam.

14. (g) So in regard of the Place, as that a (h) Butcher shall not have a (i) Shop in *Cheapside*, *&c.* *Pasch.* 18 *Car.* 2. 1 *Sid.* 284. *per Curiam.*

(h) So of a Tallow-Chandler, Brewhouse, &c. March 15. per Curiam. (i) A Man restrained from setting up a Tavern in Burchin-Lane, March 15.

15. If a By-Law is made by the Corporation of Throwsters in *London*, That none shall have above such a Number of Spindles in one Week, this is a good By-Law, for it is not in Restraint of Trade, but to make a more equal Distribution of it. *Hill.* 19 and 20 *Car.* 2. between *Freemantle* and the Company of *Throwsters*, 1 *Lev.* 229. adjudged.

(a) These 2 Cases following, seem to have been intended to

1. (a) It is not necessary that the Breach of a By-Law, made by the Homage, according to a Custom, should be presented by the Homage. D. 15 El. 322. 23. adjudged.

have come under a distinct Head or Division by themselves for in the Original, (as here) they are printed with a Distance from the preceding Matter, and the Enumeration of the Placita begins 1. &c.

(b) Whether a By-Law to restrain a Trade shall extend where a Man works for himself, or his own private Use, Bridg. 141. 3 Mod. 193.

2. If a By-Law be made by a Custom, and that for want of Observance one shall forfeit, for which the Lord shall distrain, and does not say whose Cattle, Scilicet, the Cattle of the Offender, (b) yet it shall be intended, and therefore good, D. 15 El. 322. 23. adjudged, as it seems to me.

(B) Of (a) what Things By-Laws may (b) be made, and of what not.

1. IT is a good By-Law, (where there is a Custom for the Homage of a Manor to make By-Laws, pro meliore ordine tenentium, &c.) That none shall put his Cattle in Communi the Shack antequam firmarius Rector of the Manor pulsasset Campanam in Campanili Ecclesiæ ibidem, upon the Pain of 10 s. (for it seems the Reason is, that he is not Lord, but hath Common there with the other Tenants, or no Common, and so is indifferent) D. 15 El. 321. 23. adjudged upon Demurrer against him, who was one of the Homage who forfeited the By-Law, but there, in the same Case, another Demurrer commenced, and was not resolved, but there it was objected, that this tended to the Disinheritance of the Commoner for ever, which was not reasonable.

(a) It cannot be made by a Corporation to restrain any Person to sue to the King or his Courts, for redress in their Cause, &c. per 19 H. 7. cap. 7. upon Pain of 40 l. (b) Whether by Act of Common Council, of the City of London, the Porters of Billingsgate may be created a Fellowship. 3 Mod. 193. adjornatur.

2. By the (c) Custom, Commoners may make a By-Law, That they do not put in their Cattle before such a Day, and if they do, that they may be distrained, and tho' all the Neighbours will not come, yet if Proclamation be made to do it, they who make Default, shall be bound as well as those who appear. Dubitatur. (d) 44 Ed. 3. 18, 19. (e) Whether it may be without the Assent of all: But Brooke in abridging it, Title Custom 6. That there is a Diversity, where it is in (f) Court, and where not, for it is used to bind in all Base Courts in England.

(c) The Inhabitants of a Town, without any Custom, may make By-Laws for the Repair of their Church, Highways, or such other Thing, which is for the Publick good, and in such Case, the greater Part, without any Custom, shall bind all. 5 Co. 63. Moor 579. Cart. 178. 2 Brownl. 288. — for they are by the Common Law, as it were incorporate for some Necessities, both common and peculiar to that distinct Body. Hob. 212. 1 Mod. 194. — But Inhabitants of a Town, for their private Profit, as for the better ordering their Common, &c. can make no By-Law without a Custom, and then the greater Part shall not bind the rest, unless warranted by the Custom. 5 Co. 63. and vide Moor 579, 584. 3 Leon. 265. Dal. 103. Godb. 50. Sav. 74. Cart. 178. 2 Brownl. 288. — and per Co. Lit. 110. b. the Reparation of a Church is of a private Nature, for which such Custom may be alledged. (d) Fitz. Avowry 74. S. C. (e) For this vide Goulf. 79. (f) Such By-Laws for the better ordering of the Common by Custom, may be made at the Leet, Earl of Exeter and Smith. Cart. 179. adjudged per 2 against 1. 2 Keb. 367. adjudged, and vide Palm. 396.

3. Tenants of a Manor may make a By-Law to bind themselves, (g) but not (h) Strangers, (i) 21 H. 7. 40. (it seems to be intended by Custom.)

(g) Hob. 212 dubitatur, whether they may bind Strangers, acting against it, within the Precinct. Godb. 179, 182. (h) For the general learning where Strangers shall be bound or not, vide Moor 579. at the Top. Dal. 103. Sav. 74. Godb. 180. Cart. 179. (i) Fitz. Prescription 67. S. C. Br. 40. S. C.

4. If there be a Corporation made and incorporated by the Name of *Mayor* and *Commonalty*, and by the Charter, the Mayor is appointed to be chose by the Commonalty, and in the said Charter there is a Power given to them to make By-Laws, for the better Order and Government of the said Corporation; (k) they may make a By-Law, That a select Number of the Commonalty shall be chose, by whom the Mayor shall be chosen, for the Avoidance of popular Confusion. *Mich.* 40, 41 *Eliz.* (l) The Case of Corporations. 4 *Co.* 78. a. *per Curiam.*

(k) But where Members of Parliament are to be chose by all the Commonalty, the Election cannot by a By-Law be given to a select Number, for free Elections of Members of Parliament are pro bono publico, and this is not to be compared to the Case of Elections of Mayors, &c. 4 Inst. 48, 49. (l) Jenk. Rep. 273. S. C. and S. P. per Curiam.

5. If the Corporation of Butchers, in *London*, having Power to make By-Laws, make one, That no Butcher, or Person being a Stranger, shall sell any Veal within the City of *London*, unless they dress the Kidnies of their Veal, in such Manner as the Kidnies of Sheep are dressed under the Penalty of, *&c.* a Stranger selling Veal in *London*, is not bound to take Notice of this By-Law. *Hill.* 7 *Jac.* between *Franklin* and *Green.* 1 *Bulst.* 11. adjudged.

6. But if such By-Law is made to suppress Fraud, or any general Inconvenience used by a Foreigner, as Corruption, *&c.* in the Sale of Meat, this is a good By-Law, and such of which he must take Notice. *Hill.* 7 *Jac.* 1 *Bulst.* 12. *per Curiam.*

7. If the Maſter, Warden and Aſſiſtants of the *Trinity-Houſe* in *Deptford-Strand*, being incorporated by Letters Patents of *Car.* 2. and having thereby Power to make By-Laws, do make one, That every Mariner, within 24 Hours after Anchorage in the River of *Thames*, ſhall ſend his Gun-powder on Shore, if the Weather will permit, under the Penalty of, *&c.* tho' *quoad* the Matter, this is a good By-Law, becauſe for the publick Good, and Prevention of the Danger which might otherways accrue to the City of *London*, yet becauſe the By-Law extended (m) beyond the Juriſdiction of the Makers. *Hill.* 31 and 32 *Car.* 2. between the Maſter, *&c.* and *Criſpin.* 2 *Jon.* 144, 145. *adjornatur.*

(m) Bridg. 141. like Point.

8. If the Company of Horners, of *London*, being incorporated by Letters Patents, and impow'red to make By-Laws, for the better Government of their Corporation, make a By-Law, That 2 Men, by them appointed, ſhall buy rough Horns for the ſaid Company, and bring them to the Hall, there to be diſtributed every Month, by the Maſter, *&c.* for the Uſe of the Company, and that no Member of the Company ſhall buy rough Horns within 24 Miles of *London*, but only of thoſe 2 Men ſo appointed, under the Penalty of, *&c.* this is no good By-Law; for they being a Company incorporated in the City of *London*, have no Juriſdiction elſewhere, and may as well extend their Power all over *England*, as for 24 Miles. *Hill.* 3 *Jac.* 2. between the Company of Horners, and *Barlow*, 3 *Mod.* 159. adjudged.

9. The Univerſity of *Oxford*, by ſeveral ancient Charters, having Juriſdiction *tam in laicos quam in alios*, and above 200 Years ſince, having made a By-Law againſt Night-walking, and being Guardians of the Peace, as well by Preſcription as Charter, and having had all their Juriſdictions and Privileges confirmed by 13 *El.* in the 7 *Jac.* made a By-Law, That whoever, *privilegiatus ſive non privilegiatus*, ſhould be taken walking in the Streets after 9 at Night, and having no reaſonable Excuſe to be allowed by the Proctor, *&c.* ſhould forfeit 40 *s. &c.* and a Townſman being taken abroad after that Hour, and demanded the Reaſon thereof, refuſed to give any Account, whereupon, *Cauſa contemptus & ad morum reformationem*, a Libel was exhibited againſt him in the *Chancellor's Court:* And whether this was a good By-Law, becauſe without an Act of Parliament, or expreſs Preſcription. A Corporation cannot make a By-Law to bind thoſe which are not of the Body, and Juſtices of the Peace have no Conuſance of Matters out of their Juriſdiction. *Paſch.* 32 *Car.* 2. *Dodwell's* Caſe. 2 *Vent.* 33. *dubitatur*, and a Prohibition granted, to the End the Merits ſhould be tried.

(C) (a) How it may be (b) made for the Recovery of the Penalty.

(a) Where upon a By-Law made in London, the Penalty was limited to be recovered by Action of Debt, wherein no Eſſoin, Protection, or Wager of Law ſhould be allowed, the Juſtices ſaid, They were very preſumptuous in making Acts ſo Parliament-like; and ſaid, they might be ſued in B. R. for their Preſumption and Inſolency, Godb. 107. 3 Mod. 193. (b) Where the Action cannot be reſtrained to the Court of the Corporation, in which the By-Law is made, but Debt, notwithſtanding will lie thereupon in the ſuperior Courts. 2 Sid. 105, 178. (c) Where under the Penalty of ſuch Sum, (not exceeding 40 s.) as by the Makers of the By-Law ſhould be aſſeſſed, &c. Bridg. 139, 142.

1. **If a Corporation that hath Power by Charter, or Preſcription, to make By-Laws, makes a By-Law, and a (c) penal Sum for Non-performance thereof, to be recovered by Diſtreſs, &c. this is good.** Co. 5. Clark's Caſe, 64.

2. **So if it be limited to be recovered by Action of Debt.** Co. 5. 64.

3. **So the Penalty may be recovered by Action of Debt, without Limitation.** Co. 5. 64.

4. **If an Ordinance be made by the Common Council in London, That a certain Thing ſhall not be done, upon Pain of Forfeiture of a certain Sum, to be recovered by the Chamberlain of London, by Action of Debt, this is good, becauſe the Chamberlain is their publick Officer,** Co. 5. Chamberlain of London 63. per Curiam **reſolved.**

5. If a Corporation that hath Power by Charter, or Prescription, to make By-Laws, makes a By Law, and limits a penal Sum to be forfeited for Non performance, this cannot be levied by Distress, without a Prescription to do it, or Limitation by the By-Law so to do. Co. 5. Clark 64. admit. D. 15 El. 321, 23. Fol. 367.

6. If in *London* a By-Law is made, That if any Freeman takes the Son of an Alien to be his Apprentice, the Bonds and Covenants shall be void; this is no good By-Law, for tho' the Common Council might have inflicted a Fine, or other Punishment upon such Master, yet they cannot make the Bonds and Covenants void. *Trin.* 37 *Eliz.* between *Doggerel* and *Pokes*, *Moor* 411. *Pl.* 562.

7. If the Company of Taylors in the City of *Exeter*, being incorporated by Letters Patents of *Edw.* 4. and having thereby Power given to them to make By-Laws, make a By-Law, under a certain Penalty to be (d) levied by Distress, and (e) Sale of the Offender's Goods, this is no good By-Law for the Forfeiture cannot be levied by Sale of the Offender's Goods. *Trin.* 2 *Will.* and *Mar.* between *Clark* and *Tucker*. 2 *Vent.* 182, 183. adjudged.

(d) So a By-Law cannot be made upon Pain of Forfeiture of the Goods, &c. 8 Co. 127. b. 2 Vent. 183.

(e) 1 Keb. 733. vid.

(a) Bridges.

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1. (b) Common (c) Bridges, (d) of Right, ought to be (e) repaired (f) by the (g) Inhabitants of the County, (h) if it be not known (i) who (k) else ought to do it. Trin. 10 Car. (l) in an Information against the Inhabitants of Middlesex, for Longford Bridge, agreed per Curiam. 10 Ed. 3. 28.

(a) The Freehold thereof, as well as of Highways, is in him that hath the Freehold of the Soil. 2 Inst. 705. (b) 2 Inst. 701. S. P. 13 Co. 33. S. P. by the Judges at Serjeant's Inn. (c) Per 43 El. cap. 4. Commissioners shall be appointed to inquire after Mis-employment of Lands, &c. given for the Repair of Bridges, inter alia, 2 Inst. 706. which vide with the Comment. 2 Inst. 706, 707, &c. and per 22 Car. 2. cap. 12. Justices of Peace, in their Sessions, may inquire, &c. (d) But for the Repair of several particular Bridges, as Rochester Bridge, vide 9 H. 5. cap. 12. 18 El. cap. 17. 29 El. cap. 25. — Staines 1 H. 8. cap. 9. — Burton and Culhamford. 9 H. 6. 28. Eden and Prestberie, in the County of Cumberland, Newport and Carlion, in the County of Monmouth, Chepstow, in the County of Glocester, Cardiff, in the County of Glamorgan, Upton, in the County of Worcester, and several other Bridges, vide the several Statutes relating thereto. (e) But none can be compelled to make new Bridges where never any were before, but by Parliament. 2 Inst. 701. (f) Per 22 H. 8. cap. 5. By the County Riding, or Corporation, within which they are situate, and if situate in 2 such Precincts, the several Parts shall be repaired by each respectively, but for this Act, and the Proceedings thereupon, and the full Exposition thereof, vide 2 Inst. 697, 698, &c. (g) Per 22 H. 8. cap. 5. All Privileges of Exemption, or Discharges whatsoever, from Contribution for the Repair of Bridges, are taken away, altho' the Exemption were by Act of Parliament. 2 Inst. 704. (h) If a Bishop, &c. hath once or twice, of Alms, repaired a Bridge, this binds not, but yet it is Evidence against him, that he ought to repair, &c. until he proves the contrary. 2 Inst. 700. (i) Per Mag. Chart. cap. 15. No Town, or Freeman, shall be distrained to make Bridges, nisi ab antiquo & de jure facere consueverunt, which vide with the Comment. 2 Inst. 29. (k) Where a private Person may be bound, ratione Tenure, but not ratione Prescriptionis tantum; but a Body politick may be bound, either ratione Tenure, sive Prescriptionis. 2 Inst. 700. 13 Co. 33. —— and vide 2 Keb. 43. (l) Cro. Car. 365, 366. S. C. adjudged.

2. If a Man erects a Mill for his single Profit, and makes a new Cut for the Water to come thereto, and makes a new Bridge over it, and the Subjects use to go over it, as over a common Bridge, this Bridge ought to be repaired by him that hath the Mill, and not by the County, (m) because it was erected for his own Benefit. 8 Ed. 2. B. R. adjudged for Bow-Bridge, and Channel-Bridge, against the Prior of Stratford, and it is now repaired by London, who have the Mill.

(m) But if a Man makes a Bridge for the common Good of the King's Subjects, he is not bound to repair it. 2 Inst. 701.

3. If

3. If a Man hath only Part of thoſe Lands, *ratione tenuræ* of which a Bridge ought to be repaired, yet he alone may be (n) preſented and compelled to repair it, and he muſt (o) take his Remedy for (p) Contribution from the reſt, for Bridges are of abſolute Neceſſity, and muſt not lie unrepaired until Law Suits are ended, and it be determined whether others ought to be contributory or not, *in itinere Windſor.* 8 *Car.* the Caſe of *Loddon Bridge.* 1 *Jon.* 273. *per Curiam.*

(n) But yet vide F. N. B. 235. b. Reg. 268. a. 2 Inſt. 700. where the Party grieved may in ſuch Caſe have a Writ to the Juſtices, de onerand' pro rata portione, &c. (o) Hard. 131. (p) If charged ratione tenuræ of a Manor, the ancient Freeholders and Copyholders are not liable to contribute, for nothing is Part of the Manor, but the Demeſnes and Services. Hard. 131. S. P. per Curiam. — But thoſe who have any Part of the Demeſne Lands by Purchaſe, muſt contribute. Hard. 131. per Curiam.

(a) Indictment,

Pleading thereupon.

(a) The Indictment muſt ſay, that it is Pons publicus & communis ſitus in alta regia via ſuper flumen, &c. 2 Inſt. 701.

1. IN an Information againſt the Inhabitants of the County of *N.* for not repairing a Bridge, they pleaded, That *A. &c.* Owners of certain Lands ought to repair, *ratione tenuræ, abſque hoc* that the Inhabitants of the County, have, and ought, *&c.* And the Attorney General replied, That the Inhabitants of the County ought to repair, *abſque hoc* that *A. &c.* and they rejoin, that *A. &c.* and thereupon Iſſue was joined, *&c. Trin.* 26 *Car.* 2. between the King and the Inhabitants of the County of *Nottingham.* 2 *Lev.* 112. and by the Reporter, *Note*, the Record, Iſſue, and Trial, for the Defendants, do not plead *non cul.* but that others ought to repair and traverſe, that they themſelves ought, as *Hale* ſaid, it ought to be, ſo that if they ought not, it may appear to the Court, who ought to repair, *&c.*

(a) (b) Burrough.

Fol. 369.

(a) For the Derivation of the Word, vide, Co. Lit. 109. a.

(b) For a Tenure in Burgage, and what it is, vide Co. Lit. 108, 109, &c. 13 Co. 27. Cro. El. 120. Moor 257. Pl. 405.

1. 12 ED. 1. Rotulo Walliæ Membrana 3. pro Burgenſibus de Carnarvan, de libertatibus ſuis, &c. **it begins with the King's Grant,** Quod ſit liber burgus, & homines liberi burgenſes, &c. Membrana 4. pro Burgenſibus de Aberconwey de libertatibus ſuis, &c. **in ſuch Manner as the other,** &c.

2. 5 Ed. 1. Rot. Cartarum Membrana 14. **Part 2. Grant of the King,** Quod Villa noſtra de nova Windſor ſit liber burgus & habeat libertates, &c.

(c) Vide the Original.

3. 6 Ed. 1. Rot. Cartarum Membrana 4. **Part** (c) libertates antea, **that he hath made** liber burgus.

4. 18 Ed. 1. Rot. Cartarum Membrana 2. **Grant to the Town of** Baſingwerk, Quod ſit liber burgus, & quod Inhabitantes liberi burgenſes, cum omnibus libertatibus, & conſuetudinibus ad burgum, &c.

(d) For this, vide 10 Co. 30. b.

5. 12 Ed. 1. Rot. Pat. M. 14. Rex conceſſit quod Villa de Lime in Comitatu Dorſetiæ ſit liber burgus & homines ejuſdem Villæ ſint liberi burgenſes ita quod habeant (d) gildam mercatoriam cum omnibus ad gildam ſpectantibus.

(a) (b) Chancery.

Fol. 370.

1. 31 H. 6. cap. 2. **A Great Forfeiture for not appearing after Proclamation made, but this continued but 7 Years.**

(a) Matters of Equity cannot be determined by Commiſſion, but ought to be determined in the ſaid Court of Chancery, which hath had Juriſdiction Time out of Mind. 12 Co. 113. 4 Inſ. 87. 97. (b) For this Court, it's Antiquity, Officers, Juriſdiction, &c. vide 4 Inſ. 78, 79, &c.——for the Antiquity of its Ordinary and Extraordinary Juriſdiction, vide 2 Inſ. 552, 553, 554. 12 Co. 113. 4 Inſ. 87. 97. 1 Lev. 242.

2. (c) 17 R. 2. cap. 6. Item, **Forasmuch as People be compelled to come before the King's Counſel, or in the** Chancery, **by Writs** (d) **grounded upon untrue Suggeſtions; that the Chancellor for the Time being, Maintenant after that ſuch Suggeſtions be duly found and proved untrue, ſhall have Power to ordain and award** (e) **Damages after his Diſcretion, to him which is ſo travailed unduly as aforeſaid.**

(c) 4 Inſ. 82, 83. The ſame Statute cited. (d) This extends only where the Chancellor proceeds in a Courſe of Equity, and not to a Demurrer in Law upon a Bill. 4 Inſ. 83. (e) Per 15 H. 6. cap. 4. No Subpena is to be granted till Sureties found to ſatisfy the Party grieved his Damages and Expences, in caſe the Matter of the Bill be not made good. 4 Inſ. 83, 84.

3. (f) 2 H. 4. Numero 69. **the Commons pray that all Writs or Letters of the Privy Seal of our Lord the King, directed to divers of the King's Liege People to appear before our Lord the King in his Counſel, or in his** Chancery, **or in his** Exchequer, **upon a certain Pain comprized therein, for the Time to come ſhall be altogether ouſted, and that every of the King's Liege People ſhall be treated according to the rightful Laws of the Land anciently uſed.**

(f) 4 Inſ. 83. The ſame Petition cited.

(a) (A) Anſwer.

(a) This and the two next following Diviſions are printed here, as in the Original, tho' it ſeems not to have been ſo intended by the Author, but to have been altogether the Error of the firſt Printer; for there is no Reaſon here for any ſuch Breaches or Diviſions.

1. **Such Writ ſhall not be made unleſs in Caſes where it ſeems neceſſary, and this by the Diſcretion of the Chancellor or King's Counſel for the Time being.**

2. 4 H. 4. Numero 78. **The Commons pray,** reciting the Statute of 25 E. 3. **That none ſhall be taken by Petition or Suggeſtion made to the King or his Counſel,** &c. **unleſs by Indictment or Proceſs by Original Writ, and alſo the Statute of** 42 E. 3. **That no Man ſhall be put to anſwer without Preſentment before Juſtices,** &c. **Notwithſtanding which Statutes, after this many of your Lieges have been grieved by divers Writs and Letters, ſome by ſimple Suggeſtions without any Thing found iſſuing out of** Chancery **upon a certain Pain comprized in them, to appear before you in your** Chancery **or Counſel, ſome by Writs out of the** Exchequer, &c. **others to appear before your Counſel by Privy Seal,** &c. **to the great Hindrance of your Lieges, and againſt your Laws and Statutes aforeſaid. May it pleaſe you to ordain that the Statutes aforeſaid henceforth be fully kept; and further to ordain that the Writs and Letters aforeſaid be altogether ouſted, and that none of the King's People be forced to appear or anſwer by any ſuch Writ or Letter, nor be put to loſe their Goods and Chattels, and that he which for the Time to come makes any Suggeſtion againſt any of your Subjects to your Self, your Counſel, Chancellor or Treaſurer, or before your Barons of the Exchequer, may find good and ſufficient Sureties to aver his Suggeſtion; to the end, that if he which is ſo accuſed, of his own Accord comes to the Place where the aforeſaid Suggeſtion is, and traverſes the aforeſaid Suggeſtion, his Traverſe may be received without Delay, and if it be found againſt him who made ſuch Sug-**

(*) Fol. 371.

Suggeſtion, and for him who was ſo accuſed, he ſhall recover his Damages againſt the Accuſer, to be taxed by the ſame Inqueſt (*) by which he is ſo acquitted, having regard to the ſlender Coſts and Labour for his Defence, and further ſhall make Fine and Ranſom, and the Body taken to abide in Priſon for one Year, for the Falſity aforeſaid, and that this Ordinance ſhall extend as well to the Time paſt as to come, as to Suggeſtions depending not yet diſcuſſed.

(B) Anſwer.

1. THE King will charge his Officers to abſtain more from ſending for his Lieges than they have done before theſe Days. But it is not the Intention of the King that the ſame Officers ſhould ſo much abſtain that they cannot ſend for his Lieges in Matters and Cauſes neceſſary as hath been done in the Time of your our Lord the King himſelf.

2. 4 H. 4. Numero 110. In the Petition upon which the Act of 4 H. 4. cap. 23. touching Examination of Judgments is made, another Part of the Petition is ſuch; and in the ſame Manner as it (a) belongs let every Matter be which can be determined by the Common Law, and that a due Pain be ordained in this preſent Parliament againſt thoſe who purſue the contrary, and this for God and the Safety of all the Eſtates of the Realm.

(a) In the Original it is affiert.

(C) Anſwer.

1. IT is anſwered before among the Petitions of the Commons, Numero 78. intending that which is next here before.

(D) Chancellor.

What Things he may do, what not.

(a) 4 Inſ. 79, 80. S. P.

1. (a) IF Suits are there upon Recognizances, Statutes, Attachments of Treſpaſs or Debt, againſt the Officers of t Court, he ought to adjudge according to the Courſe of the Common Law. 11 E. 4. 9.

(b) 4 Inſ. 83. Same Petition cited.

2. (b) 3 H. 5. Numero 46. The Commons prayed, that whereas many People perceived themſelves greatly grieved becauſe the Writs called Writs of Subpœna & certis de cauſis made and ſued out of your Chancery and Exchequer of Matters determinable by your Common Law, which were never granted or uſed before the Time of the late King Rich. that John Waltham, late Biſhop of Sarum, of his Subtility found out and began ſuch Novelty againſt the Form of the Common Law of your Realm, as well to the great Loſs and Hindrance of the Profits which ought to ariſe to you, our Sovereign Lord, in your Courts, as in Fees and Profits of your Seals, Fines, Iſſues and Amercements, and ſeveral other Profits to be taken in your other Courts, in caſe the ſame Matters were ſued and determined by the Common Law. Inſomuch that no Profit does ariſe to you from ſuch Writs but only 6 d. for the Seal, And alſo becauſe that your Juſtices of the one Bench and of the other, when they ought to intend their Place concerning Pleas and to take Inqueſts for the Deliverey of your People; they are occupied about the Examination of ſuch Writs as well to the moſt great Veration, Loſs and Coſts of your Lieges, which are delayed for a long Time from the Sealing of their

their Writs ſued in your Chancery, becauſe of the great Occupations concerning the ſaid Examinations which neither profit you nor your Liege People, in which Examinations there (*) is a great Noiſe by divers People not learned in the Laws, without any Record or Entry in your ſaid Places, and which Pleas cannot have an End unleſs by Examination and Oath of the Parties, according to the Form of the Civil and Law of the Holy Church in Subverſion of your Common Law, &c. and therefore they pray that every one who ſues ſuch Writ thereafter may put all the Cauſe and Matter in the Writ, and if any one perceives himſelf grieved by ſuch Writ for Matter determinable by the Common Law, let him have an Action of Debt for 40 l. &c.

(*) Fol. 372.

(E) Anſwer, the King will Adviſe.

1. ROt. Parliamenti 14 E 3. Numero 33. An Ordinance was made touching the Priory of Weſt Shirborne, &c. And if any Thing be done againſt this Ordinance, that then the Chancellor of England ſhall have Power to hear the Complaint by Bill, and thereupon to proceed in the ſame Manner as is uſually accuſtomed to do daily in a Writ of Subpœna in Chancery.

(F) Of what Things they may hold Plea, and of what not.

1. ROt. Parliamenti 45 E. 3. Numero 24. The Commons pray that it may pleaſe the King and his good Council, to grant that no Plea be thenceforth pleaded in Chancery, unleſs the King be properly a Party in the ſaid Plea, or that the Plea touch the Office of the Chancery, and that all Manner of Pleas which are there yet held or pending in the ſame Chancery be ſent to the Common Law, and that none who purſue there, or to the Counſel by Bill be thenceforth delayed of a convenient Remedy, as they have been moſt grievouſly.

2. 2 H. 4. Rotulo Parliamenti Numero 65. The Commons pray, that whereas for the Diſcuſſion of all Pleas in Matters traverſed in Chancery, the Judges are drawn into Chancery out of their Places in Aid of the ſaid Diſcuſſion, to the great Hinderance of the Buſineſs of the Common Law of the Realm, and to the great Damage of the People, that it be ordained that upon ſuch Traverſes the Record be ſent in Banco Regis or Banco, there to be diſcuſſed and determined, ſaving Liveries to be made in Chancery, &c.

(G) Anſwer.

1. THE Chancellor may do it by his Office, and let it be as it hath been uſed before theſe Days, by the Diſcretion of the Chancellor for the Time being.

2. Miſpleading in Matter of Form ſhall be prejudicial in no Caſe in Chancery, altho' it be in a Thing in which they hold Plea, according to the Common Law. 14 E. 4. 7.

(H) Of

(H) Of what Things they may have Conuſance in Chancery.

The ordinary Power.

1. 4 E. 1. ROtulo clauſo membrana 3 in Dorſo Angelinus de Gyſes **conveys Lands** to Walter de Heluin, **and in the End of the Conveyance,** (*) **it is mentioned** quod præd' Angelinus venit in Chancellariam Regis & dedit præd' Waltero Seiſinam prati præd' cum pertinentiis in forma præd', **and there is a Sale made by the Abbot and Convent** de Fontibus, **to certain Merchants, acknowledged by the Abbot in** Chancery, **and inrolled** de 62 Sacris Lanæ & Collecta Monaſterii ſive Clarks Lohe, &c.

(*) Fol. 373.

(It ſeems both theſe were Inrollments in Chancery.)

2. 20 E. 1. Rotulo clauſarum membrana 12 dorſo Conventio facta inter Richardum filium Alani Comitem Arundell & Robertum Epiſcopum Bathonenſem & Wellenſem quam 12 Januarii Anno 12. recognoverunt in Chancellaria & Comes petiit ut irrotuletur & patet, &c.

3. 2 E. 1. Rotulo clauſarum membrana 8 dorſo, **Acquittances for the Receipt of Money among common Perſons enrolled in** Chancery.

(I) Of what Actions it may hold Plea.

(a) 2 And. 164. (b) And therefore where a Suit was in the Chancery of Cheſter for a Woman's Jointure, a Prohibition was granted. 1 Sid. 189. (c) So of all Perſonal Actions, by or againſt any Office) of the Court, in reſpect of their Service and Attendance there. 4 Inſ. 80.

1. (a) IT cannot hold Plea of Pleas of (b) **Land.** 20 H. 6. 32. b.
2. **It may hold Plea of** (c) **Treſpaſs** 20 H. 6. 32 b.
3. **So it may hold Plea of Debt.** 20 H. 6. 32 b.

4. It may hold Plea of *Scire facias's* to repeal Patents, Petitions, *Monſtrans de droits*, Traverſes of Offices, *&c.* 4 *Inſ.* 79.

5. So of Executions upon Statute-Staples or Recognizances upon 23 *H.* 8. in nature thereof; but the Execution upon a Statute-Merchant, is returnable in the King's Bench or Common Pleas. 4 *Inſ.* 79.

(K) (a) What (b) Power the Chancery hath.

(a) The King cannot create a Court of Equity, but the ſame muſt be by Act of Parliament, or Preſcription. 4 Inſ. 87, 97. 12 Co. 113.——And Godb. 262. 2 Rol. Rep. 109 it is doubted whether ſuch Court, being againſt common Right, can be by Preſcription. (b) Equitable Cauſes anciently were heard by the King himſelf, and ſometime by Reference to the Chancellor; and the firſt Statute which gave Countenance to this Court was 36 Ed. 3. cap. 9. but ſuch Caſes were rare till Edw. 4. Time, when they increaſed by Occaſion of Uſes. 1 Lev. 252. arguendo.—— But Q. for they are not determinable by Commiſſion but in Chancery, which had Juriſdiction Time out of Mind. 12 Co. 113. 4 Inſ. 87. 97. but vide 2 Inſ. 552, 553, 554. (c) 4 Inſ. 84. S. P. 3 Inſ. 71. 123. S. P. Hard. 124. (d) And their Orders are but in Paper and not of Record, but triable per Pais. Yelv. 227. (e) Br. Error 95. S. C.

1. (c) THE **Engliſh** Court of Chancery **is** (d) **no Court of Record.** (e) 37 H. 6. 14 b. per Priſot.

2. The Chancellor by a Decree cannot bind the Right of the Land, but can (f) only bind the (g) Person, and if he will not obey it, the Chancellor may (h) commit him to Prison till he obeys it. 27 H. 8. 15. per Knightly.

(f) And not the Estate of the Defendant's Lands, nor Property of his Goods or Chattels. 4 Inst. 84. 3 Bulst. 34.—But yet where there hath been an ancient Possession, he may make an Order for quieting that, but not give Damages. Bozsom and Dennis. 3 Bulst. 34. adjudged. 1 Rol. Rep. 190. adjudged. Lit. Rep. 166. adjudged. (g) And therefore if there be a Decree against J. S. and he dies, there can be no Execution in Nature of a Scire facias sued against his Executor. 1 Rol. Rep. 86. (h) But cannot Fine him. 4 Inst. 84.

(L) What (a) Persons may be there relieved in Equity.

(a) Where the Churchwardens may join in a Suit with a poor Man who is chargeable to the Parish. March 90.

1. The Chancellor himself may. 16 E. 4. 4. b. Uxenbridge Chancellor was.

2. But (b) he cannot make a Decree in his own Cause. Hill. 11 Jac. in Chancery, between (c) Sir John Egerton and the Lord Darby resolved.

(b) Or his Deputy. 4 Inst. 213.

3. The King may sue (d) in Chancery (e) for Equity. Tr. 14 Jac. in the Chancery, between the King and the Lord William Howard, it was so admitted and resolved by the two Chief Justices in Chancery.

(c) 1 Rol. Rep. 246, 331. S. C. cited 3 Bulst. 117. S. C. cited. 12 Co. 113. S. C. resolved. 4 Inst. 213. S. C. cited. (d) So in the Exchequer. Lane 48. (e) If an Alien purchases Lands in the Name of another, admitting the King is intitled to the Trust, he may sue in Equity to have it executed. 1 Rol. Abr. 194. Pl. 8.

4. If the Manor of *A.* and all Lands lying in *A.* and *B.* except the Manor of *B.* are limited to *C.* and his Wife, and the Heirs of the Wife; and the Manor of *B.* is limited to *C.* and his Heirs, and *C.* conveys the Manor of *B.* to *D.* and his Heirs, admitting there is no such Manor, and that *C.* had Right only to Relief in Equity, (f) his Vendee shall not be relieved. *Mich.* 42 and 43 *Eliz.* between the Earl of *Worcester* and Sir *Moyl Finch.* 2 *And.* 162. the Opinion of the Judges delivered accordingly.

(f) But vide 1 Chan. Case 173, 174, 208. 212. where the Benefit of an Agreement for the Purchase of, &c. was devised and decreed for the Devisee.—And vid. 1 Chan. Case 39. where it is agreed, if a Man contracts for Lands, by this the Vendor becomes a Trustee for the Purchaser, and the Purchaser may Devise, &c.

5. (g) Things in Action may upon a Consideration be assigned, and are recoverable by the Assignee, and a Release by the Assignor, afterwards if not without Notice, and upon a Consideration will not hurt the Assignee. *Trin.* 22 *Car.* 2. between *Hurst* and *Goddard.* 1 *Chan. Case* 169, 170.

(g) 1 Chanc. Case 232. like Point, and vide 2 Chanc. Case 7. 37.

6. If upon a Settlement of Lands, Money is to be raised for Daughters Portions, and one of them marries and dies, and her Husband takes out Administration, and assigns all his Interest in the Portion to a Son by a former Wife, this gives the Son a Title to the Money in Equity; for tho' such an Assignment by one that hath no Colour of Right but under his Administration may not be good, yet it is otherways in this Case, where the Administration is taken only *pro forma*, and the Husband intitled to the Money, as the Portion of his Wife. *Trin.* 22 *Car.* 2. between *Hurst* and *Goddard.* 1 *Chan. Cas.* 169, 170. Decreed accordingly.

(M) In what Caſes the Suit may be there.

1. 27 E. 1. ROtulo Finium Membrana 1. **Petition in** Chancellaria Angliæ de (a) (b) terra (c) in Hibernia.

2. (d) **If an erroneous Judgment be given in a Copyhold Court of a Common Lord, in an Action in Nature of a** (e) **Formedon, a Bill** (f) **may be exhibited in** Chancery **in Nature of a falſe Judgment to reverſe it.** H. 8. Ja. Scaccario, **cited to be one** (g) Patiſhal's **Caſe.**

3. **If a Decree be made in an inferior Court of Equity, this upon a new Bill exhibited in** Chancery, **may be decreed there, to give the more Strength and Aid to the firſt Decree. As if a Decree be made againſt one for the Queen in the Court of the Queen, which the Defendant will not obey, upon a new Bill exhibited in** Chancery, **this may be confirmed and decreed there,** (h) **for the better Aid of the firſt Decree.** M. 16 Ja. **in** Chancery, **Sir** Robert Floyd's **Caſe adjudged.**

(a) But yet if there be a Truſt of Lands in Ireland, and the Truſtee in England, perhaps the Chancery here may by Decree bind his Perſon, tho' not Sequeſter the Profits of the Lands there. 2 Chan. Caſ. 189. (b) But if there be Jointenants of Lands in Ireland, and one of them receives all the Profit, being in England, he may be compelled here to Account for the Profits; but no Commiſſion can be awarded into Ireland to make Partition. 2 Chan. Caſ. 214. (c) The Iſle of Man cannot be bound by any Decree of this Court; nor can any ſuch Decree be executed there. 1 Chan. Caſe 221. (d) Lane 98. S. P. adjudged where the King was Lord of the Manor. (e) Otherways in Caſe of a Common Recovery ſuffered upon a valuable Conſideration to confirm the Eſtate of a Purchaſer; for Equity ought rather to ſupply a Defect therein, than aſſiſt in the annulling a ſolemn Agreement. Caſe in Parl. 68, 69. a Bill againſt the Lord to receive a Petition to reverſe ſuch Recovery diſmiſs'd, and that Diſmiſſion confirmed in the Houſe of Lords. (f) And if the Lord will not hold a Court, he may be compelled in Equity. Cro. Jac. 368. 2 Bulſt. 336. 2 Rol. Rep. 274. per Dodderidge. (g) Lane 98. S. C. cited, a common Perſon being Lord of the Manor. (h) Bill in Chancery to enforce the Executor of a Citizen, who lived out of the Juriſdiction of the City of London, to come and give Security for Orphans Portions, according to the Cuſtom of the City. 1 Chan. Caſ. 203.

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4. **A Man cannot ſue in the** Chancery of Cheſter **for a Thing which in Intereſt concerns the Chancellor there, becauſe he cannot be his own Judge, and therefore he may in this Caſe ſue in the** Chancery of England; **for otherways there ſhall be a Failure of Right.** H. 11 Ja. **in** Chancery, **between** (h) **Sir** John Egerton **and the Lord** Darby and Kelly, **Reſolved by the Chancellor** Coke **and** Dodderidge, quod vide **cited.** H. 13 Ja. B. R.

(h) 1 Rol. Rep. 246, 331. S. C. cited. 3 Bulſt. 117. S. C. cited. 12 Co. 113. S. C. reſolved by the Lord Chancellor, Chief Juſtice, Maſter of the Rolls, and two Judges. 4 Inſt. 213. S. C. cited.

5. If a Man hath Cauſe to complain in Equity of a Matter ariſing within the County Palatine of *Cheſter*, if the Defendant lives out of the County Palatine, he may be ſued in the Chancery here, or otherways there would be a Failure of Juſtice, for Proceedings in Equity binding the Perſon only, if the Perſon lives out of the Juriſdiction of the Chamberlain of *Cheſter*, there can be no Relief there. *Hill.* 11 *Jac.* (i) Earl of *Darby*'s Caſe. 12 *Co.* 113. reſolved by the Lord Chancellor, Chief Juſtice, Maſter of the Rolls, and two Judges.

(i) 4 Inſt. 213. S. C. cited.

(N) (a) What (b) Things ſhall be re-relieved in Equity.

(a) It is common to give Relief, tho' there is a Clauſe, that there ſhall be no Relief in Law or Equity. 1 Mod. 141, 305. —Where Relief was given for a Debt; tho' the Plaintiff to avoid a Sequeſtration, had ſworn before that he was ſatisfied. 1 Chan. Caſe 154.

(b) Lord Elſemere had uſed to ſay there were 3 Things which he would never relieve

1. I Have heard my Lord Coke cite two Verſes for this out of Sir Thomas Moore.

(c) Three Things are to be helpt in Conſcience, Fraud, Accident, and Things of Confidence.

2. If a Man comes to be remedileſs at the Common Law by his own Negligence, he ſhall not be relieved in Equity, (d) as if he pays a Statute or Obligation without Acquittance, and after is ſued thereupon (e) he ſhall not be relieved in Equity, for he was not bound to pay it without an Acquittance. 22 E. 4. 6. b.

3. If two Men are bound to another, and the Obligee releaſes to one, ſuppoſing this will not diſcharge the other, yet ignorantia juris non excuſat, and therefore he ſhall not be thereupon relieved againſt the other in a Court of Equity. 12 Ja. between Harman and Cam, in B. R. a Prohibition was granted accordingly to the Counſel of the Marches, and Mich. 14 Ja. a Conſultation denied.

in Equity; Long Leaſes, as for 1000, &c. Concealments and naked Promiſes. Lit. Rep. 3. And vide Godb. 192. (c) 4 Inſt. 84. a. S. P. (d) Bond paid to Teſtator and Suit in Equity, againſt his Executor to deliver it up. 1 Bulſt. 158. (e) But Q. if the conſtant Practice be not otherways. Hard. 23.

4 If two Executors make Partition of the Specialties, &c. of the Teſtator, and after one of them releaſes an Obligation which by the Partition belonged to the other, tho' the Debtor had Notice of the Partition (f) yet the other Executor ſhall not be relieved. *Mich.* 42 *Eliz. Moor* 620, *Pl.* 846. per *Egerton* Chancellor.

(f) So if A. and B. Jointenants of an Office, depute C. to officiate and receive the Profits for them, and after they ſue C. in Equity to account, and after A. releaſes to C. and B. files his Bill againſt A. and C. yet C. may plead the Releaſe, tho' the Bill prays to be relieved againſt it, and if B. hath any Remedy, it muſt be againſt A. Hard. 168.

5. But if the Releaſe was procured by Fraud, or without a full Satisfaction, the Debtor muſt ſatisfy the Overplus. *Mich.* 42 *Eliz.* per *Egerton* Chancellor.

6. If a Man hath a Leaſe from the Dean and Chapter of *D.* and ſurrenders it to them, upon a Promiſe that they will make him a new Leaſe, and after they perform it not, but leaſe to the Subdean, he may be relieved againſt the Subdean. *Mich.* 12 *Jac.* between Sir *George Frevil* and *Ewbank*. 1 *Rol. Rep.* 82. and a Prohibition denied to the Court of Requeſt accordingly.

(O) Of what Caſes they may hold Plea.

1. If a Man enters in Land where, &c. for a Condition broke, he whoſe Eſtate is defeated by this, ſhall not have any Relief in Equity, unleſs the Condition was broke by Diſceit or Practice of him who enters for the Condition broke. (a) Hill. 12 Jac. B. R. reſolved, and a Prohibition granted. Mich. 11 Jac. B. R. between Glaſcock and Rowly, per Curiam.

(a) 1 Rol. Rep. 120. S. C. and a Prohibition granted accordingly.

2. But

2. But otherways it had been if the Condition had been broke by Diſceit or Practice of him who enters for the Condition broke. Hill. 12 Jac. B. R. reſolved. M. 11 Jac. B. R. (b) between Glaſcock and Rowly reſolved, and a Prohibition denied.

(b) 1 Rol. Rep. 120. S. C. and S. P. per Curiam.

3. If there be a Portion of 8000 *l.* given to a Woman, provided ſhe marries not without Conſent of *A.* and that if ſhe marries without his Conſent, that ſhe ſhall have but 100 *l. per Annum*, yet if ſhe marries without his Conſent, ſhe ſhall be relieved, for the Proviſo is in *terrorem* only. *Trin.* 15 *Car.* 2. between Sir *Hen. Bellaſis* and his Wife, and Sir *William Ermin.* 1 *Chan. Caſ.* 22.

4. But it was ſaid, that if the (c) Portion upon ſuch Marriage (d) had been limited over to another, it had been otherways. *Trin.* 15 *Car.* 2. ſaid in the Caſe of Sir *Hen. Bellaſis.*

(c) But by the Eccleſiaſtical Law, ſuch Condition is void, and if the Queſtion were of a Legacy, perhaps it would be ſo, becauſe 'tis ſo in thoſe Courts where Legacies are properly handled. 1 Mod. 308. (d) But yet Relief hath been given in many ſuch Caſes. 1 Mod. 308.— Tho' per 2 Vent. 352. in ſuch Caſe 'tis generally binding, and vide 1 Chan. Caſ. 140.

5. But if by Leaſe 900 *l.* is ſecured for a Feme ſole, in Caſe ſhe marries not contrary to the Liking of *A.* and if ſhe doth, then for ſuch Perſon as *A.* ſhall nominate, and for want of ſuch Nomination for *A.* and ſhe marries without the Conſent of *A.* yet he cannot diſpoſe of the Leaſe otherways than for her Benefit. *Mich.* 16 *Car.* 2. between *Fleming* and *Walgrave.* 1 *Chan. Caſ.* 58.

6. If *A.* conveys Lands to *B. &c.* and their Heirs, upon Truſt, that if *C.* the Son of *A.* within 6 Months after the Death of *A.* ſhould ſecure to Truſtees 500 *l.* for the younger Children of *C.* then after ſuch Security given to convey to *C.* and his Heirs and until the Time for giving ſuch Security in Truſt for the eldeſt Son of *C.* and in Default of ſuch Security, to convey to ſuch eldeſt Son and his Heirs; if *A.* dies before any Security given, yet this Condition precedent being only in Nature of a Penalty, the Intent of the Truſt ſhall be regarded, which was to ſecure 500 *l.* to the younger Children. *Trin.* 19 *Car.* 2. between (e) *Wallis* and Sir *Tho. Crimes*, decreed accordingly.

(e) 1 Mod. 307. S. C. cited.

7. If a Feme covert having Power by Will to deviſe Lands, deviſes them to her Executors to pay 500 *l.* out of them to her Son, provided, that if the Father gives not a ſufficient Releaſe of certain Goods to her Executors, that then the Deviſe of the 500 *l.* ſhould be void and go to the Executors, and after her Death, a Releaſe is tendred to the Father, and he refuſes, yet upon, making the Releaſe after the Money ſhall be paid to the Son; for it was ſaid to be the (f) Standing Rule of the Court, that a Forfeiture ſhould not bind where a Thing may be done after, or a Compenſation made for it, as where the Condition is (g) to pay Money, *&c.* and tho' it is generally binding where there is a Deviſe over, yet here being to go to the Executors, 'tis no more than the Law implies between *Cage* and *Ruſſel.* 2 *Vent.* 352. Decreed accordingly.

(f) Equity will not ſuffer a Penalty to be demanded, if the Party will perform that, for the Non-performance of which, the Penalty is given.

8. If *A.* deviſes a Meſſuage, *&c.* to *B.* his Wife for Life, Remainder to *C.* his Grandaughter in Tail, upon Condition that *C.* marries with the Conſent of his Wife *D.* and *E.* or the major Part of them, and if ſhe marries without (h) their Conſent, or dies without Iſſue, deviſes the ſame to *F.* and her Heirs, and after *C.* ſteals away and is married without Conſent of any of them, and all of them as ſoon as they heard of it, proteſt againſt the Marriage, but afterwards conſent to it, and then *B.* dies, and *D.* and *E.* ſwear that they do not know but that if their Conſents had been asked before, there might have been ſuch Reaſons given that they might have aſſented, yet *C.* ſhall not be relieved in Equity, for the ſubſequent Aſſent cannot deveſt the

2 Chan. Caſ. 88. — But where there was an Agreement to accept a leſſer Sum at preciſe Days in Lieu of a greater, and a Failure in Payment.

1 Chan. Caſ. 110, 111. dubitat' whether upon Payment after with Damage, Benefit ſhall be taken of this Agreement; and note, Part of the Conſideration of the Agreement was, that a Stranger had undertaken to pay Part, and ſo the Security bettered.—But a voluntary Agreement is not binding in Equity, if the Condition thereof is not preciſely performed. 1 Chanc. Caſ. 301. and vide 1 Chanc. Caſ. 52. 2 Chanc. Caſ. 1. (g) 1 Mod. 312. 1 Chanc. Caſ. 144. (h) But when there is a Proviſo not

not to marry without Conſent obtained in Writing, and Conſent is had but not in Writing, ſhe ſhall be relieved. 1 Mod. 306. 1 Chanc. Rep. 141.

Eſtate which was before veſted in *F.* and there ſhall be no Collateral Averment that it was intended only in *terrorem*. *Mich.* 21 *Car.* 2. between (i) *Fry* and his Wife and *Porter*, 1 *Chan. Caſ.* 138. upon the firſt Hearing, a Decretal Order was made by the Maſter of the Rolls, that ſhe ſhould be relieved; but upon a Rehearing by the Lord Keeper, aſſiſted by the 3 Chiefs, her Bill was by their unanimous Opinion diſmiſs'd.

(i) 1 Mod. 300, 301, &c. S. C. and the Bill diſmiſs'd accordingly. 2 Vent. 352. S. C. cited.

and the Reaſon given, becauſe the Forfeiture was of ſuch a Nature, that no after Satisfaction could be made for it.

9. *A.* being a Citizen of *London*, and ſeiſed and poſſeſſed of ſeveral Houſes, *&c.* ſome of which were of a Publick Title, deviſed 10000 *l.* to his Daughters being his only Children and Orphans, to be paid out of his real and perſonal Eſtate, before any other ſhould have Benefit of his Lands, *&c.* and made *B.* his Nephew, and others Executors, and died in 1658. and the Executors entred into a Recognizance to the Chamberlain of *London* for Payment thereof, and by the Reſtoration the Houſes of a Publick Title reverted to the right Owners, and by the Fire in *London* the other Houſes were burnt down, ſo that it was to be doubted whether the whole Eſtate was worth 10000 *l.* and becauſe if the Chamber of *London* had taken the Eſtate into their own Hands, it would have been in no better Plight than now it is, and the Intention of the Security was only that the Executors might not waſte or miſemploy the Eſtate, it was decreed the Recognizance (notwithanding the Condition was general for Payment of the Money) ſhould be made uſe of no further than to make good the Teſtator's Eſtate over and above the Loſſes as aforeſaid. *Mich.* 22 *Car.* 2. between *Holt* and *Holt*, 1 *Chan. Caſ.* 190. decreed accordingly.

10. If *A.* gives Bond of 20 *l.* to *B.* a Fiſhmonger to behave himſelf civilly and not diſparage the Trade of *B.* and after *A.* asks a Cuſtomer of *B.* whilſt cheapning a Parcel of Flounders, why he would buy of *B.* and told him thoſe Fiſh ſtunk, ſo that *B.* loſt his Cuſtomer, and thereupon *B.* ſues his Bond, and gets a Verdict at Law, *A.* ſhall not be relieved in Equity, (*) for there is no way to aſcertain the Damages. *Mich.* 22 *Car.* 2. between *Tall* and *Ryland*, 1 *Chan. Caſ.* 184. the Bill of *A.* accordingly diſmiſs'd upon Demurrer, and the Lord Keeper ſaid, the Penalty being but 20 *l.* he thought not fit to put the Defendant to Anſwer, for that the Coſts of Suit here and at Law would exceed it, but that it ought not to be a Precedent in caſe of a Bond of 100 *l.* or the like.

(*) 1 Sid. 442.

(P) In what Caſes a Man ſhall be relieved where he hath deprived himſelf of his Remedy at Common Law by his own Act.

1. If a Man be Lord of a Copyhold Manor, and a Copyhold Tenant in Fee of the Manor ſurrenders it to the Uſe of one for Life, the Remainder to B. in Fee, and the Tenant for Life dies, and B. pays no Fine for his Admittance, but after dies, and it deſcends to his Son; and after the Son ſurrenders it to the Uſe of J. S. in Fee, and no Fine is paid for it, and alſo the Rents for the Tenement were for ſeveral Years arrear, and after the Lord of the Manor grants the Manor in Fee to J. D. and after in a Court of Equity ſues J. S. for the Rent Arrear, and the Fines which were due before his Sale of the Manor to J. D. and alledges in his Bill, that the Copyholder had free Land intermixt with his Copyhold Land, ſo that he could not know where to diſtrain for it; yet a Prohibition lies (*) becauſe he hath deprived himſelf of his Remedy by his own Act, ſcilicet the Sale of the Manor, and therefore ſhall have no Remedy in a Court of Equity, eſpecially in this Caſe he ſhall not have Remedy againſt J. S. the Purchaſer, for the Fines and Arrears of Rent due before his Purchaſe.

(*) Fol. 375.

Mich. 10 Car. B. R. between Serjeant Hitcham Plaintiff, and Finch & Block Defendants, reſolved per Curiam; and a Prohibition granted accordingly to the Court of Requeſts, tho' this Matter being there pleaded was before over-ruled upon Demurrer to the Bill.

2. If *A.* hath a Term for Years, and orders a Scrivener to make an Aſſurance thereof to *B.* rendring Rent, and the Scrivener grants the intire Term rendring Rent, *A.* ſhall have no Remedy in Equity for the Rent, for if the Aſſurance is bad, and yet there ſhall be Remedy, to what Purpoſe is the Common Law, *Trin.* 21 *Jac.* between *Hudſon* and *Midleton*, 2 *Rol. Rep.* 434. and it was ſaid, that if the Scrivener acted contrary to his Orders, an Action lay againſt him.

3. If an Adminiſtratrix pays Debts on ſimple Contract, and after is ſued on Specialties of which ſhe had no Notice before, yet ſhe ſhall not be relieved. *Paſch.* 17 *Jac. Jobbin's* Caſe, *Cro. Jac.* 535. a Prohibition to the Court of Requeſt granted accordingly.

4. If a Maſter of a Ship covenants with the Owners to pay a certain Mulct for every Cloth carried, *&c.* in the Ship, and takes *A.* to be his Mate, who makes a Parol Agreement with the Maſter *mutatis mutandis*, and gives a Bond of 50 *l.* for Performance; but without the Maſter's Knowledge carries ſo many Clothes that the Mulct comes to 70 *l.* which the Owners deduct out of the Maſter's Wages; (a) ſo that the 50 *l.* Bond will not ſatisfie, yet the Maſter ſhall not be relieved in Equity, for by the Acceptance of the Bond, the Parol Agreement is determined. *Paſch.* 26 *Car.* 2. between *Davis* and *Curtis*, 1 *Chan. Caſ.* 226. reſolved upon Demurrer to the Bill of the Executor of the Maſter.

(a) Where he that takes Security by Penalty ſets up his Reſt there, and makes himſelf Judge of what he would have, and therefore ought not to have more. 1 Chan. Caſ. 24. 1 Chan. Caſ. 16.

5. If *A.* hath a Rent-Charge iſſuing out of certain Lands, and *B.* having Notice of this Rent parchaſes theſe Lands amongſt others, and after *B.* ſells the other Lands, and alſo ſome few Acres of the Lands charged by general Words, and deſires *A.* and her Husband to join in a Fine to the Purchaſer, aſſuring her that it would not prejudice her, which was accordingly done; tho' the Rent by *A's* own Act was extinguiſhed, yet becauſe there was no Conſideration given for, or Agreement to extinguiſh the Rent, ſhe ſhall be relieved. *Hill.* 27 and 28 *Car.* 2. between and *Hawkes*, decreed accordingly.

6. If there be Articles between *A.* and *B.* that certain Lands of *A.* ſhall be ſettled before Marriage upon *A.* and *B.* his intended Wife, and the Heirs of the Body of *A.* by *B.* and after they marry, and *A.* dies; tho' by the Articles the Settlement was to be made before Marriage, and it was objected that by the Marriage the Articles (b) were releaſed, and the Benefit thereof waived; yet *Mich.* 30 *Car.* 2. between *Haymer* and *Haymer*, 1 *Vent.* 343. it was decreed the Conveyance ſhould be made.

(b) 1 Chan. Caſ. 21. 117, 118. Antea 703. Pl. 10.

(Q) What Things may be relieved (*) there, not againſt a (a) Maxim in (b) Law.

(*) If the Leſſor enters upon the Leſſee and ſuſpends his Rent, he ſhall have no Remedy in Equity. Lat. 149.

(a) In Times paſt the Chancellor uſed to ſend for the Judges, to know when Equity ſhould be admitted againſt the Common Law, and when not. 2 Rol. Rep. 434. per Dodderidge & Chamberlain.

1. (c) If a Man loſes his (d) Obligation in which J. S. is bound to him, yet he ſhall not be relieved for the Debt in a Court of Equity, becauſe it is againſt a Maxim in Law to have an Action upon this without ſhewing of it in Court. Mich. 3. Car. B. R. between (e) Miller & Reames, per Curiam, a Prohibition granted to Requeſts, and they would not grant a Procedendo, tho' there was an Affidavit made that the Obligation was loſt.

(b) Where Relief ſhall be given contrary to the Rule of the Eccleſiaſtical Law. 1 Chan. Caſ. 201. (c) Lat. 24. S. P. adjudged, and tho' it was ſaid to be the Courſe of Chancery to reſerve in ſuch Caſes, yet the Court ſaid they would not permit the Court of Requeſt (which was under their Power) to give Relief. Lat. 24. 146. (d) Lat. 146. 148. S. C. cited. (e) Where voluntary. 1 Chan. Caſ. 78. dubitatur.

2. If a Man ſeiſed of Lands in Tail for a valuable Conſideration, bargains and ſells to another in Fee, and covenants that he and his Wife will levy a Fine for the better Aſſurance to the Bargainee, and it is agreed that 30 l. Parcel of the Conſideration ſhall be paid to the Baron upon the Conuſance of the Fine by the Baron and Feme, and after the Baron and Feme acknowledge a Fine before a Judge in the Circuit in the Vacation, and after the ſaid 30 l. is paid, and received by the Feme, the Baron being ſick in his Bed, and after the Baron dies before the Term, and thereupon the Feme ſtops the paſſing of the Fine, and after brings a Writ of Dower, the Bargainee ſhall have no Remedy in Equity againſt the Dower, becauſe it is againſt a Maxim in Law that a Feme-Covert ſhall be bound without a Fine. Mich. 5 Car. between Hody & Lunn, reſolved by the Maſter of the Rolls, Juſtice Jones, and the Maſters in Chancery, and the Plaintiff diſmiſſed accordingly as to Dower; and they then ſaid it was ſo reſolved before in Maſter Dew's Caſe, one of the 6 Clerks: But the Court agreed, that if the Feme had any perſonal Eſtate, as Executrix or Adminiſtratrix to her Husband, ſhe ſhall be liable for that; and thereupon a Commiſſion was granted to inquire of the Aſſets.

3. If A. be ſeiſed of a Manor in which there are Copyholders of Inheritance rendring Rent, and the Rent being Arrear, the Lord bargains and ſells the Manor to J. S. by which he hath deſtroyed his Remedy to diſtrain, and admit that he could not have an Action of Debt for theſe Arrearages, as if they had been due out of a Freehold he ſhould not, yet he ſhall not be relieved in Equity for them, becauſe it is againſt a Maxim in Law, in as much as by Law he hath by his own Act deſtroyed his Remedy. P. 10 Car. B. R. between Serjeant Hircham Plaintiff, and Finch & Block Defendants, reſolved, and a Prohibition granted to the Court of Requeſts accordingly, after a Demurrer upon this Matter there over-ruled.

4. If *A.* leaſes to *B.* a Wine License for Years rendring 41 *l. per Annum* Rent, and *B.* aſſigns to *C.* and *C.* for a valuable Conſideration aſſigns to *D.* who had no Notice of the Rent; *A.* ſhall not charge *D.* with the Rent, for the Contract was perſonal, as in caſe of a Leaſe of a Fair, *&c.* and *equitas ſequitur legem*, eſpecially where the Aſſignee is a Purchaſer for a valuable Conſideration without Notice. *Mich* 1656. between *James* and *Blank*. *Hard.* 88. the Bill of *A.* diſmiſs'd accordingly.

5. If a lends Money to *B.* and thereupon *B.* and *C.* become bound in an Obligation to *A.* if *A.* loſes this Bond yet he may have Remedy in Equity againſt *C.* the Surety, tho' it was ſaid he was not bound at Law, but in reſpect of the Lien of the Bond. *Mich.* 18 *Car.* 2. between *Underwood* and *Stacy*, 1 *Chan. Caſ.* 77, 78. decreed accordingly; and it was ſaid that the Bond being for Money lent, tho' the Surety had no Advantage, yet the Obligee had parted with his Money; and Loſs is as good a Conſideration for a Purchaſe as Benefit.

(R) What Things may be relieved there.

Not a Thing againſt a Maxim of Law.

1. THE Chancery ſhall not relieve a Man againſt a Maxim of Law upon a Matter of Equity by which the Maxim ſhall be croſſed; for this is to (*) make a new Law. M. 16 Ja. between Roſwell & Every, by the Chancellor, Dodderidge & Hutton reſolved.

(*) Fol. 376.

2. (a) An Executor cannot be compelled to account in a Court of Equity, for Things received by the Teſtator, as Bailiff or Receiver, &c. becauſe he is diſcharged by good Reaſon by a Maxim of the Common Law, becauſe his Teſtator might have waged his Law, and might

(a) Lit. Rep. 211. S. P. adjudged, 4 Inſ. 86, 87. like Point Con. March 99.

might have had better Knowledge to discharge himself than the Executor. May, M. 13 Ja. B. R. between (b) Powel & Harris, per Curiam resolved. Contra M. 14 Ja. B. R. where a Prohibition was denied twice by the Court in such Case to the Counsel of York, between Wilby & Nowell.

(b) 1 Rol. Rep. 263. S. C. and S. P. per Curiam.

3. (c) An Executor or Administrator cannot be charged in a Court of Equity for a (d) Contract made by the Testator, of which no Remedy lies at Common Law, for this is against a Maxim of Law. Contra. M. 4. Ja. B. R. between Richardson and Sir Moyle Finch, per Curiam.

(c) Moor 556. Pl. 755. S. P. adjudged con.

(d) If an Executor commits a Devastavit and dies, his Executor may be charged in Equity, tho' not at Law. 7 Chan. Cas. 303, and 304. it was said the Executor was in Nature of a Trustee.

4. One (e) Joint-tenant cannot sue his Companion in a Court of Equity, (f) for the taking of all the Profits, because it is against a Maxim in Law. H. 13 Jac. B. R. between (g) Fin & Smith resolved, and a Prohibition granted.

(e) Sid. 33. it is said by Maynard arguendo that where there are 2 Executors, one shall not inforce the other in Chancery to Account, quere tamen—But one Joint-tenant may inforce the other to Account. 1 Sid. 33. per Maynard arguendo vide 2 Rol. Rep. 434. (f) No Relief there against Survivorship, unless during the Lives of the Parties there was an Agreement to the contrary. Winch 79. (g) 1 Rol. Rep. 338. S. C. adjudged.

5. If an Infant sells Lands for Money, and purchases other Lands with the Money, yet this Sale made by the Infant shall not be helpt by the Chancery, because the Person of the Infant is disabled by a Maxim in Law. M. 16 Ja. in Roswell & Every, by the Chancellor Dodderidge & Hutton.

6. The Assignee of a Covenant cannot sue in a Court of Equity to have Benefit of the Covenant, for this is against the Law to assign a Covenant. M. 11 Ja. B. R. between Woodford & Holland, per Curiam, a Prohibition granted to the Court of Request for such a Suit there.

7. An Executor in a Court of Equity ought not to be compelled to pay Legacies before Obligations forfeited, for this is against the Common Law. Mich. 11 Ja. B. R. between Wigglesworth & Everet resolved.

8. If a Feoffment had been made to the Use of a Feme who took Husband, and they had sold the Land to a Stranger for Money, and the Feme had received the Money, and upon the Request of the Baron and Feme, the Feoffees had made an Estate to a Stranger accordingly after the Death of the Baron, the Feme might have brought a Subpœna in Chancery against the Feoffees and recovered, for the Chancery shall not help this void Sale made by a Feme Covert, for she could not consent to it, and all the Act was the Act of the Husband only, and the Receipt of the Money by him was not to any Purpose, in as much as she could not have any Advantage thereof but the Baron. (h) 7 E. 4. 14. b. by all the Justices and Chancellor, accordingly this Case was agreed. M. 16 Ja. in Chancery by the Chancellor, Dodderidge and Hutton, in Roswell's Case. (i) 18 E. 4. 12.

(h) Br. Conscience 13. Fitz. Subpœna 5. 1. Rol. Rep. 219. S. C. cited.

(i) Br. Conscience 28. S. C. Br. Testament 13. S. C.

9. If a Feme makes a Feoffment to her own Use, and after takes Husband, and after makes her Will, that the Feoffees shall make an Estate in Fee to her Husband and dies, this Devise shall not be made good by Chancery, because all Acts by a Feme-Covert are void, and the Law of Conscience follows this. (k) 18 E. 4. 11. b. by all the Justices.

(k) Br. Conscience 28. S. C. Br. Testament 13. S. C.

10. If a Man had devised Lands to another for a valuable Consideration at the Common Law, before the Statute of Wills, where there was no Custom to warrant it, this could not be helpt by Chancery, because this is against a Maxim of the Common Law. M. 16 Ja. in (l) Roswell & Every's Case, agreed by the Lord Chancellor, Dodderidge & Hutton.

(l) 1 Rol. Rep. 192. S. C. vide.

11. If a Man that is Non compos mentis aliens Land, this shall not be restored to himself by Chancery upon a Matter of Equity, against the Maxim of the Common Law. Mich. 16 Jac. in (m) Roswell and Every's Case, by the Lord Chancellor and Doddridge agreed. Fol. 377.

12. (n) A Purchaser of a Reversion shall compel the Lessee in Chancery to attorn where he hath no Means to compel him by the Common Law; for this is a particular Mischief not against any Maxim. Mich. 16 Jac. in Roswell's Case, agreed per Doddridge, according to several Precedents in Chancery shewed to him.

13. (o) If there be Lessee for Life, the Remainder for Life, the Reversion or Remainder in Fee, and the Lessee in Possession wastes the Land, tho' he is not punishable by the Common Law during the Remainder, yet he may be (p) restrained in Chancery, for this is a particular Mischief, and tho' he is not punishable during the Continuance of the Remainder, yet it is a Tort, and he is punishable after. Mich. 16 Jac. in Roswell's Case agreed per Doddridge, according to the Precedents of the Court of Chancery, which were before cited.

(m) 1 Rol. Rep. 219. S.C. and S. P. per Curiam.

(n) Godb. 208. 209. S. P. dubitatur Lat. 24. S. P. per Dod'. Moor 80. Pl. 1092. S. P. because the Grantee hath no Remedy as the Conusee of a Fine, to inforce an Attornment.

—But 4 Leon. 8. 184. it is agreed per Curiam, the Conusee may in Equity compel the Tenant to attorn. (o) Moor 554. Pl. 748. S. P. (p) Where an Injunction shall be granted to stay Waste, vid. Hardr. 96.

14. If by the Usage of a certain Country, Land is to lie in common every 3 Years, and the Owner of this Land by Deed leases this Land for 20 Years then next ensuing, provided every 3 Years when the Land is to lie in common, shall not be reckoned among the 20 Years; tho' this Proviso is void by the Common Law, yet it shall be helpt by the Chancery, and the Lessee shall have the 20 Years, leaving out every third Year; for this is not against any Maxim of Law, but it is according to the Intent of the Deed. Mich. 16 Jac. in Chancery, between Fleet and Cooper decreed.

15. If there be an Agreement upon a Marriage between A. and E. that a Jointure shall be made by Grant of a Rent to B. (the Father of A. the Feme) his Executors and Assigns for the Life of the Feme, and that for Default of Payment, B. the Father shall have an Estate for certain Years in the Land out of which this issues, if A. the Feme so long lives, and after the Rent is granted accordingly, and by several subsequent Acts this Grant is confirmed, and the Wife of C. the Father of E. the Baron joins in a Fine with C. her Husband, for the better Settlement thereof, and after both the Barons grant a Lease for Years, in Trust for the Feme of C. to the Intent that she should pay the said 80 l. Rent to A. the Feme, and that she her self shall have 40 l. a Year, and that if the Rent be not paid, that the Lease shall be void; after B. the Father of A. dies without making any Assignee of the Rent, by which the Rent is extinct in Law; yet this shall be made good against the Wife of C. and the Lessees in Trust for the Wife of C. because she gave her Consent thereto by Fine, and the Trust is to be guided in a Court of Equity. Tr. 3 Car. between Sir Richard Buller against Cheverton and Polwheel, decreed in Chancery by Justice Jones.

16. A Court of Equity cannot compel an Executor to perform a Decree made there against the Testator, before a (q) Statute acknowledged by him. Mich. 12 Jac. B. R. between (r) Walter and Heyford per Curiam, and a Prohibition granted accordingly to the Counsel of York.

(q) An Obligation becoming due after the Death of the Testator, shall be satisfied before a Decree in Chancery, per Stil. 38. per Roll.

(r) 1 Rol. Rep. 86. S. C. adjudged.

17. If two submit themselves to the Arbitrament of J. S. of all Controversies ita quod, &c. de præmissis, &c. and J. S. makes an Award of Part only, so that the Award is void in Law; this shall not be made good in a Court of Equity, because the Award was meerly void by Law. P. 7 Jac. B. between Robinson and Biss adjudged, and a Prohibition granted to the Counsel of York.

18. If a Man for 100 l. assumes to make a Lease for 21 Years, and dies, his Heir is not compellable in a Court of Equity to make the Lease; (s) for this is against the Common Law. Mich. 3 Jac. B. between Chapman and Boier, per Curiam.

(s) Fol. 378.

19. If a Feme Tenant in Dower ſues in a Court of Equity for Damages, where her Husband did not die ſeiſed, a Prohibition lies, for it is againſt the Common Law. Mich. 5 Jac. B. between Sweetman and Revet reſolved, and a Prohibition granted to the Court of Requeſt accordingly.

(t) Lat. 24. like Point, and the Court ſaid, tho' it was Common in Chancery to give Relief in ſuch Caſes, yet they would not permit the Court of Requeſts to do it, which was under their Power; and vid. Lat. 146.——the Rent decreed (the Deed being loſt) tho' it did not appear what kind of Rent it was. 1 Chan. Rep. 120. (u) Where voluntary, 1 Chanc. Caſ. 78. dubitatur.

20. (t) If A. (u) grants a Rent out of Land to B. and after grants the Land to his Son and Heir in Fee, and covenants that it is diſcharged of all Incumbrances præter the ſaid Rent, and after B. loſes his Deed of the Grant of the Rent, and therefore ſues in a Court of Equity for the Rent, a Prohibition lies; for it is a Maxim in Law, that none ſhall recover ſuch Rent without ſhewing of a Deed

B. R. between Beverly and Unite, a Prohibition granted to the Council of York, and M. 2 Car. a Conſideration was prayed and denied, but referred.

21. If a Man ſues in a Court of Equity to have Seiſin of a Rent-ſeck, a Prohibition lies for the Cauſe aforeſaid; for this would be to make a new Law. Mich. 2 Car. per Dodderidge, M. 5 Car. B. R. between Norris and Price, agreed per Curiam, where the Rent commenced by Grant.

(y) Moor 805. Pl. 1092. S.P. cited. Lat. 146. S. P. cited con. 1 Chan. Caſ. 147.

22. (y) But if a Rent be deviſed (z) by Will in Writing, a Court of Equity may compel the Tenant of the Land to give (a) Seiſin, becauſe by Intendment the Tenant of the Land was inops conſilii, at the Time of the Deviſe. Mich. 5 Car. B. R. between Norris and Price per Curiam, upon a Prohibition to Wales.

(z) So where a Rent is granted the Court may decree Seiſin to be given, and the Rent to be paid to the Grantee. 4 Leon. 184. 1 Chan. Caſ. 79. ——But vide 1 Ch. Caſ. 185. where it is ſaid the Court will give Seiſin only. (a) And where ſuch Rent was deviſed without giving a Power of Diſtreſs, and yet the Court decreed it to be paid. Vid. Moor 805. Pl. 1092. and 626. Pl. 859.

(z) 1 Chan. Caſ. 212. like Point decreed Con.

23. (z) If a Man hath Lands ſubject to the Payment of a Rent-charge, and grants Part of the Land to *B.* and covenants, that that Part ſhould be diſcharged of the Rent, yet this is not ſuch a real Covenant that ſhall run with the Land, and charge the other Lands with the Whole, but it is only a perſonal Covenant, which muſt charge the Heir only in reſpect of Aſſets. *Mich.* 1656. between *Cook* and *Arundel. Hard.* 87. decreed *in Scaccario* accordingly.

24. If the Patron hath a Penſion of 53 *s.* and 4 *d.* iſſuing out of a Vicarage, tho' there is no Vicarage Houſe, Tithes, or Glebe, but only *Eaſter* Offerings, Burials, *&c.* yet the Vicar is liable, tho' his Profits are caſual. *Trin.* 14 *Car.* 2. between the Dean and Chapter of *Norwich* and *Collins. Hard.* 230. reſolved *per Curiam.*

(b) 2 Chan. Caſ. 64.

25. If a Man makes *B.* and *C.* Executors, and deviſeth to them *reſiduum bonorum, &c.* after Debts and Legacies paid, and after *B.* dies, the Surpluſage ſhall not ſurvive; (b) for it ſhall be ſuppoſed the Teſtator intended an equal Share to his Executors. *Mich.* 26 *Car.* 2. between *Cox* and *Quantock.* 1 *Chan. Caſ.* 238. decreed for the Adminiſtrator of *B.* accordingly, but much to the Diſſatisfaction of the Bar; for where the Intention is ſecret and not declared, it muſt give way to the legal Intent.

(S) In

(S) In what Cases a Man shall be relieved against a Statute.

1. Where there is an apparent Fraud or a dubious Case by Law, of which the Party could not have Conusance, there it shall be aided by a Court of Equity against a Statute. Mich. 16 Jac. said by the Lord Chancellor in Long's Case, and Roswell's Case.

2. As if after the 13 Eliz. cap. 10. a Dean and Chapter had leased Land to the King for a valuable Consideration, at what Time the Law was taken that the King was not bound by the Statute, so that such Lease was good, and the King assign'd it over, and now the Law is taken that the Law is contrary, scilicet, that the King is bound by the Statute; yet this shall be made good by this Court against the Statute, because he could not know the Law in a Matter so doubtful. Mich. 16 Jac. B. R. in Chancery, between Long and the Dean and Chapter of Bristol adjudged and decreed, that the Lessee shall enjoy it, paying 200 l. to the Dean and Chapter, and such a Decree was made between Maudlin College and Wood.

3. If the Father by his Will in Writing devises Lands to his younger Son, and the elder Son knowing thereof, enters into the Land and disseises the Father, and so continues till the Death of the Father, by which the Will is void, yet because it was made void by Deceit and Covin, it shall be made good by Chancery, M. 16 Jac. by the Lord Chancellor in Roswell's and Every's Case.

4. (a) If a Man in a Court of Equity sues for a Rent, and the Defendant pleads the Statute of Limitations of 32 H. 8. alledging that the Plaintiff, &c. had not any Seisin of the Rent within 60 Years, according to the Statute, and shews that this which is demanded is no Rent-service, for he shews that King E. 6. was seised of the Land, the Court ought not to proceed against the Statute to relieve the Party, for it is against the Statute it self, and if the Courts of the Common Law, are bound by the Statute, the (b) Courts of Equity are also bound, and when a Man hath but one Right (*) of Action, if the Action is taken away the Right is taken away, otherways where he hath a Right of Entry. Mich. 14 Car. B. R. between Mountague and Goldsmith, which concerned the Hospital of St. Catharine's, resolved per Curiam, and a Prohibition granted accordingly to the Court of Requests.

(a) March 129. S. P. cited, and one Lord Keeper, Con. another.

(b) But a Trust is not within the Stat'. March 129.

(*) Fol. 379.

—And where a Feme covert deposited Money in the Hands of another to be disposed of as she should direct, it was look'd upon as a Depositum or Trust, and so not within the Statute. 2 Vent. 345.—And what shall be a Trust and so not within the Statute, vid. 1 Chan. Cas. 20, 26.—If a Suit in Chancery is begun within the Time of Limitation, and dismiss'd after the Time, yet the Court will not order the Defendant to take no Advantage of the Statute. 2 Chan. Cas. 217.—— But otherways, if the Party was staid by the Act of the Court, as Injunction, &c. 2 Chan. Cas. 217. but when a Man shall be bound by the Statute of Limitation or not, vide the Divisions, Title Limitation.

5. If a Man having Lands held in Capite, conveys 2 Parts of his Lands to Uses within the Statute of 32 and 34 H. 8. of Wills, and after devises, that his Executor shall sell the other 3d. Part for the Payment of his Debts, and dies, and the Executor by Force of a Decree in Chancery compelling him to it, sells the Land for a valuable Consideration, and with the Money pays the Debts, to which the Heir is liable, being due by Obligation; so that the Purchaser hath much Equity of his Side, yet this 3d Part being void by the Common Law, and 32 and 34 H. 8. it shall not be made good against the Statutes by Chancery, because it is directly against the Statutes, for this would cross the Statutes, and then it would be in the power of the Court of Chancery to make a new Law. Mich. 16 Jac. in Chancery, between Roswell and Every, resolved by the Lord Chancellor, the Master of the Rolls, and Justice Dodderidge, and Justice Hutton upon Argument, and a Decree before made to the contrary reversed accordingly.

6. If

6. If Tenant in Tail makes a Leaſe for Years not Warrantable by the Statute of 32 H. 8. this ſhall not be made good in Chancery upon a good Matter of Equity. M. 16 Jac. in Roſwell's Caſe, per Hutton.

(c) 2 Rol. Rep. 434. S. P. per Chamberlain. 2 Vent. 350. S. P. agreed

7. (c) So if Tenant in Tail (d) bargains and (e) ſells the Lands, yet this cannot be made good in Equity againſt the Statute, by which he is diſabled to bar his Iſſue. Hobart's Reports, between (f) Cavendiſh and Worſly reſolved.

by the Lord Keeper; and vid. Hard. 96. 1 Chan. Caſ. 236. S. P. agreed per Finch Lord Keeper. —But he ſaid, where a Man is only Tenant in Tail in Equity, the Court will decree ſuch Diſpoſition good; for a Truſt and equitable Intereſt is a Creature of their own, and therefore diſpoſable by their Rule. 2 Vent. 350. 1 Chan. Caſ. 235, 236. (d) If Tenant in Tail agrees to convey, he is bound by that Agreement; but if he dies, his Iſſue is not bound thereby, unleſs he doth ſome Act whereby he conſents to and confirms the Agreement. 1 Chan. Caſ. 172. and vid. 1 Lev. 239. (e) But if Tenant in Tail covenants upon a valuable Conſideration to levy a Fine, and a Decree is made in Purſuance thereof, his Iſſue ſhall be bound thereby. 1 Chan. Caſ. 294. (f) Hob. fol. 203. S. C. reſolved per Lord Keeper and Hobart.

8. A Teſtament Naval or Military made of Land without Writing for Want of ſuch Things requiſite thereto; yet this Deviſe per Parol ſhall not be helpt againſt a Statute. Mich. 16 Jac. in Roſwell and Every's Caſe by the Lord Chancellor.

(g) When the Equity charges the Lands, 'tis barred by the Fine, but

9. If a Bill be exhibited to be relieved againſt a Conveyance obtained by indirect Means, the Defendant may plead (g) a Fine and (h) Nonclaim. *Hill.* 14 *Car.* between (i) *Thynne* and *al'* and *Cary*. 1 *Jon.* 416. the Opinion of 7 Judges delivered to the Lord Keeper accordingly.

otherways where the Perſon is charged in reſpect of the Land. 1 Chan. Rep. 278. But when an Equity ſhall be barred by a Fine, Vide the Diviſions, Title Fine. (h) An Equity cannot be claimed by Entry but Subpœna. 1 Chan. Caſ. 278. (i) 1 Chan. Caſ. 278. S. C. cited.

10. If the Leſſee of a Prebend mortgages his Leaſe, and after the Day pays the Money, and then ſurrenders and takes a new Leaſe from the Prebend, tho' he hath Equity againſt the Mortgagee, yet if he dies, this Equity will not make the 2*d.* Leaſe good againſt the Succeſſor againſt the Statute which binds all Men, and has no Saving of ſuch Rights of Equity, and the Chancellor cannot add to the Statute by making a Saving, which the Statute has not made. *Paſch.* 26 *Car.* 2. between *Cooke* and *Bampfield*. 1 *Chan. Caſ.* 227, 228. *per Curiam.*

(T) Chancery and Courts of Equity.

In what Caſes a Man ſhall be relieved there againſt a (a) Deed, not againſt the Agreement of the Parties.

(a) Where no Relief upon a hard Bargain. 2 Vent. 359. — And for a contingent Agreement. vid. 2 Chan. Caſ. 136, 137. and vid. 2 Chan. Caſ. 241.

1. If a Man makes a Conveyance of a Houſe to the Uſe of himſelf for Life, without Impeachment of Waſte, the Remainder to another, and after the Leſſee will pull down the Houſe, yet he in the Remainder ſhall not be relieved in the Court of Requeſt, upon an Averment that there Agreement was, that the Leſſee ought not to do any voluntary Waſte, for he ſhall have no Averment (b) againſt a Deed. Mich. 8 Jac. B. Alice Parawick's Caſe reſolved, and a Prohibition granted.

(b) Where there may be a collateral Averment, conſiſtent with the Deed. Lit. Rep. 211.

2. If A. leaſes Lands to B. without Impeachment of Waſte, and after B. builds a Barn upon Part of the Land, to put in certain Tithes which he obtained by Leaſe of another, and after the Leaſe of the Tithes being expired, and having no Uſe of the Barn, he ſuffers it to lie without Uſe, per quod Beggars inhabit there in their Paſſage, which draws an Inconvenience to the Neighbours; and thereupon B. pulls

pulls down the Barn before the End of his Leaſe of the Land, and thereupon A. ſues him in the Court of Requeſt for Damages, and B. there juſtifies by Force of the Clauſe without Impeachment of Waſte, and the other Matter, and notwithſtanding a Decree was there made, that B. ſhould pay 10 l. Damages to A. for it, a Prohibition lies in this Caſe, becauſe this is againſt the expreſs Agreement of the Parties. Mich. 14 Car. (*) B. R. between the Maſter of the Hoſpital of St. Oſwalds & Salway reſolved per Curiam, and a Prohibition granted accordingly.

(*) Fol. 380.

3. But if a Leſſee for Years without Impeachment of Waſte circa the End of his Term intends to cut down all the Timber Trees, an Injunction lies out of a Court of Equity upon this Matter, (b) to ſtop the cutting down of the Trees, notwithſtanding the Agreement of the Parties, becauſe this is againſt the Good of the Publick to deſtroy the Trees, and the Suit there is to hinder and prevent it, and not to have any Damages after it was done. Mich. 14 Car. B. R. in the ſaid Caſe of Salway ſaid per Brampſton, that this Was the Biſhop of Winton's Caſe which was referred out of the Chancery to the Judges, and by their Advice, an Injunction granted for the Cauſe aforeſaid.

(b) 2 Chan. Rep. 32. it was declared by my Lord Chancellor, that he would ſtop pulling down Houſes, or defacing a Seat by Tenant after Poſſibility of Iſſue extinct, or by Tenant for Life, who was diſpuniſhable of Waſte by expreſs Grant, or by Truſt.

4. *A.* being poſſeſſed of a Church Leaſe, aſſigned it to *B.* to attend the Inheritance, and after purchaſed the Inheritance from the Truſtees for Sale of Church Lands; and before Marriage covenanted to ſtand ſeiſed to the Uſe of himſelf and Wife for Life, *&c.* and made *B.* his Executor and died, and after the Wife in Conſideration of Money releaſed to *B.* all her Right and Demand to the perſonal Eſtate of her Husband, and after upon the Reſtoration the Title to the Inheritance became void. *Paſch.* 16 *Car.* 2. between *Bawtry* and *Ibſon*, tho' the Inheritance was gone, yet the Settlement in Marriage being upon a Conſideration, the Term was decreed to the Wife for ſo many Years as ſhe lived, and the Releaſe being before the Title to the Inheritance was avoided, and concerning that only which was then looked upon as perſonal Eſtate, it was reſolved the Releaſe ſhould not bar or prejudice the Title of the Wife in Right to the Leaſe.

5. Where by Decree of the Court a Fine is levied to a particular End and Purpoſe, which in Point of Law would operate further than to that End for which it was ordered; ſuch Fine ſhall not in Equity be ſuffered to work farther than the Decree intended. *Paſch.* 16 *Car.* 2. between *Goodrick* and *Brown*, 1 *Chan. Rep.* 49. reſolved *per* Lord Chancellor, Mr. of the Rolls, and *Windham.*

6. A Bond was entred into, conditioned to pay 40 *l. per Annum* for 12 Years out of the Profits of an Office, which Office was taken away by the Uſurpers, but after revived. *Hill.* 17 and 18 *Car.* 2. between *Lawrence* and *Braſier*, 1 *Chan. Rep.* 72. it was decreed the 40 *l. per Annum* ſhould be paid for ſo many Years only as the Office continued, and thereupon the Bond to be delivered up.

7. If *A.* is Tenant for the Life of his Wife of a Rectory in the Right of his Wife, and leaſes it to *B.* at 100 *l. per Annum* Rent payable at *Lady-Day* and *Michaelmas*, and a Fortnight before *Michaelmas* the Wife dies, of which *B.* hath Notice, (c) but after gives Bond to *A.* to pay him *Mich.* Rent, and *A.* agees to ſave *B.* harmleſs againſt all others for that Rent; yet becauſe no Rent was due, and (d) ſo no Conſideration for the Bond, *B.* (e) may be relieved againſt it. *Mich.* 26 *Car.* 2. between *Negus* and *Fettiplace*, 1 *Chan. Rep.* 239. decreed accordingly, tho' it was objected that *B.* having taken all the Summer's Profits, ſhould pay for them at leaſt in Proportion.

(c) Where an Agreement made upon a Conceit he had no Title, when in Truth he had

ſhall bind. 1 Chan. Rep. 85, 86. (d) But per Hard. 200. a Man is not bound to diſcover the Conſideration of a Bond which in it ſelf implies one. (e) Where an Accountant to the Crown gave Bond for Payment of the Money, and after the Account was pardoned by the Act of Indemnity. Hard. 204. whether he ſhould be relieved, dubitatur & adjorn', for it was ſaid the Bond changed the Matter of Account into another Nature, and amounted to Payment.

8. If *A.* hath a Manor, and being about to ſell it, a Copyhold eſcheats which not being intended to paſs is left out of the Particular, but the Conveyance is ſufficient in Law to paſs it, yet *A.* ſhall be relieved in Equity. *Trin.* 32 *Car.* 2. Sir *William Beverſham's* Caſe, 2 *Vent.* 345. decreed accordingly.

(U) What Perſons in reſpect of their Eſtates ſhall be Bound.

1. IF a Man poſſeſſed of a Leaſe for Years as Executor of J. D. agrees for a good Conſideration to convey it to J. S. and after before it is done, dies inteſtate, and after J. N. takes Letters of Adminiſtration of the firſt Teſtator, (a) he is not bound in Equity to convey it according to the Agreement of the Executor, altho' the Executor during his Time had Power to diſpoſe of it at his Pleaſure, becauſe the Adminiſtrator comes Paramount this Agreement, and is to diſpoſe of it for the Soul, and for the Payment of the Debts of the firſt Teſtator. Paſch. 13 Car. in Chancery, between Sir Gamaliel Capell Defendant, at the Suit of Sir Robert Wiſeman, decreed by the Lord Keeper, he having the Opinion of Juſtice Jones, Barkly and Crawly in the ſame Caſe as he ſaid, their Opinions being accordingly.

(a) An Adminiſtrator de bonis non of the Conuſee of a Statute agreed to aſſign it to the Conuſor upon Payment of Money, and died, 2 Vent. 362. the Money was decreed to be paid to the Executor of the Adminiſtrator, and not to the new Adminiſtrator de bonis non.

2. So if there be 2 Joint-tenants of a Leaſe for Years, and one agrees to aſſign his Moiety, and dies before it is done; this Agreement ſhall not in Equity bind the Survivor, becauſe he comes Paramount the Agreement. Paſch. 13 Car. in Chancery in the ſaid Caſe of Wiſeman, agreed by the Lord Keeper, and he ſaid that it was alſo the Opinion of 3 Judges; and he ſaid alſo that ſo was their Opinion, that if the Baron be poſſeſſed of a Term in the Right of his Wife, and grees to aſſign it to another, and dies before it is done; this ſhall not in Equity bind the Feme.

3. If the Father being ſeiſed in Fee of Land, and being indebted to ſeveral Creditors, mortgages this Land to J. S. for Money paid upon Condition of Redemption, and after it is forfeited to the Mortgagee for Non-payment at the Day, and after the Father dies; and after the Son and Heir of the Father, who is liable to the Debts of the Creditors, joins with the Mortgagee in a Conveyance to another Purchaſer, and this is made for Money alſo given to the Heir, yet the Creditors of the Father ſhall not have any Remedy in Equity againſt the Son for the Money by him received, for his joining in the Aſſurance, becauſe in Law he had no Power of the Eſtate. M. 15 Car. B. R. reſolved in Chancery by the Lord Keeper, Juſtice Jones, and Barkly, as it was ſaid by Juſtice Jones and Barkly.

(X) In what Caſe one may Sue in a Court of Equity, where he hath Remedy at Common Law.

1. (a) If a Man for a good Conſideration, promiſes to another to make to him a Leaſe of certain Land, and does not perform it, he ſhall not Sue upon this Promiſe in a Court of Equity, becauſe he may have an Action upon the Caſe at Common Law, altho' in this he ſhall recover Damages (*) only, and not the Leaſe it ſelf, where in a Court of Equity he ſhould be compelled to make the Eſtate according to the Promiſe. Paſch. 14 Jac. B. R. between (b) Bromage and Jennyng, reſolved and a Prohibition granted accordingly to the Marches of Wales.

(a) Lat. 172. S. P. dubitatur tho' ſaid to be the Common Courſe in Equity.

(*) Fol. 381.

(b) 1 Rol. Rep. 368. S. C. adjudged, tho' objected, it was uſual to allow ſuch Suits in Chancery to inforce a Specifick Performance

2. If B. ſues D. in the Court of Marches of Wales by Engliſh Bill, for that whereas A. leaſed to B. certain Lands for Years reſerving a Rent, the Leſſee entred into an Obligation of 100 l. for the Payment of the Rent during the Leaſe; and after B. aſſigned the Term to D. who promiſed B. to ſave him harmleſs from the ſaid Obligation of 100 l. againſt A. and to pay the future Rent as it ſhould become due, a Prohibition lies, becauſe in this Caſe nothing is to be recovered but only Damages; ſo that this is meerly but an Action upon the Caſe, and the ſaid Court cannot hold Plea by Engliſh Bill in Actions upon the Caſe, where the Damages exceed 50 l. P. 11 Car. B. R. between Blunt and Fleming, per Curiam, a Prohibition granted.

3. If a Convepance of Land be made with a Power of Revocation, and a Queſtion is made in Chancery upon a Suit there, (c) whether there was a Revocation or not, this ſhall not be tried there, but ought to be diſmiſſed to be tried at Common Law. Hob. Reports 274. (d) between Manwering & Dennis reſolved.

(c) So if the Queſtion be, whether Leaſes are made purſuant to a Power, Cro. Jac. 349. 2 Bulſ. 216. 251. 1 Chan. Rep. 18. (d) Hob. fol. 103. S. C. reſolved by Lord Keeper, Maſter of the Rolls, and Hobart; and that this Cauſe was not proper, for a Court of Equity unleſs all Cauſes triable naturally by Common Law, and Jury ſhould be examinable and determinable in Chancery per teſtes.—And per March 93. a Thing which may be tried by Jury is not triable in Chancery; for in the firſt Caſe, if the Jury give not their Verdict according to Evidence an Attaint lies, but in the other there is no Remedy; and vide 2 And. 163. 4 Inſ. 85. Hard. 51.

(Y) At what Time a Man may be relieved there.

1. If a Man brings an Action of Debt upon an Obligation in B. and after the Defendant exhibits a Bill in a Court of Equity, ſhewing good Matter of Equity, and after the Plaintiff recovers in Bank, and there by Agreement of the Parties and Mediation of the Court according to the Equity of the Cauſe, the Plaintiff takes a certain Sum of the Defendant, in Diſcharge of the Debt, Damages and Coſts; if the Defendant proceeds after in the Court of Equity to have Relief there, a Prohibition ſhall be granted, becauſe the Matter is now ended in an equitable Courſe by the Agreement of the Defendant himſelf.

A Prohibition was granted to the Counſel of the Marches, between Grubb & Oliver in this Caſe; and Trin. 15 Jac. B. R. a Procedendo was prayed & per Curiam denied for the Cauſe aforeſaid.

2. A

8. If *A.* hath a Manor, and being about to ſell it, a Copyhold eſcheats which not being intended to paſs is left out of the Particular, but the Conveyance is ſufficient in Law to paſs it, yet *A.* ſhall be relieved in Equity. *Trin.* 32 *Car.* 2. Sir *William Beverſham's* Caſe, 2 *Vent.* 345. decreed accordingly.

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(b) 1 Rol. Rep. 368. S. C. adjudged, tho' objected, it was uſual to allow ſuch Suits in Chancery to inforce a Specifick Performance

2. If B. ſues D. in the Court of Marches of Wales by Engliſh Bill, for that whereas A. leaſed to B. certain Lands for Years reſerving a Rent, the Leſſee entred into an Obligation of 100 l. for the Payment of the Rent during the Leaſe; and after B. aſſigned the Term to D. who promiſed B. to ſave him harmleſs from the ſaid Obligation of 100 l. againſt A. and to pay the future Rent as it ſhould become due, a Prohibition lies, becauſe in this Caſe nothing is to be recovered but only Damages; ſo that this is meerly but an Action upon the Caſe, and the ſaid Court cannot hold Plea by Engliſh Bill in Actions upon the Caſe, where the Damages exceed 50 l. P. 11 Car. B. R. between Blunt and Fleming, per Curiam, a Prohibition granted.

3. If a Conveyance of Land be made with a Power of Revocation, and a Queſtion is made in Chancery upon a Suit there, (c) whether there was a Revocation or not, this ſhall not be tried there, but ought to be diſmiſſed to be tried at Common Law. Hob. Reports 274. (d) between Manwering & Dennis reſolved.

(c) So if the Queſtion be, whether Leaſes are made purſuant to a Power, Cro. Jac. 349. 2 Bulſ. 216. 251. 1 Chan. Rep. 18.

(d) Hob. fol. 103. S. C. reſolved by Lord Keeper, Maſter of the Rolls, and Hobart; and that this Cauſe was not proper, for a Court of Equity unleſs all Cauſes triable naturally by Common Law, and Jury ſhould be examinable and determinable in Chancery per teſtes.—And per March 93. a Thing which may be tried by Jury is not triable in Chancery; for in the firſt Caſe, if the Jury give not their Verdict according to Evidence an Attaint lies, but in the other there is no Remedy; and vide 2 And. 163. 4 Inſ. 85. Hard. 51.

(Y) At what Time a Man may be relieved there.

1. IF a Man brings an Action of Debt upon an Obligation in B. and after the Defendant exhibits a Bill in a Court of Equity, ſhewing good Matter of Equity, and after the Plaintiff recovers in Bank, and there by Agreement of the Parties and Mediation of the Court according to the Equity of the Cauſe, the Plaintiff takes a certain Sum of the Defendant, in Diſcharge of the Debt, Damages and Coſts; if the Defendant proceeds after in the Court of Equity to have Relief there, a Prohibition ſhall be granted, becauſe the Matter is now ended in an equitable Courſe by the Agreement of the Defendant himſelf.

A Prohibition was granted to the Counſel of the Marches, between Grubb & Oliver in this Caſe; and Trin. 15 Jac. B. R. a Procedendo was prayed & per Curiam denied for the Cauſe aforeſaid.

2. A

2. A Cauſe ſhall not be examined upon Equity in the Court of Requeſt, Chancery, or other Court of Equity, (a) after Judgment at the Common Law. Hill. 11 Jac. B. R. a Prohibition granted. M. 12 Jac. B. R. (b) Glanfield's Caſe per Curiam, M. 13 Jac. B R. between (c) Dr. Googe & Wood. P. 7 Jac. B. R. Skipwith's Caſe, a Prohibition granted to the Requeſts. P. 7 Jac. B. adjudged, and a Prohibition granted to the Counſel of Marches. M. 7 Jac. B. Curteis's Caſe adjudged, and a Prohibition granted to the Counſel of York.

(a) Per 3 Inſt, 123. it cannot be done for 3 Reaſons, 1ſt, Becauſe it draws the Matter determinable by the Common Law ad aliud examen, viz. A Trial by Witneſſes. 2dly, After Judgment the Parties ought to be at Peace and Quiet, and if it ſhould be otherways every Plaintiff would begin in Equity, which would tend to the utter Subverſion of the Common Law. 3dly, A Court of Equity being no Court of Record, cannot hold Plea of any Thing of which Judgment is given, which is a judicial Matter of Record. But for this Matter and the Arguments thereupon vid. 3 Inſ. 123, 124. 4 Inſ. 86. 91, 92. Dal. 81. Moor 836. Pl. 1129. 916. Pl. 1300. 1 Leon. 241. 2 Leon. 115. 3 Leon. 18. 2 Brownl. 97. Godb. 244. 1 Rol. Rep. 71, 72, 252. 2 Bulſ. 194. 284. 3 Bulſ. 118. 120. Lit. Rep. 37. Cro. Jac. 335. 344. March. 54. 83. Cro. Car. 595, 596. Stil. 27. 1 Sid. 463. 1 Mod. 6. Hard. 23. 123. 2 Chan. Rep. 98. (b) Moor 838. Pl. 1131. S. C. reſolved. 1 Rol. Rep. 111. S. C. reſolved. Cro. Jac. 343, 344. S. C. reſolved. 2 Bulſ. 301, 302. S. C. reſolved. (c) 3 Bulſ. 115. S. C. and S. P. per Curiam. 1 Rol. Rep. 277. S. C and S. P. per Curiam.

3. If A. be the King's Farmer of a Warren, but the Inheritance is in the King, and B. brings an Action of Treſpaſs againſt A. in B. R. and has a Verdict in Point and Judgment accordingly, that there is not any Warren; it ſeems that this ſhall not bind the King, but that he may ſue after in a Court of Equity, for this was but a perſonal Action, and binds not the King at Common Law, and therefore he is at large, as if no ſuch Thing had been done.
Contra M. 12 Jac. B. R. between Wright & Fowler per Curiam.

4. If C and F. bring a Prohibition in B. R. againſt W. and upon a Demurrer there a Conſultation is granted, and after the King and the ſaid C. and F. ſue in the Dutchy Court, pretending Matter of Equity of Diſcharge, and that the ſaid W. claims the Tithes by the Patent of the King, which they pretend to be void; a Prohibition ſhall be granted, becauſe this is after (d) Judgment here in B. R. and alſo no Matter of Equity appears. M. 13 Jac. B. R. between (e) Coates and Sir Henry Warner, reſolved, and a Prohibition granted.

(d) Fol. 382.

(e) 3 Bulſ. 119. 120. S. C. and S. P. ſeems to be agreed per Curiam. 1 Rol. Rep. 252. reſolved per Curiam.

(Z) Chancery and Courts of Equity.

Decree (a) (b) reviewed.

In what Caſes it may be.

1. If in Chancery a Decree be againſt a Statute as the Caſe was, againſt the Statute of Wills, by which the Common Law is affirmed, that where the Land is held in Capite, one third Part ſhall be ſuffered to deſcend to his Heir, and the Father deviſes all for the Payment of Debts, which is void for a third Part, and the Chancery confirms it for this third Part by a Decree, and this Matter appears within the Decree; this Decree may be re-examined and reverſed becauſe it is againſt the Statute, and ſo the Chancery errs in Law. Tr. 15 Ja. in Chancellaria, between Ruſwell & Every, adjudged upon a Demurrer per Bacon, the Lord Keeper, and after M. 16 Jac. the Decree reverſed accordingly by the Advice of Juſtice Doddridge and Juſtice Hutton, Aſſiſtants to the Court.

(a) Where the Decree is for Payment of Money no Bill of Review ought to be brought till paid, tho' in ſome Caſes the Rule may be diſpenſed with. 1 Chan. Rep. 42.

(b) Where a Decree was avoided by Original Bill. vide 1 Chan. Rep. 3.

2. (c) So if the Chancellor errs in a Decree in a Matter of Law, and it appears within the Decree, as if the Chancellor makes a Decree upon the Law upon his own Opinion, against the Opinion of the Judges, this Decree may be reviewed for this Error in Law. Tr. 15 Jac. in Chancellaria in Sir George Reynel's Case adjudged upon a Demurrer by Bacon, the Lord Keeper. Tr. Jac. in Camera Scaccarii per Curiam; this Bill of Review is in Nature of a Writ of Error. (d) 27 H. 8. 15. there was a Matter of Law, and adjudged that it might be reversed there.

(c) Lane 69, 70. S. P. dubitatur. Hard. 51. S. P. arguend'. 1 Chan. Cas. 54. S. P. resolved.

(d) Lane 70. S. C. cited.

3. (e) But if the Chancellor errs in his Decree (f) upon a Matter of Fact this Decree is final, and (g) cannot be reviewed because they cannot go to a new Examination of Witnesses now, for after Publication this cannot be done. Tr. 15 Jac. in Cancellaria, this was so held by the Lord Keeper in the said Case. Tr. 8 Jac. between (h) Ardem and Darcy, per Curiam.

(e) Hard. 51. S.P. arguend' 174. S. P. resolved.

(f) Where there is no Remedy against a Decree in a Court of Equity. 2 Bulst. 197. Cro. Jac. 336. 2 Bulst. 215.

4. So if the Chancellor errs in his Conscience upon a Matter of Fact proved before him, there may be a (i) Review upon this Matter, because there needs no new Examination, but (k) this may be reviewed upon the old Depositions, and this is usual.

—And 3 Bulst. 118. it is said, that where a Man is wronged by a Decree, his best and only way to have Remedy, is by Petition to the King, who may refer it to the Judges to give redress therein. 4 Inst. 85.—But not to others. 1 Rol. Rep. 331.—But 12 Co. 113. it was resolved by the Lord Chancellor, Chief Justice, Master of the Rolls, and 2 Judges, that the King cannot grant a Commission to determine a Matter of Equity; but that it ought to be determined in the Court of Chancery, which hath had Jurisdiction Time out of Mind. (g) or altered by Original Bill. 1 Chan. Cas. 45.—Unless for Matter subsequent. 1 Chan. Cas. 64. (h) Lane 68, 69. S. C. (i) A Rehearing before the Decree is enrolled. 1 Chan. Cas. 54. (k) Want of any Evidence or Matter which might have been used in the first Cause, and of which the Party had then Knowledge, is no Ground for a Bill of Review. 1 Chan. Cas. 43, 44.

5. (l) If there be a Decree made by Commissioners upon the Statute of 43 *Eliz. cap.* 4. of charitable Uses and Exceptions put in against it in Chancery, and there it is Heard, Examined, and Confirmed; it cannot upon a Bill of Review be further examined, for the Authority of the Chancellor is given by the Act, which mentions but one Examination; so that it is not like a Decree made by the Chancellor by his ordinary Authority. *Mich.* 2 *Car.* between (m) *Windsor* and the Inhabitants of *Farnham*. *Cro. Car.* 40. resolved by 3 Judges upon a Reference to them out of Chancery.

(l) Cro. Car. 40, 351. like Point cited.

(m) Cro. Car. 351. S. C. cited. 1 Jon. 147. S. C. resolved by 4 Judges, upon a Reference to them.

(A) Costs.

1. The Plaintiff shall not recover any Costs in Chancery, tho' he recovers the Thing for which he sues as a Deed, or such like, which is not recovered in Damages.

2. If an Executor is Defendant in Equity, and there is a Decree against him, yet he shall not pay Costs, (tho' an Executor Defendant at Law pays Costs in all Cases) for he cannot plead it at Law in Excuse of Assets. *Hill.* 1659. between *Thistlewelton* and *Thelwell*. *Hard.* 165. ordered accordingly in *Scaccario*.

(B) How the Suit ſhall be proſecuted.

(a) 2 Rol. Rep. 96, 103. reſolved, and that the Court of Requeſt could not compel the Parties to be bound to ſtand to their Orders.

1. (a) Upon a Suit in a Court of Equity, if the Court will compel the Defendant (b) to ſtand to their Award a Prohibition ſhall be granted, for this is againſt Law, for if they have Juriſdiction of the Thing, they may compel him to perform it without an Obligation. H. 13 Jac. B. R. between Atkinſon and Hobbs, a Prohibition granted to the Counſel of York.

(b) The Tranſlation is exact according to the Original, but by the Coherence here ſeems Words to be wanting, viz. to give Bond, and that it ſhould be, if the Court will compel the Defendant to give Bond to ſtand, &c.

(c) March 102. S. P. arguendo.

2. (c) If there be a Suit before the Counſel of the Marches of Wales, and the Cauſe is diſmiſſed, but referred to certain Perſons to hear and determine it, and this is without the Conſent of the Defendant; but thereupon the Referees make an Order, and certify it to the Court, and for Non-performance thereof the Court (*) impriſon him, a Prohibition lies, for the Court cannot make Strangers Judges in the Caſe without the Aſſent of the Parties. M. 8 Car. B. R. between Mayow and Mayow reſolved, and a Prohibition granted.

(*) Fol. 383.

(C) (a) Examination of Witneſſes (b) *in perpetuam rei memoriam.*

(a) Hetl. 30. 31.

(b) In a Bill for this purpoſe, if the Plaintiff prays Relief, the Bill ſhall be diſmiſſed. 2 Vent. 366.

1. If a Man aſſumes to J. S. in Conſideration that he will marry his Daughter, that he will pay him 500 l. after the Death of J. D. in this Caſe becauſe the Witneſſes are old, and J. D. is as young as J. S. ſo that the Witneſſes to prove the Promiſe may die before J. D. and ſo J. S. ſhall be without Remedy for his Promiſe, he may exhibit his Bill in Chancery, and examine Witneſſes to prove it, in which he that made the Promiſe may join in Nature of an Examination in perpetuam rei memoriam. M. 16 Ja. in Chancery, between Sir Edward Tirrel and Sir Thomas Co.

Fol. 384.

Chancellor.

(a) Both the Britiſh and Saxon Kings had their Chancellors. 4 Inſt. 78.

1. There were Chancellors in England (a) before the Coming of the Normans into this Realm, Jan. Anglorum 127. for it is cited that Rembald was Chancellor to King Edward the Confeſſor, and there are divers other Chancellors before this William cited.

—And for the Antiquity thereof, vide 4 Inſt. 78, 79.

2 Mich. 14 Jac. B. R. Upon Evidence at the Bar a Charter of William the Conqueror was ſhewn under the Seal of the ſaid King, which was ſubſcribed by ſeveral Lords as Witneſſes, in which I ſaw that it was ſubſcribed per Mauricium Regis Cancellarium after the Biſhops and before the Abbots.

(A) Chancellor.

Keeper.

(a) Writs Original.

(a) 4 Inſt. 80.

1. MIrror of Juſtices, fol. 3. b. **it was ordained, that the Court of the King was open to all Plaintiffs**, per quod **they had** (b) **without Delay, Writs remedial as well** (c) **upon the King or upon the Queen, as upon other of the People, of every Injury, but in Vengeance of Life, or Member, or Plaint held Without Writ.**

(b) This Court is always open and never adjourned, therefore a Habeas Corpus, Prohibition, &c. are grantable in Vacation. 4 Inſt. 81. 2 Inſt. 53.

(c) In the Original it is ſur le roy ou ſur la royne come ſur auters de people, &c.

2. (d) Mirror of Juſtices, fol. 3. **It was ordained by ancient Kings, that every one ſhould have** (e) **out of the King's** Chancery, **a Writ remedial upon his Complaint without Difficulty**: & ibidem, Fol. 27. S. 13. **in the Title of** (f) **the perſonal Offences at the Suit of the King, there it is ſo**, &c. I ſay for our Lord the King, that **Sim.** there is perjured, and (g) has falſify'd his Faith againſt the King, for that whereas the ſaid **Sim.** was the King's Chancellor, and was ſworn that he would not ſell, deny, nor delay Right, nor a Writ remedial to any Plaintiff; the ſame **Sim.** ſuch a Day, &c. (h) **ſuch a Writ of Attaint or other Remedial would not grant for leſs than for half a Mark**: & ibidem fol. 64. cap. 5. **among the Abuſes of the Law it is ſaid that one is**, that Writs remedial are vendible, **and that the King ſends to the Sheriffs**, take Surety for ſo much to our Uſe for the Writ, **for by the Purchaſe of thoſe Writs it may be one deſtroy his Enemy tortuouſly**; & ibidem, fol. 70. cap. 5. **among the Defaults of the great Charter upon the** 25 cap. Nullus liber homo, &c. **this Point is ſaid**, that the King grants to his People, that he well not ſell Right, nor deny nor delay it, **and it is diſuſed by the** Chancellor, **who ſells the Writs remedial, and calls them** Writs of Grace, ibid. fol. 50. Ordinance de Judgment, **by this Seal only is a Juriſdiction aſſignable to all Plaintiffs Without Difficulty, and to do this the** Chancellor **is chargeable by Oath in Obedience of the King's Charge, that he ſhall not ſell, deny, or delay any Right, nor a Writ remedial to any.**

(d) 4 Inſt. 78. cited.

(e) 4 Inſt. 78.

(f) In the Original it is del peches perſonal.

(g) In the Original it is for mentue againſt the King.

(h) In the Original it is Mee a tiel brief d'attaint ou auter brief, &c.

3. Bracton lib. 5. De exceptionibus, cap. 17. Sunt quædam brevia formata ſuper certis caſibus de curſu & de Communi conſilio totius regni (*) conceſſa & approbata, quæ quidem nullatenus mutari poterint abſq; conſenſu & voluntate eorum, & ibidem pertinet ad regem, ad quamlibet injuriam compeſcendam remedium competens adhibere. Brevia tamen Communia inter omnes pro jure generaliter debent obſervari cum ſint originalia, & actionibus originem præſtant.

(*) Fol. 385.

4. Rotulo Parliamenti 46 E. 3. Numero 38. **The Commons pray, that as in the great Charter it is contained** quod nulli negabimus nulli vendemus aut differemus juſtitiam vel rectum, **to the Intent that of ſome Fines which are taken in** Chancery **in many Writs contrary to the ſaid Statute, to the great Impoverichment of the People of which they pray a Remedy, and that the ſaid Statute be declared.**

Anſwer.

1. **THE King will uſe as he and his Anceſtors have done before theſe Days, and will charge his Chancellor, that the Fines be reaſonable, according to the State of the Perſon.**

(a) (b) (c) Chancellor.

(a) May be made ſo at Will by Patent, but not for Life, for being an ancient Office it ought to be granted as hath been accuſtomed. 4 Inſt. 87. 1 Sid. 338. — So the Chancellorſhip cannot be granted in Succeſſion. 4 Inſt. 78. — But the Maſter of the Rolls is grantable at Will, or for Life. 4 Inſt. 95. (b) Per 5 Eliz. cap. 18. it is declared, That by the Common Law the Keeper of the Great Seal hath always had, uſed, and executed, and may have, uſe, and execute the ſame Place, Authority, Pre-eminence, Juriſdiction, &c. as the Lord Chancellor, &c. 4 Inſt. 87.— H. 5. had 2 Great Seals, one of Gold, which he delivered to the Biſhop of D. and made him Lord Chancellor; another of Silver, which he delivered to the Biſhop of London to keep, but at this Day there being but one Great Seal, there cannot be both a Lord Chancellor and Lord Keeper of the Great Seal at one Time, becauſe both are but one Office, as is declared by the Act of the 5 Eliz. 4 Inſt. 88. (c) His Oath. 4 Inſt. 88. (d) Lord Keeper and Chief Juſtice of the Common Pleas not inconſiſtent. 1 Sid. 338, 365. (e) The Lord Chancellor or Keeper made ſo per traditionem Sigilli. 4 Inſt. 87. —Sometimes by Patent. 4 Inſt. 87. (f) The taking away the Seal determines the Office. 1 Sid. 338.

(d) Keeper.

1. 10 E. 1. ROtulo Clauſo Membrana 6. Hic 31 Martii venit Bathonienſis & Wellenſis Epiſcopus Cancellarius regis de Epiſcopatu ſuo ad Curiam quo die (e) Sigillum fuit ei liberatum, and there Membrana 7. Memorandum 13 Febr. apud Garcot receſſit Bathonienſis & Wellenſis Epiſcopus Cancellarius regis a Curia verſus Epiſcopatum ſuum quo die Sigillum fuit (f) liberatum in Garde roba regis per manum Johannis de L. &c. 12 E. 1. Membrana 4 Cancellarius receſſit de D. to S. & liberavit Sigillum J. de R. & W. de S. Cuſtodiend' Simile, 18 E. 1. Membrana 14. 18 E. 1. Rotulo finium Membrana 17.

2. 14 E. 1. Membrana 4. Cancellarius transfretavit ad partes Franciæ cum Rege cumq; ſigillo ipſius regis, 16 E. 1. M. 4. his return with the King cum magno Sigillo. 17 E. 1. Rot. finium M. 4.

3. 20 E. 1. Rotulo Clauſo M. 21. Memorandum quod die Sabbati ante Feſtum Simonis & Judæ anno 20. apud Berewick obiit venerabilis pater Burnell Cancellarius regis, & magnum Sigillum regis quod fuit in Cuſtodia ſua liberatum fuit in Garde roba regis Cuſtodiend' eadem Garde roba ſub Sigillo Willielmi de Hamelto qui inde brevia conſignavit uſq; diem mercurii proximo Sequentem quo die iter eripuit verſus Wells cum corpore pred' Roberti. 20 E. 1. Rotulo finium M. 2. & Rotulo Scotiæ M. 7. the ſame Memorandum 21 E. 1. Rotulo finium M. 26. Magnum Sigillum domini regis Commiſſum Johanni de Langton cuſtodiend' in præſentia, &c. qui die craſtino inde brevia conſignavit.

4. 25 E. 1. Rotulo Clauſo M. 7. the Chancellor delivered the Great Seal to the King, and received another Seal of the King's Son, which ſhould be uſed in the Abſence of the King.

5. 6 E. 1. Rot. finium Memb. 24. Memorandum quod die Veneris proxima poſt feſtum Stæ' Scolaſticæ Virginis apud Dover venerabilis pater R. Bathonienſis & Wellenſis Epiſcopus Cancellarius regis transfretavit ad partes tranſmarinas & Sigillum fuit tunc liberatum in Garde roba regis ſub Sigillo Domini Johannis de Kerby cui Cancellar' injunxit in receſſu ſuo quod negotia Cancellariæ expediret, 6 E. 1. Rot. Cartarum (*) Membrana 2 Parte 15, 16. 7 E. 1. Rotulo Patentium, M. 15. Redelivery of the Seal upon the Return of the Chancellor.

(*) Fol. 386.

6. 25 E. 1. Rot. finium M. 6. Dominus Johannes de Langton Regis Cancellarius in Navi Regis in qua rex tunc fuit paratus ad transfretandum in Flandriam liberavit eidem Regi magnum Sigillum ſuum quod idem rex Statim recepit & illud tradidit domino de Beneſtede ad Cuſtodiendum, and after in the Abſence of E. 1. his Son, locum tenens regis liberavit prefato domino Johanni de Langton præd' Regis Cancellar' Sigillum regis quo dum idem erat in Vaſconia uti in Anglia conſuevit qui quidem Johannes Sigillum a manibus domini Edvardi Statim recepit & in craſtino inde brevia conſignavit, 27 E. 1. M. 15. upon the Return of the King the ſaid Chancellor under

der his Seal delivered to the King the Seal which he uſed in his Abſence, and he delivered it to his Treaſurer to be kept in the Treaſury & Statim, the King delivered the Great Seal which he aſportavit with him in Flandriam to the ſaid J. de Langton ſub Sigillo ſuo.

7. 2 E. 2. Rot. finium M. 8, 9. de liberatione magni Sigilli, &c.

8. 2 E. 1. Rot. Patentium M. 8. Memorandum quod die Veneris in feſto Sancti Matth. Apoſtoli magnum Sigillum regis liberatum fuit Roberto Burnell Archidiacono Eborum apud Windſor, & Statim inde conſignavit brevia Cancellariæ tam de curſu quam de præcepto.

9. 5 E. 1. Rotulo Patentium M. 17. de Sigillo Hibernico mutato.

10. 1 E. 3. Clauſo 2. Pars M. 11. dorſo, A new Great Seal made with ſome Alteration, and the old Seal broke, and a Command to the Sheriff of every County to publiſh it in pleno Comitatu, and to ſhew there the new Seal.

11. Statutum de Forma mittendi extractas ad Scaccar' in Magna Charta 2 parte fol. 47. b. The King to our dear William de Airemyn, Keeper of our Rolls of the Chancery, and to his Companions Keepers of our Great Seal ſalutem.

12. Rotulo Parliamenti 14 E. 4. Numero 26. the Chancellor is called the Chief Judge in the Realm.

Relief.

In what Caſes in general.

1. THE Conſtable of the Caſtle of *Glouceſter*, exhibited a Bill in the Exchequer againſt a Brewer, ſetting forth, That he and his Predeceſſors had uſed to have 12 *s.* of every Brewer within the City of *Glouceſter*. *Trin.* 4 *Car. Lit. Rep.* 103. upon Demurrer to the Bill becauſe there was no Conſideration wherefore taken, it was ruled the Defendant ſhould anſwer, for a lawful Commencement ſhould be intended, and the Court ſaid that upon ſuch Bill the Lieutenant of the *Tower* had been relieved, who claimed certain Wines of every Ship that arrived laden with it.

2. *A.* being ſeiſed in Fee for 120 *l.* by Bargain and Sale inrolled, conveyed to *B.* and his Heirs in Conſideration that *B.* ſhould re-demiſe to *A.* and his Wife for their Lives, and with a Condition that if *A.* paid 120 *l.* at the End of 20 Years, that then the Bargain and Sale ſhould be void; and *B.* redemiſed, *&c.* and died, and the Wife of *B.* brought Dower, and tho' it was ſaid to be againſt Equity and the Agreement, and that it was but in Nature of a Mortgage; and upon a Mortgage, if the Land be redeemed, the Wife of the Mortgagee ſhall not have Dower; yet *Paſch.* 6 *Car.* between *Naſh* and *Preſton*. *Cro. Car.* 190, 191. this Caſe being referred to *Jones* and *Cro.* after Conference with the reſt of the Judges, they certified their Opinion that the Wife of *B.* was to have Dower, and not to be precluded thereof in Equity; and it was ſaid to be the Folly of *A.* that he did not join another with *B.* according to the ancient Courſe in Mortgages.

3. (b) An Abbot had a Mill within the King's Manor, where by Cuſtom all the Inhabitants were to grind, *&c.* and the King granted over the Manor, and the Mill came to the Crown by the Diſſolution of Abbies, and the King after granted it in Fee-farm. *Mich.* 1655. *Scaccario*, between *Currier* and *Crier*, *Hard.* 21. the Reſiants and Inhabitants upon view of ſeveral Precedents were decreed to grind there, but none of the Precedents were in Point, *viz.* of a Mill in groſs, which never appertained to the King's Manor or was originally in him.

(b) Hard. 175. like Point, where a Manor was held of the King, and the Lord had a Will therein, &c. and vid. Hard. 162. 177. 185.

4. A Widow poſſeſſed her ſelf of her Husband's perſonal Eſtate and paid ſeveral of his Debts, and after his Executor got the Eſtate out of her Hands. *Trin.* 15 *Car.* 2. between *Ayre* and *Ayre*, 1 *Chan. Caſ.* 33. upon a Bill preferred by her, it was decreed by Conſent of Counſel that ſhe ſhould be allowed for all Payments made which were incumbent on the Executor to pay according to the Courſe of Law, but as to Payments made out of Order and Rule which the Law left the Executor liable to, ſhe ſhould not be allowed, if they were to the Prejudice of the Executor.

5. If in a Bill in Equity the Plaintiff ſets forth a Promiſe by the Defendant to pay Money, but ſuggeſts that he hath not ſuch preciſe Proof thereof as by Law required, and the Defendant (c) confeſſes the Promiſe, but ſays he hath paid the Money, the Court ſhall proceed no further, for the Plaintiff hath obtained the End of his Suit, and may proceed at Law upon the Evidence of the Defendant's Anſwer. *Trin.* 24 *Car.* 2. between *Mekins* and *Minſhaw*, 1 *Vent.* 212. a Prohibition granted to the Court of the Chancellor of *Cheſter* accordingly.

(c) So if denied, for if the Promiſe could be proved, he might proceed at Law. March. 102, 103.

6. If a Man by Will deviſes that the Reſidue of his perſonal Eſtate ſhall be divided amongſt 16 by Name, but deviſes that the Quantity of the reſiduary Eſtate ſhall be as his Executor will voluntarily and without being thereto compelled by Compulſion of Law declare, and after the Executor declares what the Reſidue amounts to, yet upon a Bill ſuppoſing it to be more, the Executor muſt anſwer and diſcover. *Trin.* 26 *Car.* 2. between *Gibbons* and *Dawley*, 2 *Chan. Caſ.* 198.

7. If *A.* is Tenant for the Life of his Wife of a Rectory in the Right of his Wife, and leaſes it to *B.* at 100 *l. per Annum* Rent payable at *Lady-Day* and *Mich.* and a Fortnight before *Mich* the Wife dies, of which *B.* hath Notice, but after gives Bond to *A.* to pay him *Mich.* Rent, and *A.* agrees to ſave *B.* harmleſs againſt all others for that Rent; yet becauſe no Rent was due, and ſo no Conſideration for the Bond, *B.* may be relieved againſt it. *Mich.* 26 *Car.* 2. between *Negus* and *Fettiplace*, 1 *Chan. Caſ.* 239. decreed accordingly, tho' it was objected that *B.* having taken all the Summers Profits ſhould pay for them at leaſt in Proportion.

(d) 2 Chanc. Caſ. 116, 117. like Point decreed.

8. (d) If a Man mortgages his Lands in Fee, and gives a Statute to the mortgagee to pay, *&c.* and then makes his Will and deviſes 500 *l.* to *A.* and dies, and the Mortgagee takes ſo much of the perſonal Eſtate in Execution upon the Statute that there is not ſufficient Aſſets left to pay the Legacy, *A.* ſhall be relieved againſt the Heir (e) who was eaſed out of the perſonal Eſtate which was liable to the Legacy of *A. Mich.* 32 *Car.* 2. 4, 5. for the perſonal Eſtate in the Hands of the Executor ſhall be applied in Diſcharge of the Heir only, where there is ſufficient Aſſets to diſcharge other Debts and Legacies.

(e) If a Man deviſes that his Debts ſhall be paid out of his real and perſonal Eſtate, if the Executor pays more than his perſonal Eſtate, he ſhall be reimburſed out of the real Eſtate. 2 Chan. Caſ. 109.

9. If *A.* is ſeiſed in Fee of the Manors of *B.* and *C.* and makes a voluntary Settlement whereby he charges Part of the Manor of *B.* with the Payment of 3000 *l.* to his Daughter, and after upon Marriage with a ſecond Wife, ſettles the Manor of *B.* upon her in Jointure, and after by Will reciting that the Jointure-Lands were ſo incumbered, deviſes his Manor of *C.* to his Wife, in lieu of ſuch Part of his Manor of *B.* as was charged as aforeſaid in caſe ſhe would accept thereof, but the Manor of *C.* not being equivalent in Value to the Lands charged, ſhe holds the later free of the Charge becauſe voluntary; (f) now the Portion ſhall be charged upon the Manor of *C. Hill.* 35 and 36 *Car.* 2. Sir *Rob. Reeve's* Caſe, 2 *Vent.* 363.

(f) A Man deviſed that his Debts ſhould be paid by Sale of his Lands in A. and if thoſe ſufficed not by Sale of his Lands in B. and if thoſe ſufficed not by Sale of his Land in C. and deviſes 600 l. per Annum out of his Lands in C. the Truſtees ſold the Lands in A. and great Part of the Lands in C. ſo that the Reſidue were not ſufficient to anſwer the Arrears of the Annuity, and therefore, 1 Chan. Caſ. 295. ſince the Lands in C. were ſold in lieu of the Lands in B. it was ordered that the Lands in B. ſhould be ſold to ſatisfie the Arrears of the Annuity.

(a) Where there ſhall be a (b) Contribution.

(a) Amongſt Legatees, vide the Subdiviſions of Legacy. Title Deviſe.

1. IF *A.* and *B.* are jointly and ſeverally Bound for *C.* and after *A.* is ſued alone and the Money recovered againſt him, he ſhall have no Remedy againſt *B.* for being ſeverally Bound (c) either was chargeable. *Godb.* 243. a Prohibition granted to the Court of Requeſt.

(b) If a Collector of 15ths, levies all the Tax within one Townſhip upon one Inhabitant, he ſhall have the Aid of the Court of Exchequer to make the others contributory. Lan. 65. per Tanfield. (c) A. and B. are Sheriffs of Middleſex, and a Recovery is had againſt them for an Eſcape, and 500 l. Damages which A. pays, and B. dies, and whether the Executor of B. ought to contribute. Hard. 164. dubitatur.

2. If a Man deviſes Lands to his Heir, upon Condition that he pays his Daughter 500 *l.* at her Age of 16, and that upon Default ſhe may enter and raiſe it and dies, and after the Heir deviſes the Lands to *A.* for Life, the Remainder to *B.* in Fee and dies, the Daughter being under Age, *B.* may compel *A.* to contribute towards the Payment of the 500 *l.* *Hill.* 25 *Car.* 2. between *Hays* and *Hays*, 1 *Chan. Caſ.* 223. tho' it was objected the Suit was only *quia timet*, and *A.* might live till the Daughter was 16, and then the Daughter might enter and raiſe it.

3. So if *A.* mortgages Lands for 2000 *l.* and then deviſes to *B.* for Life, the Remainder to *C.* in Fee, *C.* may compel *B.* to pay his (d) Share of the Mortgage-Money. 1 *Chan. Caſ.* 224.

(d) Viz. Tenant for Life ſhall pay one Third, and he in Remainder two Thirds. 1 Chan. Caſ. 271.

(a) Where there ſhall be a (b) Diſcovery.

(a) Vide Poſt the Diviſion Title Plea.

(b) Of Tithes, if the Plaintiff alledges he is content to accept the ſingle Value only. Hard. 190, 201.

1. (c) IF a Man is Outlawed a Bill may be exhibited by the Attorney-General to diſcover his real and perſonal Eſtate, for the Outlawry is in Nature of a Gift to, or Judgment for the King. *Mich.* 1655. between the Protector and Lord *Lumly*. *Hard.* 22 *per Curiam.*

2. So a common Perſon may have a Bill of Diſcovery (d) to enable him to ſue Execution. *Mich.* 1655. *Hard.* 22. *per Curiam.*

3. A (e) Bill was exhibited by the Attorney-General in the *Exchequer*, wherein it was charged that the Defendant, being a Merchant, had concealed the Cuſtom of 290 Casks of Currans, and for the better effecting thereof, had given 40 *l* apiece to 2 Cuſtom-Houſe Officers, and Relief and a Diſcovery of the Truth prayed, *Hill.* 1658, between the Attorney-General and *Mico*. *Hard.* 137. 138, *&c.* upon Demurrer *Dubitatur* whether the Defendant ſhould be bound to diſcover, *&c.*

(c) Hard. 145. S. P. arguendo.

(d) But a Purchaſer for a valuable Conſidera-

tion is not bound to diſcover. 2 Chan. Caſ. 47. (e) Hard. 201. like Point adjorn', where it was alledged the Attorney-General would not proſecute for the Forfeiture, but for the Duty only.

4. If it is charged by the Bill that the Defendant in 1659. by Colour of an Order of Sequeſtration by the Committee, had ſeiſed ſeveral Tithes, *&c.* due to the Plaintiff, the Plaintiff may pray a Diſcovery of the Particulars ſo taken, and their Value; as where a Man by colour of Title enters into an Houſe, *&c.* and poſſeſſes himſelf of the Goods, *&c.* it may be impoſſible for the Plaintiff to diſcover the Particulars without ſuch Bill, and this is a Charge not by way of Treſpaſs but under Colour of Title; ſo where a Will is proved, and the precedent Adminiſtration revoked, ſuch Bill is uſual and neceſſary for the Diſcovery of the Goods, and yet in Strictneſs of Law there was a Treſpaſs. *Paſch.* 13 *Car.* 2. between *Cage* and *Warner*. *Hard.* 182. reſolved upon Demurrer.

5. A Man is not bound to diſcover the Conſideration of a Bond which in it ſelf implies a Conſideration. *Trin.* 13 *Car.* 2. between *Turner* and Sir *George Binion*, *per Hard.* 200. reſolved *per Curiam*, and Baron *Adkins* ſaid it had been ſo ruled in Chancery.

6. If a Bill is brought to be relieved upon a Truſt, and charges the Defendant with Notice before the taking his Conveyance, the Defendant by way of Anſwer may deny the Notice and plead he is a Purchaſer for a valuable Conſideration, without ſhewing what the Conſideration was. *Mich.* 15 *Car.* 2. between *Moor* and *Mayhew* 34.

(f) 2 Chan. Caſ. 4. S. P. by the Lord Chancellor.

(g) But perhaps it may be otherwaies in Caſe of a Deviſe or voluntary Proviſion for Wife or younger Children. 2 Chan. Caſ. 4. 2 Chan. Caſ. 133, 134.

7. (f) If a Man makes Title to Lands by an old Intail, and charges that the Defendant had got into his Hands the old Evidences, *&c.* and prays a Diſcovery, the Defendant may plead he is a (g) Purchaſer for 1000 *l.* *bona fide* paid, *&c.* and ſhall not be bound to diſcover, *&c.* *Paſch.* 17 *Car.* 2. between *Shirley* and *Fag*. 1 *Chan. Caſ.* 68.

8. To a Bill to diſcover Goods by the Defendant taken out of the Plaintiff's Ship at Sea, the Defendant ſet forth the Charter of the King to the *African* Company of the ſole Trade in thoſe Parts, with Power to ſeiſe the Ships

Ships and Goods of any that ſhall trade in thoſe Parts, and demurred to that Part of the Bill which prayed a Diſcovery. *Paſch.* 34. *Car.* 2. between *Brookes* and *Bradly*. 2 *Chan. Caſ.* 95. My Lord Chancellor ſaid, I will give no Aſſiſtance to diſcover here in Prejudice of the King's Charter.

(h) 2 Chan. Caſ. 156. S.P. and a Diſcovery ordered in caſe the Plaintiff would conſent to take no Advantage thereof at Law but in this Court only.

9. (h) If an Aſſignee of a Bankrupt exhibits a Bill to diſcover the Bankrupt's (i) Goods, the Defendant may plead that he has no Goods of the Bankrupt, or that ever were his, but what he bought for a full and valuable Conſideration *bona fide*, and that at the Sale or Payment of his Money, he had no Notice of the Bankruptcy. *Hill.* 34 and 35 *Car.* 2. between *Brown* and *Williams*, 2 *Chan. Caſ.* 135.

(i) So where to diſcover the Bankrupt's Lands, the Defendant may plead he is a Purchaſor, &c. 2 Chan. Caſ. 136.

Where the (a) (b) Defects of Agreements, Deeds, Wills, (c) &c. ſhall be ſupplied.

(a) Where the Defect of a Deed made upon valuable Conſideration ſhall be ſupplied. 4 Leon. 8. —Where the Want of, or Defect in the Execution of a Power. 2 Vent. 350. 1 Lev. 238. 1 Chan. Caſ. 104. 159. 2 Chan. Caſ. 30.—If a Man hath Power to leaſe for 10 Years, and he leaſes for 20, this in Equity is good for 10 Years. 1 Chan. Caſ. 23.

1. *A.* being ſeiſed in Fee by Covenant to ſtand ſeiſed, raiſed an Uſe to himſelf for Life, Remainder to his eldeſt Son in Tail, *&c.* with Power to leaſe a ſmall Part for 40 Years, and after made a Leaſe thereof for the Benefit of younger Children, and tho' the Leaſe was void at Law becauſe the Power was not well raiſed, yet 40 *Eliz. Prince's* Caſe, as cited 1 *Chan. Caſ.* 161. it appearing to the Court that the eldeſt Son was greatly advanced by the Father, and that the Conveyance was firſt intended to have been by Livery, the Court decreed for the Leaſe, if no Intail paramount the Settlement.

2. If a Man gives Inſtructions to put his Will in Writing, and that his Meſſuages, *&c.* ſhould be ſold by *A.* and *B.* for Payment of his Debts and Legacies, and made other Executors, and died without other Publication of his Will, and after *A.* died, (d) and *B.* and the Heirs were compelled to ſell, becauſe the Lands were tied with a Truſt which will ſurvive in Equity. *Mich.* 13 *Car.* 2. between *Guilliams* and *Rowel*, *Hard.* 204. decreed accordingly.

(b) Where there were not ſufficient Words to carry all that was intended. 2 Chan. Caſ. 68, 69. (c) Of Livery. 1 Chan. Caſ. 241. (d) So if deviſed to A. for Life, and after to his Executor to be ſold for younger Childrens Portions, and the Executor dies, and then A. dies, yet the Eſtate ſhall be ſold. 1 Chan. Caſ. 35.

3. A Man deviſed 20 *l. per Annum* out of a Rectory where the Glebe was worth but 40 *s. per Annum*, and ſo there was no ſufficient Remedy at Law for the Rent, yet becauſe the Deviſor intended to charge the whole Rectory. *Hill.* 18 and 19 *Car.* 2. 1 *Chan. Caſ.* 79. it was decreed accordingly.

4. If a Copyholder ſurrenders to a Mortgagee, and after ſurrenders to the Uſe of his Will, and deviſes to his Wife for Life, in Purſuance of an Agreement before Marriage, and deviſes the Remainder to his Daughter in Fee, and the Surrender of the Mortgage is not preſented at the next Court, yet the Mortgagee ſhall be relieved againſt the Daughter, becauſe the Deviſe to her was purely voluntary. *Trin.* 22 *Car.* 2. between *Martin* and *Seamore*, 1 *Chan. Caſ.* 170. decreed.

5. *A.* upon Marriage of his Brother ſeals and delivers a Writing, by which he promiſes, that if the Wife be worth 160 *l.* then if *A.* dies without Iſſue he will give his Lands to his Brother and his Heirs, *&c.* and for the true Performance thereof, binds himſelf and his Heirs, and the Wife is worth 160 *l.* and *A.* dies without Iſſue, tho' the Limitation was to take Effect after the Death of *A.* without Iſſue, and ſo if ſuch Settlement had been made in the Life of *A.* it had been ſubject to be defeated; yet becauſe it was proved, the Marriage was had in Expectation of the Performance of this Agreement *B.* and his Heirs had the Lands. *Mich.* 33 *Car.* 2. between *Joylmer* and *Paddington*, 2 *Vent.* 353, 354. decreed accordingly.

(a) Where he that will have Equity muſt do it.

(a) 2 Chan. Caſ. 194, 195. vide.

1. If *A.* is bound in ſeveral Bonds with *B.* as his Surety for 4000 *l.* and *A.* conveys the Manor of *C.* to *B.* by way of Mortgage to Counter-ſecure him againſt the Bonds for 4000 *l.* and *A.* dies, and after *D.* the Son and Heir of *A.* becomes Bound with *B.* for 2000 *l.* more, but there was no Agreement that the Morgage ſhould be a Security to *D.* againſt the Bonds for 2000 *l.* and after *B.* dies, his Heir ſhall not be permitted to redeem upon Payment of the 4000 *l.* only, but muſt ſave *D.* harmleſs, as well touching the 2000 *l.* as the 4000 *l.* for he that will have Equity help where the Law cannot, muſt do Equity to the Party againſt whom he ſeeks to be relieved. *Hill.* 19 and 20 *Car.* 2. between *St. John* and *Holford.* 1 *Chan. Caſ.* 97. decreed accordingly.

2. If the Mortgagor borrows more Money of the Mortgagee, and gives Bond for it, the Heir of the Mortgagor ſhall not redeem without paying alſo the Debt by Bond, if the Mortgagor bound himſelf and his Heirs in the Bond. *Trin.* 36 *Car.* 2. 2 *Chan. Caſ.* 164.

Where Law and Equity ſhall prevail againſt Equity only.

1. If *A.* acknowledges a Statute to *B.* for Payment of 800 *l.* with Intereſt, which being forfeited, and the Lands extended upon it, *A.* for a valuable Conſideration ſettles the ſame Lands in Tail, and (a) after borrows more Money of *B.* and by Articles it is agreed, the Statute and Extent ſhall ſtand a Security for the laſt Money, and after *A.* dies, and the 800 *l.* with Intereſt is ſatisfied by Perception of the Profits, yet the Iſſue in Tail ſhall not be relieved againſt the Penalty of the Statute, for tho' the Heir has an Equity by reaſon of the Tail made upon a Conſideration, yet the Money lent raiſes an Equity for *B.* ſo that *B.* hath both Law and Equity, whereas the Iſſue in Tail hath Equity only till the Penalty is ſatisfied. *Mich.* 14 *Car.* 2. between Sir *John Hedworth* and *Joſias Primate.* *Hard.* 318. reſolved *per totam Curiam.*

(a) 1 Chan. Caſ. 119. like Point, the laſt Money being lent without Notice of the Settlement.

2. If *A.* is ſeiſed in Fee of the Manors of *B.* and *C.* and mortgages Part of the Manor of *B.* to *D.* and after acknowledges a (b) Statute to *D.* of 800 *l.* for Payment of 400 *l.* and after mortgages both Manors to *E.* and then mortgages the Manor of *B.* to *F.* who had no Notice of the Prior Mortgages, and after *F.* having Notice, purchaſes in both the Incumbrances of *D.* now *F.* hath both Law and Equity, and ſhall hold the Lands included in the firſt Mortgage until ſatisfied, not only the Moiety paid *D.* but alſo the Money lent upon the laſt Mortgage, (c) but the firſt Mortgage can protect no more than what is included within that Mortgage. *Trin.* 22 *Car.* 2. between (d) *Marſh* and *Lee.* 2 *Vent.* 337, 338. decreed by the Lord Keeper, aſſiſted by *Hale* Chief Baron, and *Rainsford,* and ſeveral Caſes cited to have been reſolved in Chancery, that a Purchaſer or Mortgagee coming in upon a valuable Conſideration without Notice, by Purchaſe of a precedent Incumbrance ſhall protect his Eſtate againſt any Perſon that hath a Mortgage ſubſequent to the firſt, tho' before the laſt Mortgage, and tho' he purchaſed in the Incumbrance after he had Notice of the ſecond Mortgage.

(b) Per Hard 173. There is a Diverſity where a Man Purchaſes in a precedent Recognizance, &c. which are only Charges upon the Eſtate, and carry no Intereſt therein, and where a precedent Mortgage, but yet Vid. 1 Chan.

Caſ. 149, 150. 2 Chan. Caſ. 208. (c) 1 Chan. Caſ. 202. S. P. per Wild and Twiſden; but it was reſolved Con. Quære. (d) 1 Chan. Caſ. 162, 163. S. C. the firſt Incumbrances being purchaſed in pending a Suit in Chancery by E. againſt A. &c. of which E. had Notice.——And 1 Chan. Caſ. 36. It was ſaid to be the conſtant Juſtice of the Court, that if a Purchaſer bona fide bought in an Eigne, Incumbrance, Statute or Judgment, and there was a Judgment or Statute Meſne between that and

and his Purchaſe, of which he had no Notice at his Purchaſe, that he ſhould protect his Purchaſe with the Eigne Incumbrance ſo bought in. And vid. 1 Chan. Caſ. 201. 2 Chan. Caſ. 20. 35. 213.

3. And as to the Statute *F.* ſhall not Account in Equity otherways than at Law, and tho' the Lands were extended but at the third Part of the Value; yet becauſe at Law in a *Scire facias ad computandum*, he ſhall Account but according to the extended, and not the real Value, (e) he ſhall not in Equity be compelled to Account otherways, unleſs he hath received enough to ſatisfy his own Mortgage alſo. *Trin.* 22 *Car.* 2. between (f) *Marſh* and *Lee.* 2 *Vent.* 338. decreed by the Lord Keeper, aſſiſted by *Hale* Chief Baron and *Rainsford*, 2 *Vent.* 339. per *Hale*, if according to the extended Value the Money upon the Statute hath been received, or if *E.* will pay the Reſidue, or ſo much as the Proportion for the Manor of *C.* will come to, that Manor ought to be diſcharged of the Statute.

(e) Hard. 136.

(f) 1 Chan. Caſ. 167, 168. S. C. Decreed as to the Manor of B. but as to the Manor of C. in which F. had no Eſtate before he bought in the Statute, the Court inclined that ſo much of B. as was not in D's Mortgage (for he could not extend upon himſelf) ſhould be accounted for at the real Value, in order to diſcharge the Manor of C. of the Extent, but not to prejudice the Extent in Courſe of Law as to the Manor of B. but that the Statute ought to protect the Manor of B. as far as by any Courſe of Law it might; and vide 2 Chan. Caſ. 213.

4. If the Father is Tenant for Life, Remainder to his Son in Tail, and the Father mortgages to *J. S.* who, finding his Title defective, lends 100 *l.* to the Son, and takes a Mortgage from him of the ſame Land, *&c.* the Son may redeem, paying the 100 *l.* only; for the Son is a Stranger to the Eſtate of his Father. *Hill.* 31, and *Caſ.* 2. between *Bromly* and *Hamond.* 2 *Chan. Caſ.* 23.

Relief.

Againſt whom.

1. If *A.* leaſes to *B.* and *C.* in Truſt for the Wife and Children of *A.* and after *A.* and *B.* are attainted of Treaſon, *&c.* by which a Moiety of the Term is forfeited to the King; (a) now he ſhall not in Equity be ordered to perform the Truſt, for as the King cannot be ſeiſed to an Uſe, ſo his Eſtate cannot be ſubject to a Truſt, and (b) there is no Equity againſt the King. *Trin.* 7 *Jac. Wike's* Caſe, *Lane* 54. reſolved *per Curiam.*

(a) The Mortgagee in Fee after forfeiture was attainted, and the King ſeiſed, and whether the Mortgagor ſhould redeem. Hard. 465, 466. dubitatur. (b) The Chancellor has no Juriſdiction over the King's Conſcience, but over the Conſciences of Subjects only, for that is a Power by the King delegated to the Chancellor, to exerciſe the King's Equitable Authority between Subject and Subject. Hard. 468. arguendo, and vid. Hard. 181.

2. (c) If *A.* puts out 100 *l.* at Intereſt in the Name of *B.* who after becomes a *felo de ſe*, (d) *A.* may be relieved againſt the King upon this Truſt in Equity upon the Statute of 33 *H.* 8. *cap.* 39. *Hill.* 12 and 13 *Car.* 2. between Sir *William Hix* and the Attorney General, and Sir *William Cooper.* *Hard.* 176. decreed accordingly; but the Reporter makes a Query, whether the Statute extends to any Equity againſt the King, otherways than in Caſe of Pleas by way of Diſcharge.

(c) Vid. Hard. 395, 468.

(d) If a Truſtee for Years is Outlawed, the Court may ſtay Proceſs. Hard. 466.

3. If *A.* by Writing agrees with *B.* and *C.* to Pave the Streets in a Pariſh, and they on Behalf of the Pariſh agree to pay him for it, and this Writing is lodged in the Hands of *B.* if *A.* paves the Streets, he muſt have Relief againſt the Undertakers, eſpecially in this Caſe, the written Agreement, which is his Evidence, being in the Hands of one of them, and the Undertakers muſt take their Remedy againſt the reſt of the Pariſh. *Mich.* 13 *Car.* 2. between *Meriel* and *Wymondſal. Hard.* 205. reſolved *per Curiam.*

4. If *A.* deviſes Legacies, and makes *B.* and *C.* Executors, and *B.* makes *C.* and *D.* his Executors and dies, and they poſſeſs themſelves of the Eſtate of *A.* they may be both charged in Equity; for tho' in Point of Law the Executorſhip ſurvived to *C.* and *D.* is not Privy, yet the Eſtate of *A.* in whoſe Hands ſoever, ought to be liable. *Trin.* 15 *Car.* 2. between *Nicholſon* and *Sherman.* 1 *Chan. Caſ.* 57. reſolved upon Demurrer.

(a) (b) (c) Parties.

(d) Who ſhall be made (e) Parties.

1. If there be an Agreement in a Pariſh by a Veſtry-Order, that 100 *l.* *per Annum* ſhall be paid to *A.* for a Lecture in the Pariſh; in a Bill for the Recovery thereof, all the Parties to the Order muſt be made Defendants, otherways it cannot be Decreed. *Mich.* 15 *Car.* 2. between *Henchman* and *Ayer. Hard.* 333. reſolved *per Curiam.*

2. (f) The Heir of the Mortgagee exhibited a Bill to have the Money paid, or forecloſe, *&c. Paſch.* 16 *Car.* 2. 1 *Chan. Caſ.* 51. reſolved upon Demurrer, that the Executor of the Mortgagee ought to have been made a Party, for he may have a Title to the Money.

(a) Where ſufficient to make the ceſtuy que truſt only. Hard. 131.

(b) Where a Defendant that was never ſerved with Proceſs, tho' mentioned in the Decretal Order, ſhall be taken as none. Hard. 183. —Where 2 Commoners in Behalf of themſelves and others bring a Bill, &c. and thoſe only who were particularly named, are accounted Parties. Hard. 22. and vid. Hard. 118. (c) Where thoſe who are not Parties to a Decree ſhall not be bound thereby. 1 Chan. Caſ. 48. (d) Truſtees have a Decree, and after 5 of them are put out and others made, whether in a Bill of Review the new Truſtees muſt be made Parties. Hard. 104. dubitatur. (e) One joint Obligor dies in a Suit againſt his Executor to diſcover Aſſets, the Survivor muſt be made Party that the Charge may be equal. 2 Vent. 348. but Quære, if the Principal may not be ſued alone.— But if there be a Judgment at Law againſt one Obligor, his Executor may be ſued alone to diſcover Aſſets. 2 Vent. 348. (f) 2 Chan. Caſ. 29 S. P.

Relief.

At what Time.

1. If *A.* makes *B.* Executor, and after Debts and Legacies paid, deviſes *reſiduum bonorum* to *C.* if *B.* puts not in all the Goods into his Inventory, or undervalues thoſe he puts in, *C.* before the Debts are paid may ſue *B.* in Equity to enforce him to ſhew the very Value of the Goods. *Paſch.* 1 *Car. Palm.* 409. *per Dodd'* and *Crew.*

2. *A.* was bound to *B.* in a Bond of 100 *l.* and *B.* made his Will, and *C.* Executor thereof; and after declared his further Will, that *A.* ſhould have the Bond, and died, and *C.* proved the Will but omitted this Codicil, and to compel him to prove it, *A.* ſued *B.* before, *&c.* pending which the Bond was ſued at Law, and *A.* filed his Bill and prayed Relief, *&c. Paſch.* 1657. between *Took* and *Fitz-John. Hard.* 96. it was reſolved *per Curiam,* that there ſhould be no Relief for the Legacy before the Codicil proved, and that then he ſhall be relieved againſt the Bond by reaſon of the Legacy, but the Court ſupported the Injunction till, *&c.*

3. There ſhall be no Bill in Equity againſt an Executor to diſcover Aſſets before a Suit commenced at Law. *Paſch.* 1658. *Cough* and *Floyd. Hard.* 115. reſolved upon Demurrer to ſuch Bill, for perhaps if he were ſued at Law, he would confeſs and pay the Debt.

4. If *A.* being ſeiſed of Lands in Fee, grants a Rent-charge iſſuing thereout, and after deviſes the Lands to *B.* for Life, the Remainder to *C.* in Fee, and dies, *C.* may compel *B.* to pay the Arrears, for fear all ſhould fall on *C.* in Reverſion. *Hill.* 25 *Car.* 2. between *Hays* and *Hays.* 1 *Chan. Caſ.* 223. *per Curiam.*

Chancery.

Proceedings.

According to the Course of the Common Law.

1. The legal Proceedings in this Court are not inrolled in Rolls, but remain *in Filaciis*, being filed up in the Office of the Petit Bag. 4 *Inſt.* 80.

2. If the Parties deſcend to Iſſue, this Court (a) cannot Try it by Jury, but the Lord Chancellor or Keeper, by his proper Hands (b) delivers the Record into the (c) King's Bench to be tried there, and after Trial had, (d) it ſhall be (e) remanded into Chancery, and there Judgment given. 4 *Inſt.* 80.

3. But if there be a (f) Demurrer, it ſhall be argued and adjudged in Chancery. 4 *Inſt.* 80.

(a) But otherways where the Iſſue is not triable by Jury, as if by Certificate of the Biſhop, &c. 1 Jon. 80. Lat. 3.

(b) The Chancery either before or after Iſſue may adjourn any Cauſe there depending, and tranſmit the Record into the King's Bench, there to be determined. Jefferſon and Morton. 2 Sand. 27. reſolved per Curiam. (c) Where the Proceedings are according to the Courſe of Law, the Chancery and King's Bench are as one Court. 2 Rol. Rep. 291, 349. Palm. 371. (d) But Q. if the conſtant Practice is not otherways? and vide 2 Sand. 27. where it is ſaid, that the Books cited in 4 Inſt. warrant not this Opinion. vid. All. 16, 17. Stil. 84, 94, 95. Cro. Jac. 12. 2 Rol. Rep. 291, 349. Blackſton's Caſe. Lat. 3. 112. 3 Bulſt. 305. 1 Jon. 82, 90. yet vid. Kelw. 94. b. (e) 2 Sand. 27. a Caſe was cited where in a Scire facias upon a Recognizance the Iſſue was adjourned in B. R. and the Plaintiff after being Nonſuit, brought a new Scire facias in B. R. upon the Record there. (f) But if a Demurrer for Part and Iſſue for Part, the whole Record ſhall be tranſmitted in B. R. and Judgment given there. Jefferſon and Morton. 2 Sand. 23, 24, &c. adjudged. 1 Mod. 29. adjudged. 1 Sid. 438. adjudged. 1 Lev. 283, 284. adjudged; tho' it was ſaid the Chancery might have given Judgment upon the Demurrer before the Record came in B. R. 2 Keb. 584, 587, 588, 608.

(a) Proceedings.

(b) In Equity.

Their (c) Proceedings in General.

1. If one is brought into Court to anſwer the Breach of an Order, if it was made within a Year, he ſhall anſwer upon Interrogatories without a Bill. *per Dal.* 91.

2. But if it be a naked Order only, and the Year be paſt, a Bill ought to be filed and Breach ſet forth, to which he muſt anſwer. *per Dal.* 91.

3. There can be no Sequeſtration granted by a Court of Equity until (d) the Proceſs of Contempt are run out. *Paſch.* 16 *Car. March* 81. *per* 2 Judges.

4. The (e) Sequeſtration of Things (f) collateral as other Lands or Goods, is illegal. *Paſch.* 16 *Car. per March* 81. by 2 Judges.

(a) Where a Cauſe was removed by Certiorari out of the Mayor's Court into Chancery, vid. 1 Chan. Caſ. 31.

(b) Where after a Decree to Account, the Defendant cannot diſmiſs his Bill, paying Coſts. 1 Chan. Caſ. 40.

(c) Where there may be an Original Bill to execute a Decree againſt Purchaſers who claim under Parties bound by that Decree. 1 Chan. Caſ. 231. (d) If againſt a Peer the Courſe is, firſt my Lord Keeper writes a Letter to him, and if he anſwers not, then a Subpœna goes, then an Order to ſhew Cauſe why a Sequeſtration ſhould not go, and if he ſtill ſtands out, then a Sequeſtration goes, for there can be no Proceſs of Contempt againſt his Perſon. 2 Vent. 342. (e) For Sequeſtrations, vid. 2 Chan. Caſ. 44, 45, 46. (f) 1 Chan. Caſ. 91, 92. S. P. Con.

5. If there be an Order that one ſhall ſtand committed to the *Fleet* for Breach of a Decree, yet by this Order only the Warden of the *Fleet* hath not Power to take and impriſon him, but in Purſuance to the Order, there ought to be a Writ awarded for taking him. *Hill.* 21 and 22 *Car.*

21 *Car.* 2. between (g) *Furlong* and *Bray*, reſolved and ſaid the Courſe in Chancery was ſo.

(g) 1 Mod. 272. S. C. adjudged.

6. Where a Bill is (*) barely to diſcover a Deed, or only in order to have it produced at a Trial, the Plaintiff need not ſwear he hath not the Deed, for it ſhall not be preſumed he would exhibit the Bill if he had the Deed. *Trin.* 14 *Car.* 2. 1 *Chan. Caſ.* 11. reſolved upon Demurrer to the Bill for want thereof.

(*) So where the Caſe in its own Nature is proper for a Court of Equity, and the Remedy deſired cannot be obtained at Law.

7. (h) But where a Bill ſuggeſts the Want of a Deed, and ſeeks Relief upon the Matter of the Deed (i) ſuch Oath is neceſſary. *Trin.* 4 *Car* 2. admitted *arguendo.*

2 Mod. 173. per Th. Juſtice.

8. If after Proceſs of Contempt the Defendant puts in an inſufficient Anſwer, the Plaintiff ſhall not as formerly begin with Proceſs at the *Subpœna*, but ſhall go on to the Attachment with Proclamations and other Proceſs, as if the Anſwer had not been put in. *Mich.* 26 *Car.* 2. 1 *Chan. Caſ.* 238. declared by the Lord Keeper for a Rule.

9. If the Plaintiff replies to an Anſwer, and without Rejoinder, and giving Rules for Publication brings the Cauſe to an Hearing, the Anſwer ſhall be taken wholly true, as if there had been no Replication; for the Opportunity which the Defendant had to prove his Anſwer, was taken from him. *Hill.* 31 and 32 *Car.* 2. 2 *Chan. Caſ.* 21.

(h) 1 Chan. Caſ. 231. S P. 2 Mod, 173. S. P. per Chief Juſtice.

10. If one Defendant cannot be found to ſerve Proceſs on him, if Proceſs be againſt him till Sequeſtration, and he appears not, the Plaintiff may proceed againſt the reſt as where one is Outlawed at Law. *Paſch.* 35 *Car.* 2. 2 *Chan. Caſ.* 139.

(i) For if not loſt, 'tis properly triable at Law.

(a) Bill.

(a) Where 2 cannot join in one Bill, becauſe their Intereſts are ſeveral. Hard. 219.

1. A Bill of Reviver upon a Bill of Reviver lies. *Mich.* 13 *Car.* 2. *Hard.* 201. agreed *per Curiam*, eſpecially in caſe of Death.

2. If one be named Defendant in the Original Bill, who is yet alive, he ought not to be named in the Bill of Reviver, becauſe the Suit never abated *quoad* him. *Mich.* 13 *Car.* 2. *Hard.* 201.

3. But if named in the Bill of Reviver only, he may be named in every Bill of Reviver after, becauſe he was not named a Defendant in the Original Bill. *Mich.* 13 *Car.* 2. *Hard.* 202.

4. If in a Bill brought againſt *B. C. D.* and *E.* the Plaintiff ſets forth that he is Keeper of *G.* Caſtle, and prays *B.* may diſcover what Title he hath to a certain Meadow which belongs to the ſaid Office; and that the Defendans, as Brewers of the City of *G.* by Cuſtom ought to pay to the ſaid Keeper a certain Annual Sum, *&c.* This Bill is naught, becauſe it concerns Things of diſtinct Natures, and is brought againſt ſeveral Perſons, which will occaſion ſeveral Anſwers and Examinations, and if ſuffered to be put all in one Bill, each Party would be obliged to take Copies of what no way concerned his own Cauſe, whereby his Charge would be increaſed to no Purpoſe. *Mich.* 15 *Car.* 2. between *Berk* and *Harris. Hardr.* 337. reſolved upon Demurrer.

5. So if a Parſon prefers a Bill againſt ſome for Tithes, and others for Glebe. *Hard.* 337. *per Curiam.*

6. But a Bill for Tithes may be brought againſt ſeveral Pariſhioners, becauſe they are of the ſame Nature. *Hard.* 337. *per Curiam.*

7. So if a Lord of a Manor prefers a Bill againſt ſeveral Tenants for ſeveral and diſtinct Matters, as common Waſte, ſeveral Piſchary, *&c.* this is naught tho' the Ground and Foundation of the Suit, *viz.* the Manor is one intire Thing. *Hard.* 337. *per Curiam.*

(a) Anſwer.

(a) Where a Defendant before Replication may amend his Anſwer. 1 Chan. Caſe 29.

1. UPon a Bill in the Star-Chamber the Defendants anſwered, but refuſed to Anſwer upon Interrogatories; and yet *Hob.* 115. it was reſolved *per Curiam*, the Bill could not be taken *pro confeſſo*, becauſe it was anſwered and denied by the Anſwer, tho' *Hobart* conceived that the anſwering upon Interrogatories was the moſt perfect Anſwer, that being his own, and the other as it were his Counſel's; ſo that he thought the Anſwer not finiſhed till the Interrogatories were anſwered by the Courſe of the Court.

2. In a joint and ſeveral Anſwer by *A.* and *B.* if *A.* for himſelf anſwers, and *B.* ſays he hath peruſed the Anſwar of *A.* and believes it to be true, ſuppoſing *B.* charged with nothing of his own Knowledge, ſuch a relative Anſwer is ſufficient. *Hill.* 1659. between *Walker* and *Norton*, *Hard.* 165.

3. But it is otherways where the Defendants anſwer ſeverally each apart. *Hard.* 165.

4. In a Bill for Tithes of Conies by Cuſtom, the Defendants by Anſwer denied the Cuſtom, but did not diſcover how many Conies they killed, nor the Value thereof; yet *Paſch.* 13 *Car.* 2. between *Randal* and *Hard.* 188. *per Curiam*, it was reſolved well enough (the rather becauſe the Demand was againſt common Right) for there being a full Anſwer given to the Thing in Demand, till that be tried the Defendants are not bound to diſcover, and if it ſhould be otherways, the Defendant by a feigned Suggeſtion might be forced to diſcover any Thing; but in ſuch Caſe if the Matter be found againſt the Defendant, he ſhall after be examined upon Interrogatories.

5. But where there is no ſuch great Inconvenience as upon a Bill againſt an Executor to diſcover Aſſets, he muſt anſwer, tho' he denies the Debt; becauſe it concerns the Act of another, and Aſſets are preſumed. *Paſch.* 13 *Car.* 2. *Hard.* 188. *per Curiam.*

(a) (b) Plea.

(a) Where a Plea was naught for want of an Averment in the Concluſion. Hard. 160.

(b) Where the Matter of the Plea was Special, but concluded generally whether he ought to anſwer to any Matters contained in the Bill. Hard. 216.

1. IF a Bill is brought to be relieved upon a Truſt, and charges the Defendant with Notice of the Truſt, before the Taking his Conveyance, the Defendant by way of Anſwer (c) may deny the (d) Notice, and plead he is a Purchaſer for a valuable Conſideration, without ſhewing what the Conſideration was. *Mich.* 15 *Car.* 1. between *Moor* and *Mayhew*, 1 *Chan. Caſ.* 34. tho' it was objected, that 5 *s.* is a valuable, tho' not an equitable Conſideration.

2. But where the Bill charges Notice before the Defendant took his Conveyance, and the Defendant (e) by way of Anſwer, denies the Notice at the Time of his Purchaſe or Contract, and pleads he is a Purchaſer, *&c.* this Plea is naught, being founded upon the Anſwer which denies only Notice at the Time of the Purchaſe, which may be underſtood of the Contract, and not of the Execution of the Conveyances. *Mich.* 15 *Car.* 2. between *Moor* and *Mayhew*, 1 *Chan. Caſ.* 34. ſuch Plea over-ruled.

it was awarded the Defendant ſhould anſwer to what was not contained in the Plea. (c) He muſt deny the Notice, elſe his Plea is not good. 2 Vent. 361. (d) Where Notice to him that purchaſes for another, ſhall affect the Purchaſer himſelf. 1 Chan. Caſ. 39. (e) Notice muſt be denied by way of Anſwer, and not by Plea. 2 Chan. Caſ. 161.

(a) Demurrer.

(a) No Demurrer to an Anſwer. 1 Chan. Caſ. 56.

1. THere can be no Demurrer to a *Subpœna* in Nature of a *Scire facias*, for the *Subpœna* is no Record, nor any where filed. *Paſch.* 16 *Car.* 2. between *Wan* and *Lake.* 1 *Chan. Caſ.* 50.

(a) (b) Depoſitions.

(a) Where Depoſitions taken in another Cauſe ſhall or ſhall not be Evidence. 1 Chan. Caſ. 73. 175. 236. 2 Chan. Caſ. 250.——Where Witneſſes having been examined in a former Cauſe in the Exchequer, ſhall not again be examined here. 1 Chan. Caſ. 233. (b) Where after Publication and Death of the Deponent, they may be explained but not contradicted by new Proof. Kelw. 96. a. b. And Vid. 1 Chan. Caſ. 25. Hard. 180. 1 Chan. Caſ. 229.—Exceptions to Witneſſes muſt be taken before Publication. Kelw. 100. a.

(a) Hearing.

(a) Where Title to Dutchy Lands was made in the Bill by Grant under the Great Seal, and yet by ſhewing a Grant under the Dutchy Seal at the hearing the Defect was ſupplied. vid. Hard. 171.

1. UPon a Bill for Tithes the Defendant did not admit the Plaintiff's Title, but alledged an Extinguiſhment by Unity of Poſſeſſion, and upon Hearing the Court would not direct a Trial at Law becauſe the Plaintiff had made no Proof of the Value of the Tithes nor what Cattle had been depaſtured in the Place where, *&c.* ſo that no Damage appeared to them whereon to ground a Decree for the Plaintiff, if the Verdict ſhould go for him. *Trin.* 1655, between the Attorney-General and *Strait.* *Hard.* 4. the Bill diſmiſs'd.

2. If a Bill ſetting forth a Deed of Settlement of Lands in Truſt, is brought to compel the Truſtee to execute an Eſtate, *&c.* and in his Anſwer the Truſtee ſays, He believes there is ſuch a Deed as in the Bill is ſet forth; yet upon the Hearing, the Plaintiff ſhall not read the Deed without proving it, for the Confeſſion goes no further than what is ſet forth, and will not warrant the Reading of a Deed produced, tho' it hath ſuch Clauſes in it. *Paſch.* 35 *Car.* 2. 2 *Vent.* 361.

(a) Injunction.

(a) To ſtay Reſtitution upon an Indictment of forcible Entry. Moor 820. Pl. 1108. —But whether a Man ſhall by Injunction be reſtrained Trading. Vide 2 Chan. Caſ. 165.—No Injunction to be granted before a Bill filed. 4 Inſ. 92.

1. IF there be a Suit in Equity concerning Title to a Cloſe, and thereupon an Order is made that the Defendant ſhall ſuffer the Plaintiff to enjoy the Cloſe till, *&c.* and notwithſtanding the Defendant upon a Title of Common puts in his Cattle; This is no Breach of the Injunction, for the Common was not in Queſtion by the Bill. *Hill.* 8 *Jac. Bent's* Caſe, *Lane* 96.

Decree.

Who ſhall take the Benefit thereof.

1. IF Baron and Feme have a Decree for Money in the Right of the Feme, and the Baron dies; the Wife, and not the Executor of the Husband, ſhall take Benefit thereof. *Mich.* 15 *Car.* 2. between *Nanny* and *Martin.* 1 *Chan. Caſ.* 27. decreed accordingly.

(a) (b) Chan-

Fol. 387.

(a) (b) Chantery.

(A) By whom it may be made.

1. A Man may (c) make a Chantery by Licence of the King, without the Ordinary, for the Ordinary hath nothing to do with the making thereof. 9 H. 6. 16.

(a) All these Chanteries have long since been dissolved, and their Lands, &c. given to the King for which vide 37 H. 8. cap. 4. 1 E. 6. cap. 14. (b) It may properly consist of a Priest singing for Alms without any Corporation. 4 Co. 108. b. (c) But it could not be without a Foundation by Licence and Letters Patents of the King. Dal. 114.

(*) (B) In what Place.

1. IT may be founded in a Cathedral Church, and also in any other Church. 9 H. 6. 17.

(*) This is (Q.) in the Original, and so plainly appears to be misprinted.

Fol. 388.

(*) Charge.

(A) In what Cases a Charge made by (a) one shall bind another.

1. IF a Man devises Lands to J. S. and his Heirs, upon Condition that he shall grant a Rent-Charge in Fee to J. D. the Remainder of the Land to W. N. in Tail, and J. S. grants the Rent accordingly, and dies without Issue, this Charge shall bind this Remainder, because it was not granted meerly out of the Estate of the Tenant in Tail, but also partly by Force of an Authority of the Devisor, for it was the Will of the Devisor who had Power to charge it; and this was made in (b) Preservation of the Estate of him in Remainder, for if he had not granted it the Condition had been broke; and some said that here the Donee had a Fee by Force of the Devise, until the Rent granted by Force of the first Words, and after a Tail. Mich. 15 Jac. B. R. between (c) Dutton & Ingham adjudged, per totam Curiam; which intratur P. 15 Jac. Rot. 204.

(*) It is a Maxim in Law that all Fee-simple Lands may be charged one way or other. Lit. Sect. 648. (a) Where the Charge made by the Baron shall bind the Wife, or by one Joint-tenant shall bind another, &c. vide under the proper Divisions. (b) Where a Charge made by Tenant in Tail in Preservation and Support of the Estate shall bind the Issue. Vide 1 Rol. Abr. 842. Letter G. (c) Cro. Jac. 428. S. C. adjudged.

2. So it had been in this Case, if the Remainder in Tail had been limited to him to whom the Rent ought to have been granted; for tho' the Devisor appoints that it should remain to the same Person to whom he appoints the Rent to be granted, yet it cannot appear that his Intent was that the Rent should not continue longer than during the Continuance of the first Estate Tail, because the Rent is a Fee, and shall go to his collateral Heirs when Heirs of his Body fail, and so more large than the Estate of the Land. Mich. 15 Jac. B. R. between (d) Dutton & Ingham adjudged per totam Curiam, præter Croke, who seemed econtra, because of the Intent of the Devisor aforesaid, which intratur. P. 15 Jac. Rot. 204.

(d) Cro. Jac. 428. S. C. adjudged.

3. So if a Man deviſes Lands to J. S. in Tail, upon Condition that he ſhall grant a Rent in Fee to W. S. the Remainder of the Land to a Stranger, and the Deviſee grants the Rent accordingly and dies without Iſſue, this will bind the Remainder for the Cauſe aforeſaid. Mich. 15 Jac. B. R. between (e) Dutton and Ingham, per Curiam.

(e) Cro. Jac. 428. S. C. adjudged.

4. So if the Rent ought to be granted to the ſame Perſon to whom the Remainder is limited, yet the Remainder ought to hold it charged after the Death of Tenant in Tail. M. 15 Jac. B. R. between (f) Dutton and Ingham, per Curiam, for the Cauſe aforeſaid.

(f) Cro. Jac. 428. S.C. and S. P. adjudged, the Remainder Man having granted over the Rent, before the Eſtate fell to him in Poſſeſſion.

5. If a Man ſeiſed in Fee ſuffers a Recovery to the Uſe of the Recoverors until they have made a Leaſe for certain Years, and after to the Uſe of himſelf, (g) if the Recoverors leaſe for Years accordingly, he that hath the Uſe after ſhall never avoid it, for he comes under the Leaſe. Dyer 12 Eliz. 290, 61. by all the Juſtices. Co. 2. Beckwith 57. b. Mich. 15 Jac. B. R. between Dutton and Ingham it was ſo agreed, per totam Curiam.

(g) From what Time a Uſe ſhall be ſaid to ariſe. Vide 2 Rol. Abr. 800. Letter X.

6. If the Baron be ſeiſed of Lands in Fee in the right of his Feme, and thereof makes a Leaſe for Years, and after he and his Wife levies a Fine come ceo, &c. to J. S. in Fee, and after the Baron dies, the Conuſee ſhall hold the Land diſcharged of the Leaſe, for the Leaſe was void by the Death of the Baron, for the Baron joined (*) but for Conformity and Neceſſity, for all the Eſtate paſſed from the Feme. (h) H. 33 Eliz. B. R. adjudged quod vide cited Co. 1. Bredon 76. Co. 2. Cromwell 77. b. Mich. 32, 33 Eliz. B. R.

(*) Fol. 389.

(h) Harvy and Thomas 4 Leon. 15.

ſeems to be. S. C. Cro. Eliz. 216. adjudged. 1 Leon. 217. adjudged, per totam Curiam. 1 Judge againſt 1.

7. So if the Baron ſeiſed in Fee in the Right of the Feme (i) acknowledges a Statute, or grants a Rent out of the Land, and after he and his Wife join in a Fine come ceo, &c. to J. S. in Fee, and after the Baron dies, J. S. ſhall hold the Land diſcharged of the Rent, and Statute for the Cauſe aforeſaid. Co. 2. Cromwell 77. b. ſaid to have been adjudged in B.

(i) 3 Leon. 254. S. P. cited, tho' the Baron was intitled to be Tenant by the Curteſy.

8. But if the Baron and Feme are Jointenants in Fee or in Tail upon a Conveyance to them made during Coverture, and the Baron acknowledges a Statute, and after he and his Wife levy a Fine come ceo, &c. to J. S. and ſuffer a Recovery to him, and after the Baron dies, yet J. S. ſhall hold it charged with the Statute, for he comes in as well of the Eſtate of the Baron as of the Feme, for the Whole, (k) for there are no Moieties between them.

(k) Where there ſhall be Moieties or not between Baron and Feme. Vide Co. Lit. 187. a. b. But for this, vide under Title Jointenants.

9. If Baron and Feme are Jointenants in Fee upon a Conveyance to them made before Marriage, and the Baron acknowledges a Statute, or grants a Rent out of the Lands, or leaſes the Land to another, and after he and his Wife levy a Fine come ceo, &c. to J. S. and after the Baron dies, (l) it ſeems that J. S. ſhall hold one Moiety diſcharged, and the other Moiety charged with the ſaid Charges, for it ſeems the Moiety of the Feme is diſcharged by the Death of the Baron, for it ſeems the Baron had no Power to charge the Moiety of the Feme but during her Life.

(l) Here, and in the following Places it is temble, &c. in the Original.

10. If *A.* is Tenant in Tail, the Remainder to *B.* in Fee, and *B* grants a Rent-charge out of, *&c.* and *A.* makes a Feoffment in Fee to *C.* and dies without Iſſue, theſe Lands ſo long as they continue in the Poſſeſſion of *C.* by Force of the Feoffment, ſhall not be liable to the Rent, for *C.* is in of the Eſtate which Tenant in Tail gave him, which is not ſubject to the Rent. *Paſch.* 23 *Eliz.* in (m) *Capel's* Caſe. 1 *Co.* 62. *per Curiam.*

(m) 1 Co. 128. a. S. C. and S. P. cited to have been agreed, per Curiam.

11. If *A.* is Tenant for Life, the Remainder to *B.* in Tail, the Remainder to *C.* in Tail, *&c.* and *A.* and *B.* levy a Fine *ſur Conuſance*, &c. to *D.* who renders a Rent-charge to *A.* for Life, and after *B.* dies without Iſſue, yet the Rent ſhall continue during the Life of *A.* for this Fine was no Forfeiture by

A. but *A.* and *B.* granted each their reſpective Eſtates, and (n) tho' *B.* is dead without Iſſue, yet *D.* ſhall enjoy the Lands during the Life of *A. Mich.* 39 and 40 *Eliz.* between (o) *Gardiner* and *Bredon.* 1 *Co.* 76, 77. adjudged.

12. (p) If *A.* is Tenant for Life, the Remainder to *B.* his Son in Tail male, the Remainder to *A.* in Tail male, the Remainder to *B.* and the Heirs of his Body, the Remainder to the right Heirs of *A.* and *A.* and *B.* (being within Age) join in a Deed by which *A.* grants, and *B.* confirms to *C.* and his Heirs a Rent out of, *&c.* and after *A.* and *B.* join in a Fine to the Uſe of *A.* and his Heirs, who infeoffs *D.* and dies; this is a good Rent, and ſhall bind *D.* tho' *B.* hath Iſſue yet living, for tho' *quoad B.* who was within Age the Grant was meerly void, yet the Tail is (q) barred by the Fine, the Uſe whereof was limited to *A.* and his Heirs, and *D.* comes in under the Eſtate of *A.* (r) which was charged with the Rent. *Trin.* 2 *Car.* between (s) Sir *Thomas Holt* and *Sandbach. Cro. Car.* 103. adjudged.

(n) For by the Fine D. had a Fee to continue during the Eſtate both of A. and B. Hob. 277.

(o) 2 And. 66. S. C. and S.P. adjudged.

(p) 2 Bulſt. 42, 43, &c. S. P. with a long Argument thereupon, but no Judgment.

(q) The Tail is meerly extinct by the Fine. 3 Co. 51. b. 2 Bulſt. 45, 46. (r) Cro. Eliz. 355. S. P. adjudged. (s) Hut. 96. S. C. adjudged. Winch 102. S. C. adjudged.

Fol. 390.

(a) Chimin Common.

(A) (b) What ſhall be ſaid a Common Highway.

1. If there be a Common Highway for all the King's Subjects, and it hath been uſed Time out of Mind (when the Way hath been foundrous) for the King's Subjects to go by Outlets upon the Lands next adjoining, the Way lying in the Open Field not incloſed; theſe Outlets are Part of the Way, for the King's Subjects ought to have a good Paſſage, and the good Paſſage is the Way, and not only the beaten Track; for if the Land adjoining be ſowed with Grain, the King's Subjects (the Way being foundrous) may go upon the Grain. Trin. 10 Car. B. R. (c) per Curiam, upon a Trial at Bar upon an Information againſt Sir Edward Duncomb.

2. If there be a Water which is a (d) Highway, which Water by the Increaſe of Force thereof, changes its Courſe upon the Ground of another, yet he hath (e) a Highway alſo over there where the Water is, as he had before in the ancient Courſe; ſo that the Lord of the Soil cannot diſturb this Courſe made of new. (f) 22 Aſſ. 93. ſaid to be adjudged in the Eire of Nottingham.

(a) For the ſeveral kinds of Ways, and how called and diſtinguiſhed, vide Co. Lit. 56. a.

(b) If a Way leads to a Market, and is a Way for all Travellers, and communicates with a great Road, &c. it is a common Highway, but if it lead only to a Church, Private Houſe or Village, 'tis a Private Way. 1 Vent. 189. per Hale.

(c) Cro. Car. 366. S. C. and S. P. per Curiam. (d) In the Original haute eſtreet, &c. (e) Haute eſtreet. (f) Fitz. Barre. 302. S. C.

3. If Time out of Mind there hath been a common Foot-way through a certain Cloſe, and the Owner of the ſaid Cloſe Plows up the ſaid Way and Sows it with Corn, and lays Thorns at the ſide of it, and in the ſame Cloſe near the ſaid Way (g) leaves and aſſigns another Foot-way for all the King's Subjects, (h) which is uſed accordingly by all Foot Paſſengers, any Man may juſtify going in the ſaid Way, (k) for the Owner of the Cloſe ſhall not puniſh the Tort of which he himſelf was the Occaſion. *Mich.* 6 *Jac.* between *Home* and *Widlake. Yelv.* 141, 142. Where in Treſpaſs brought by

(g) One Way cannot legally be ſtopped, and another laid forth, without Licenſe of the King, granted after the Return of an Inquiſition upon a Writ of ad quod damnum. Cro. Car. 266, 267. Vaugh. 341. (h) But this being done without Authority, may be ſtopped at Pleaſure, per Cro. Car. 267. arguend'.— But the King's Subjects have no Intereſt, ſo as from the Nature of the Thing it ſelf to juſtify. Cro. Car. 267. arguendo. (k) But for this, vide 2 Rol. Abr. 564. Letter G.

the Owner, the Defendant pleaded *quod aſſignavit viam*, &c. and did not ſhew to whom; and yet becauſe *quod eſt commune omnibus* cannot be aſſigned to a particular Perſon, it was adjudged for the Defendant *per totam Curiam, præter Yelverton.*

(B) (a) Who ought to Repair it.

1. (b) If there be a Common Highway which Time out of Mind hath been uſed to be repaired (c) by the Country; and after J. S. that hath Lands not encloſed next adjoining to the Highway (d) of both ſides of the Way for his ſingular Profit, incloſes his Lands of both ſides the Way by Hedge and Ditch, he by this (e) thenceforth hath taken upon himſelf the Reparation of the Highway, and hath freed the Country from the Reparation thereof, ſo that he himſelf at all Times after, where there ſhall be need, ought to repair it. Trin. 10 Car. B. R. in an Information againſt (f) Sir Edward Duncombe reſolved per Curiam upon Evidence at the Bar upon ſuch an Information, and it is not ſufficient for him to make the Way as good as it was at the Time of the Incloſure, but he ought to make it a perfect good Way, without having any reſpect to the Way as it was at the Time of the Incloſure, and then (g) it was ſaid that it was ſo reſolved by all the Judges. 6 Jac. and 19 Jac. for when the Way lay in the open Fields not incloſed, the King's Subjects when the Way was bad or foundrous, uſed to go for their better Paſſage over the Fields adjoining, out of the common Tract of the Way, which Liberty is taken away by the Incloſure.

(a) Where an Exemption by Charter is void. vide 3 Mod. 96. (b) Stil. 364. S. P. per Roll Chief Juſtice. (c) Where no particular Man is bound, the Pariſh of common Right ought to repair a publick Way. 1 Vent. 183, 189. per Hale. Stil. 163, 364. per Roll. March 26. per Curiam, Con. 13. Co. 33. —But private Ways are to be repaired by the Village or Hamlet, and ſometimes by particular Perſons. 1 Vent. 189. per Hale. (d) So if a Man incloſes Land of one Side, which was anciently incloſed of the other Side, he that makes the new Incloſure muſt repair the whole Way. 1 Sid. 464. per Chief Juſtice.—But if there hath not been any ancient Incloſure of the other Side, he ſhall repair but half the Way. 1 Sid. 464. per Chief Juſtice. (e) But if afterwards he lays it open again, he ſhall be diſcharged of ſuch Reparations. 2 Sand. 160. per Keeling, Ch. Juſtice. (f) Cro. Car. 366. S. C. adjudged. 1 Sid. 464. S. P. ſaid, and S. C. cited per Chief Juſtice. (g) Said by Noy Attorney General, and affirmed by Richardſon, Chief Juſtice. Cro. Car. 366.

2 (h) An Owner of Land which is no (i) Occupier thereof, cannot be charged to repair a common Way, but only the Occupier. Hill. 11 Car. B. R. in one Foſter's Caſe per Curiam, upon a Motion for a Prohibition to the Marches of Wales, upon an Information there preferred in ſuch Caſe againſt the Owner.

(h) 2 Rol. Rep. 412. S. P. per Curiam arguend'. Palm. 389. per Curiam. (i) Otherways if there is no Occupier, but the Owner ſuffers them to lie freſh. 2 Rol. Rep. 412. S. P. per Curiam arguendo. Palm. 389. per Curiam.

Chimin Private.

Fol. 391.

1. A Man by Preſcription may have a Way from his (a) Meadow to the High Street. (b) 20 Aſſ. 18.

2. A Man may have a Way from his Houſe to the Church. (c) 20 Aſſ. 18.

(a) So a Publick Way may be laid to be leading from a particular private Place. 3 Keb. 644. (b) Fitz. Aſſiſe 218. S. C. Br. 228. S. C. Br. Chemin 7. S. C. (c) Fitz. Aſſiſe 218. S. C. Br. 228. S. C. Br. Chemin 7. S. C.

(A) A Way

(A) A Way.

(a) How it may be uſed.

1. If A. be ſeiſed in Fee of a Backſide in a Town, and the High Street is next adjoining thereto of the Eaſt, and there is a Gate in the Backſide which encloſes it from the Street, the Gate being in the Eaſt next to the Street; and A. is alſo ſeiſed in Fee of a Meſſuage and Piece of Land next adjoining to the Backſide of the North of the Backſide, and by Deed infeoffs B. of the Meſſuage and Piece of Land which are of the North of the Backſide, and by the ſame Deed further grants to him and his Heirs liberos ingreſſum, egreſſum & regreſſum in ad & extra eadem conceſſa præmiſſa in per & trans prædictas januam & Backſide by Force of this Grant, B. may go from the Street through the Gate, and over the Backſide to the Meſſuage or Piece of Land of which he is infeoffed; but he cannot go through the ſaid Gate and Backſide to other Places, or from other Places to the Street without coming to the ſaid Meſſuage or Piece of Land, for the Liberty is granted to him of Ingreſs and Egreſs in ad & extra eadem conceſſa præmiſſa; ſo that this is made appurtenant to the Premiſſes before granted Car. B. between Hodder and Holman, adjudged upon a Demurrer wherein Treſpaſs pedibus ambulando in the Backſide, the Defendant juſtified by Force of the ſaid Grant, ſhewing all this Matter and the Grant, and that he went from the ſaid Piece of Land over the Backſide and through the Gate to the Street & ſic retrorſum, and the Plaintiff replied, That he did the Treſpaſs of his own Wrong abſq; hoc that he went from the ſaid Piece of Land over the Backſide through the Gate to the Street & ſic retrorſum, and adjudged a good Traverſe, for the Cauſe aforeſaid. Intratur Hill. 9 Car. Rotulo Dorſet.

(a) A. hath a Way, which by roting of Cart-wheels, &c. is ſo digged and drowned that it becomes impaſſable, and whether he may fill up the Cart-rotes, and Diga Trench to let out the Water. Godb. 52, 53. dubitatur. But as pleaded there, viz. That he could not uſe his Way ſo well as before, and therefore, &c. it is clearly naught; for he ought to have ſaid he could not uſe the Way at all, and therefore, &c.

2. (b) In Treſpaſs for breaking his Cloſe, if the Defendant juſtifies (c) going over this Cloſe becauſe he hath uſed Time out of Mind to have a Way over it from D. to Blackacre; and the Plaintiff replies, That at the Time of the Treſpaſs the Defendant went with his Carriages from D. to Blackacre, & dehinc to a Mill, this will not maintain his Action; for when the Defendant was at Blackacre, he might go whether he would. Paſch. 16 Jac. B. R. between Sanders and Moſe, adjudged upon Demurrer.

(b) 1 Mod. 190, 191. S.P. adjudg'd upon Demurrer Con. becauſe of the Damage which would accrue to the Plaintiff, if the Defendant ſhould Purchaſe other Land adjoining to Blackacre, &c. But yet Q. for in ſuch Caſe he might help himſelf by ſpecial Pleading, for which vide the next Caſe. Pl. 3. (c) This Word is wanting in the Original, for there it is only juſtify ouſter eeo Cloſe, &c. So there ſeems to have been an Omiſſion.

3. (d) But it ſeems that if a Man hath a Way for Carriages from D. to Blackacre over my Cloſe, and after he purchaſes Land adjoining to Blackacre, he cannot uſe the ſaid Way with Carriages to the Land adjoining, tho' he comes firſt to Blackacre, and thence to the Land adjoining, for then it may be very prejudicial to my Cloſe; but it ſeems, if I will help my ſelf, I muſt ſhew the ſpecial Matter, and that he uſed it for the Land adjoining. Vide the ſaid Caſe of P. 16 Jac. Banco.

(d) 3 Keb. 848. ſeems to be S. P. tho' obſcurely reported.

(B) To whom the Soil and the Things thereupon do belong.

Fol. 392.

1. IN an High-way the King hath but the Paſſage for himſelf and his People. (a) 8 E. 4. 9. (b) 2 E. 4. 9.

2. But the Freehold and all the Profits, as Trees, &c. belong to the Lord of the Soil. (c) 8 E. 4. 9. (d) 2 E. 4. 9. (e) 8 H. 7. 5 b.

3. The Lord of the Soil ſhall have an Action for Digging the Ground. (f) 8 E. 4 9.

4. If Trees grow in the High-way, he to whom the Seigniory of the Leet of the ſame Place doth belong, ſhall have the Trees. (g) 27 H. 6. 8. per Curiam.

5. Generally the (h) Owner of the Soil of (i) both ſides the Way, ſhall have the Trees growing upon the Way. 18 Eliz. B. R. per Curiam, cited P. 11 Jac. B.

6. (k) The Lord of a Rape, within which there are 10 Hundreds, may preſcribe to have all the Trees growing within any High-way within this Rape, tho' the Manor or Soil adjoining be to another, (l) for Uſage to take the Trees, is a good Badge of Ownerſhip. P. 11 Jac. B. R. between Sir Thomas Pelham Plaintiff, and Wiatt & Black Defendants, per Curiam.

(a) Fitz. Chimin 1. S. C. Br. 10. S. C.

(b) Fitz. Treſpaſs 95. S. C. Br. Chemin 9. S. C.

(c) Fitz. Chimin. 1. S. C. Br. 10. S. C.

(d) Fitz. Treſpaſs 95. S. C. Br. 298. S. C. Br. Chemin 9. S. C.

(e) Br. Chimin 15. S. C.

(f) Fitz. Chimin 1. S. C.

(g) Br. Leet 3. S. C. and ſuppoſes it intended of the Lord of the Soil. (h) Whether Lord or Freeholder. 1 Brownl. 42. (i) Kelw. 141. vide. (k) This in the Original is 5, and ſo plainly appears to be miſprinted. (l) 1 Brownl. 42. S. P.

Pleader.

(a) How and by what Name a Way may be claimed by Preſcription, or otherways.

1. (b) IT muſt not be claimed as (c) Appendant or Appurtenant to a Houſe, becauſe it is only an Eaſement and no Intereſt. *Trin.* 7 *Jac.* between *Godly* and *Frith*. *Yelv.* 159. agreed *per Curiam*, in an Action upon the Caſe for Stopping a Way, with which it was ſaid all the Precedents agreed; and *Man* Secondary, informed the Court that a Judgment in *B. R.* was reverſed in *Cam' Scac* becauſe laid ſo.

2. If in Bar of an Action of Treſpaſs, the Defendant pleads that *J. S.* and all thoſe whoſe Eſtate he hath in certain Lands Time out of Mind for themſelves and their Servants have had and uſed *Paſſagium*, *in*, *per* & *trans* the Place where, *&c.* and ſo juſtifies as Servant; this is no good Plea, for (d) *Paſſagium* is (e) properly a Paſſage over Water, and not over Land, and he ought to have preſcribed in the Way, and not in the Paſſage, and ſhould have uſed ſuch Words as are (f) proper, and known in Law. *Mich.* 7 *Jac.* between *Alban* and *Bromſal*, *Yelv.* 163. adjudged upon Demurrer.

(a) A Man may preſcribe for a Way from his Houſe through a certain Cloſe, &c. to Church, tho' he himſelf hath Lands next adjoining to his ſaid Houſe through which of Neceſſity he muſt firſt paſs; for the general Preſcription ſhall be applied only to the Lands of others. Palm. 387, 388. by 2 Judges againſt 1. 2 Rol. Rep. 397. by 2 againſt 1.—But without Queſtion, if a Man hath a Way over a Common Field, Part whereof doth belong to himſelf, for the Infiniteneſs of the Caſe he may preſcribe generally. Palm. 388. agreed by all the 3 Judges. 2 Rol. Rep. 397, 398. agreed by all the 3. (b) 1 Bulſ. 47. in Treſpaſs ſeems to be S. P. but obſcurely reported (c) But it may be quaſi appendant thereto, and as ſuch paſs by Grant thereof. Cro. Jac. 190. (d) For this vide 8 Co. 46 b. (e) So a Preſentment in a Leet for diverting the King's High-way is meerly void; for the Word divert may be applied to a Courſe of Water, and a Way may be obſtructed or ſtopt, but it is not diverted when ſtopt, and another made in another Place. 1 And. 234. adjudged. (f) So a Man cannot preſcribe for a Way trans Cemetery, for that is a Greek Word, and ſignifies only Commune dormitorium, quia corpora illic uſq; ad diem reſurrectionis dormiunt. Jenk. Rep. 142.

3. If in Bar of an Action of Treſpaſs, the Defendant pleads, that *J. S.* and all thoſe whoſe Eſtate he hath in certain Lands, for themſelves and their Servants, Time out of Mind have had and uſed a Way *in per & trans* the Place where, *&c.* (g) to the ſaid Lands; this is no good Plea, becauſe it is not (h) ſhewed (i) *a quo loco* the ſaid Way is claimed, and the rather becauſe it is claimed by Preſcription, which ought to be laid in *certo loco*. *Mich.* 7 *Jac.* between *Alban* and *Bromſal. Yel.* 163. adjudged upon Demurrer.

(g) Where he that preſcribes for a Way uſq; talem clauſum, muſt ſhew his Intereſt in the Cloſe, but otherways where he preſcribes for a Way uſq; talem Campum, for that may be intended a Common Field. Latch. 160. vide. (h) In an Indictment for an Incroachment upon, or not Repairing the High-way it need not be ſhewn, per 2 Keb. 715. 721.—But vide 2 Rol. Abr. 81. Pl. 18. Con. and that it is a Common Exception, and ſeveral Indictments have been quaſhed for it.—So it need not be ſhew'd where in Pleading an High-way is named only as an Abuttal, and is not the Foundation of the Plea. Palm. 421. (i) It muſt be ſhewed a quo loco ad quem, becauſe you muſt not go over my Ground but to the right Place. Hob. 190.—Yet vide 2 Rol. Rep. 134.—And ſuch Defect is helpt where Iſſue is joined and tried upon the Right of the Way. Gogle's Caſe. Hob. 189, 190. adjudged. Hut. 10. adjudged. Clerk and Cheyny, 1 Vent. 13. adjudged. 2 Keb. 480. 488. adjudged.—Yet vide 1 Brownl. 6. (k) If a Man preſcribes habere viam tam pedeſtrem quam equeſtrem pro omnibus Carriagiis, by this he ſhall not have a Cart-way, for every Preſcription is Stricti juris, per 3 Leon. 13. per Leonard, Prothonotary, which Dier conceived to be Law, and therefore ſaid it was good to preſcribe habere viam pro omnibus Carriagiis, generally without ſpeaking of Horſe-way, Cart-way, or other Way.

Indictment for not Repairing, Obſtructing, &c. a High-Way.

1. If a Man incloſes a Common which before lay open to the High-way, by which he becomes bound to repair the ſaid Way, in an Indictment for not Repairing thereof, he ſhall not be charged *ratione tenuræ* of the ſaid Lands, but *ratione Coarctationis* of the ſaid Way; for if he lays it open again, he ſhall for the future be diſcharged of the ſaid Repairs: But where a Man is bound (a) *ratione tenuræ* of certain Lands, he cannot diſcharge himſelf by laying the ſaid Lands open to the Way. *Trin.* 21 *Car.* 2. between (b) the King and *Stoughton*, 2 *Sand.* 160. *per Curiam.*

(a) Vide 1 Keb. 829. 2 Keb. 514. 3 Keb. 58. 855. Noy 93. (b) 1 Sid. 464. S. C. and ſaid the Preſentment was adjudged naught, becauſe laid by way of Preſcription, ſcilicet, that he, and all thoſe whoſe Eſtate he hath in, &c. ought to repair, &c. whereas it ought to have been laid by way of Cuſtom, but 2 Sand. 158. vide the Preſentment at large, but not laid as the Report of Sid. ſuppoſes. 2 Keb. 552. S. C. obſcurely reported, and vide Br. Preſentment 20. Stil. 400. Kelw. 52 a.

2. If an Indictment be laid for Stopping (c) *Communem viam pedeſtrem ad eccleſiam de W.* this is a good Indictment, for being laid to be a Common Way, the Church ſhall be intended to be mentioned only as the *terminus ad quem*, not but that the Way may lead further. *Paſch.* 24. *Car.* 2. between the (d) King and *Thrower*, 1 *Vent.* 208. *per Hale* Chief Juſtice.

3. But if laid to be *Communis via pedeſtris ad Eccleſiam de W. pro parochianis* it will be intended a Private Way only, and not Indictable. *Paſch.* 24 *Car.* 2. between the King and *Thrower*, 1 *Vent.* 208. *per Hale* Chief Juſtice.

(c) Where by the Indictment it ought to appear to be the King's Way, and tho' laid to be valde neceſſariam for all the King's Subjects, it does not imply it. Leon. 121. and vid. Cro. Eliz. 63. (d) 3 Keb. 28. S. C. it being laid pro omnibus ſubditis domini regis.

Pleading to an Indictment.

IF a Pariſh is indicted for not Repairing a High-way, they cannot plead Not Guilty, and (a) give in Evidence that another by Tenure or Preſcription ought to repair; for being chargeable *de Communi jure*, if they would diſcharge themſelves by laying it elſewhere, it muſt be pleaded. *Paſch.* 26 *Car.* 2. (b) *Anonymus*, 1 *Vent.* 256. adjudged.

(a) But if found quod debent reparare, Judgment ſhall be given againſt them. 1 Sid. 140. 1 Keb. 498. (b) 1 Mod. 112. ſeems to be S. C. and S. P. per Hale, who ſaid, Not Guilty goes only to the being in Repair, or not. 3 Keb. 301. ſeems to be S. C. and S. P.

(a) (b) Church-wardens.

Fol. 393.

1. THE Church-wardens (c) cannot preſcribe to have Lands to them and their Succeſſors, for they are not any Corporation to have Lands; (d) but for Goods for the Church. P. 37 Eliz. B. between Longley & Meredine.

2. (e) If a Feoffment be made to the Uſe of the Church-wardens of D. this is a void Uſe, for they have not any Capacity of ſuch a Purchaſe. (f) 17 H. 7. 27 b.

(a) By whom to be Elected. Vide 2 Rol. Abr. 234. Pl. 1. (b) Where the Predeceſſors may be ſued by their Succeſſors either in the Spiritual Court, or by Writ of Account at Common Law, vide Biſhop & Turner, Godb. 279. 1 Rol. Rep. 71. 106, 107.—Welcome & Lake, 2 Keb. 6. 22. 1 Sid. 281, 282. at Common Law for Damages, and in Spiritual Court for the Things in Specie. And vide 1 Rol. Abr. 121. Pl. 9. (c) In London the Parſon and Church-wardens are a Corporation, and may purchaſe and demiſe Lands, &c. Cro. Jac. 532. March. 66. according to the falſe Print, but in Truth 67.—and vide Lan. 21. (d) March 66. S. P. per Curiam. (e) Kelw. 32 a. S. P. Co. Lit. 3 a. S. P. (f) This is miſprinted in the Original (as here) for there are no Reports in Print of that Year, and this ſhould be 12 H. 7. 27 b. which vide Br. Feoffments al Uſe 29.

(A) The Power of them and of the Pariſh.

1. A Gift by them of Goods in their Cuſtody (a) without the Conſent of the Sidemen or Veſtry is void. 38 Eliz. (b) Method & Winn's Caſe, cited per Coventry. My Rep. 14 Jac. B.

2. If a Man takes the (c) Organs out of the Church, the Church-wardens may have an Action of Treſpaſs for it, for the Organs belong to the Pariſhioners, and not to the Parſon, and (d) therefore the Parſon cannot ſue in the Eccleſiaſtical Court againſt him who took them. Tr. (e) 12 Jac. B R. per Curiam adjudged.

(a) For tho' of themſelves they have Power to receive Goods for the Benefit of the Church, yet of themſelves they have no Power to do any Thing to its Diſadvantage. Yelv. 173. 2 Brownl 215. (b) 1 Rol. Rep. 426. S. C. cited. (c) So if a Man takes the Church Bible, &c. 1 Rol. Rep. 67. (d) For this, vide 2 Inſt. 492. (e) 1 Rol. Rep. 67. Buckſale againſt S. C. adjudged.

3. The Church-wardens by the Conſent and Agreement of the Pariſhioners may take a ruinous Bell, and deliver it to a Bell-Founder, and that he by their Agreement ſhall have for the Caſting thereof 4 l. and ſhall retain it till the 4 l. be paid, and this Agreement of the Pariſhioners ſhall excuſe the Church-wardens in a Writ of Account brought againſt them by the Succeſſors of the Church-wardens; for the Pariſhioners are a Corporation for the Diſpoſal of ſuch perſonal Things as belong to their Church. M. 37, 38 Eliz. B. R. between (f) Method & Winne adjudged.

(f) 1 Rol. Abr. 121. Pl. 9. S. C.

4. So the Church-wardens by the Aſſent and Agreement of the Pariſhioners may take the Stones belonging to the Church, and with

Part

Part thereof repair a ruinous Window of the Church, and retain the reſt to themſelves in Satisfaction of their Expences imployed in the Repairs of the ſaid Window. M. 37, 38. Eliz. B. R. between (g) Method & Winne adjudged.

(g) 1 Rol. Abr. 121. Pl. 9. S. C.

5. (h) Church-wardens may bring an Action of Treſpaſs for a Bell taken out of the Church (i) in the Time of their Predeceſſors. *Mich.* 31 and 32 *Eliz.* between (k) *Hadman* and *Green*, *Cro. Eliz.* 145. 179. *per Curiam*; but becauſe they had declared *ad damnum ipſorum*, Judgment was given againſt them.

(h) Dal. 105. ſeems to be S. P. per Curiam, admitted Con.

6. But in that Caſe the Predeceſſors themſelves can have no Action, becauſe their Time is paſt. *Mich.* 31 and 32 *Eliz.* between (l) *Hadman* and *Green*, *Cro. Eliz.* 145. *per Curiam.*

(i) Where a Succeſſor ſhall have an Action upon a Fact done in the Time of his Predeceſſor. Vide at large, 2 Inſ. 151, 152.

7. If 2 Church-wardens ſue in the Spiritual Court for a Levy towards the Reparation of their Church, and (m) have Sentence to recover, and Coſts aſſeſſed, and after one of them releaſes; yet the other may proceed for the Coſts, *&c.* for Church-wardens have nothing but to the Uſe of the Pariſh, and the Corporation conſiſts of both, and one only cannot releaſe or give away the Goods of the Church. *Trin.* 7 *Jac.* between (n) *Starky* and *Barton*, *Cro. Jac.* 235 adjudged, *per totam Curiam.*

(k) 1 Leon. 177. S. C. but no Reſolution.

8. If a Man being at Church ſits with his Hat upon his Head, in the Time of Divine Service, and refuſes to pull it off, the Church-wardens may take it off; for tho' they may preſent it in the Spiritual Court, yet they are not bound in the mean Time to permit ſuch Irreverence and Indecency in the Church. *Mich.* 18 *Car.* 2. between (o) *Hall* and *Flanner*, 1 *Lev.* 196. adjudged.

(l) 1 Leon. 177. S. C. and S. P. debated, but no Reſolution.

(m) By the Report of this Caſe in Yelv. Sentence was given againſt them, and they appealed, pending which one of them releaſed, &c. (n) Yelv. 173. S. C. adjudged. 2 Brownl. 215. S. C. adjudged. (o) 1 Sand. 13, 14. S. C. adjudged; and 'tis there ſaid by the Reporter, that the Court taking it to be a great Miſdemeanor in the Plaintiff, gave Judgment againſt him, without regard to the Exceptions to the Defendant's Plea. 1 Sid. 301. S. C. and S. P. adjudged. Twiſden only doubting upon the Words of the Canon againſt wearing a Hat, &c. viz. what Hat intended; and ſaid they might appeaſe a Diſturbance in the Church; but laying Hands upon a Man to pull off his Hat, tends to the raiſing a Diſturbance and Breach of the Peace. 2 Keb. 124, 125. S. C. adjudged.

Pleading.

1. IF Church-wardens bring an Action of Treſpaſs for a Bell taken out of the Church in the Time of their Predeceſſors, it muſt be laid to be *ad damnum Parochianorum*, and not *ad damnum ipſorum*. *Mich.* 31 and 32 *Eliz.* between *Hadman & al'* and *Ringwood*. *Cro. Eliz.* 145. 179. adjudged.

2. But if Church-wardens bring an Action for Goods taken in their own Time, they may lay it to be *ad damnum ipſorum*, or (a) *ad damnum Parochianorum* at their Election. *Mich.* 31 and 32 *Eliz.* between *Hadman & al'* and *Ringwood*. *Cro. Eliz* 145. 149. *per Curiam.*

(a) For this vid. 2 Brownl. 215. Kelw. 32 a

3. If Church-wardens bring an Action of Account againſt their Predeceſſors for a Bell, *&c.* they muſt not be laid to be *bona Eccleſiæ*, but *bona Parochianorum*. *Trin.* 22 *Car.* 2. betwen (b) *Taylor* and *Rouſe*, 1 *Mod.* 65. *per Curiam.*

(b) 1 Vent. 89. S. C. and S. P. and the Court inclined accordingly, but ſaid the Precedents were both ways. 2 Keb. 675. 704. S. C. and S. P. per Curiam.

(a) (b) Certio-

(a) (b) Certiorari.

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(A) (c) (d) (e) Out of what Court it (f) (g) ought to Iſſue, and (h) (i) (k) to whom, & *econtra*.

(a) Where a Judge or known Officer may deliver in a Record without. Godb. 14.

1. **If the Record be pleaded in a more base Court than that in which it is, the Court may grant a** Certiorari. (l) 4 H. 6. 23.

March 113. 2 Inſt. 424. and vid. 2 Keb. 538. (b) Certiorari's to be Signed by the Chief Juſtice, or in his Abſence by one of the Judges of the Court. 1 and 2 Ph. & Mar. cap. 13. (c) Per 21 Jac. cap. 8. Certiorari's to be delivered to the Juſtices at ſome Quarter-Seſſions in open Court, and not to be allowed till the Party indicted becomes bound to the Proſecutor to pay Coſts, &c. but what Recognizance he that brings a Certiorari ſhall now give, vide 5 & 6 W. & M. cap. 11. 8 & 9 Will. cap. 33. —And what Recognizance one indicted for deſtroying the Game, &c. ſhall give, vide 4 & 5 W. & M. cap. 23. Par' 7. (d) Per 22 Car. 2. cap. 12. Par' 4. An Indictment for not repairing a Highway or Bridge, ſhall not be removed till traverſed and Judgment given.—But per 5 & 6 W. & M. cap. 5. Par' 6. upon Suggeſtion and Affidavit, that the Right or Title to repair the ſame may come in queſtion it may. (e) Where to be granted upon Motion for and on Behalf of the King only. Vide 1 Vent. 63. Mod. 41. Stil. 295. 1 Sid. 54. Hard. 409, 410. 1 Keb. 4. —And where and how upon Motion or Inſtance of the Party or not, vid. Stil. 126, 127. 211. 351. 356. 364. Ray. 74.——Where a Second after ſent down again by Procedendo. Stil. 300.—And where after an Indictment returned. Cro. Jac. 277. 1 Sid. 230. (f) To remove a Record out of one Court into another, to bring an Attaint thereupon. Moor 17. Pl. 60. 4 Inſt. 214. 1 Rol. Abr. 281. Pl. 1. vide. (g) Whether it lies to remove a Record out of an Inferior Court, to have Execution out of a Superior, vide 1 Rol. Abr. 887. Pl 4. (h) To whom to be directed to remove an Appeal pending by Bill before the Coroner. 2 Inſt. 176. But vid. Antea under Title Appeals, Antea 492. (i) To none but a known Officer, who is known to have the Cuſtody of Records. Stil. 371. per Roll Chief Juſtice. (k) To the Executors of the Officer, &c. who ought to certify. Vid. 2 Inſt. 424. 2 Keb. 750. Dier 163. Pl. 54. (l) Br. Failer de Record. 3. S. C. Fitz. Record 17. S. C.

2. **In an Information** in Banco **upon the Statute of Recuſants, if the Defendant pleads a Conviction at the Seſſions of Peace in** Middleſex, **and the Plaintiff pleads** null tiel Record, **the** Common Pleas **will grant a** Certiorari **to the Juſtices of Peace to certify them of the Record, becauſe they ſhall be certified by the Tenor of the Record.** Hill. 14 Jac. Banco, (m) Pie **and** Trill **adjudged, tho' it was objected that it ought to iſſue of** Chancery, **and come by** Mittimus in Banco. Hobart's Reports, 182. **the ſame Caſe, and there afterwards awarded to the Juſtices of Gaol-Delivery.**

(m) Hob. fol. 135. S. C. adjudged.

3. **So in Conſpiracy** in Banco, **upon an Indictment before Juſtices of Peace,** if null tiel Record **is pleaded,** a Certiorari **ſhall Iſſue out** de Banco, **and then Proceſs ſhall iſſue thereupon, till he hath done the one or the other, becauſe this is the more baſe Court.** (n) 4 H. 6. 23 b. (o) 19 H. 6. 19.

(n) Br. Failer de Record 3. S. C. (o) Fitz. Record 4. S. C. Br. 24. S. C.

4. (p) If in an Action of Debt brought in the Common Pleas upon a Judgment in *B. R.* the Defendant pleads *null tiel Record*, the Plaintiff may have a *Certiorari* out of Chancery to ſend the Record thither, and the ſame may be ſent after by *Mittimus* into the Common Pleas; notwithſtanding the (q) General Rule, that Records in *B. R.* ſhall not be moved out of that Court into any other Court. *Hill.* 8 *Car.* between *Lutterel* and *Lea. Cro. Car* 297. adjudged, and ſeveral like Precedents cited.

(p) Dier 187. Pl. 4. like Point, as to the Removal of a Record from London. (q) For this, vid. 4 Inſt. 73.

5. So if in an Action of Debt brought in an inferior Court upon a Bond, the Defendant pleads that the Plaintiff hath recovered in *B. R.* upon the ſame Bond, and the Plaintiff replies *null tiel Record*, and thereupon Iſſue is joined *quod habetur tale recordum*, the Record in *B. R.* may be certified into Chancery, and from thence ſent by *Mittimus* to the inferior Court. *Mich.* 19 *Car.* between (r) *Pit* and *Knight.* 1 *Sand.* 97, 99. agreed *per Curiam* upon a Writ of Error upon a Judgment in the Court of *Briſtol.*

(r) 1 Lev. 223. S. C. with a Nota as to this Point, 1 Sid. 329, 330. S. C. and S. P. ſeems to be commonly practiſed, 2 Keb. 205, 249, 278. S. C.

6. If an Order is made at the Seſſions of the Peace for the County of, &c. that the Sheriff of the ſaid County ſhall perſonally attend the ſaid Court upon *Wedneſday* following, and this Order is perſonally ſerved upon the ſaid Sheriff, and yet he does not appear, upon which the Court impoſes a Fine upon the ſaid Sheriff, and this upon a Mandate of the Chief Baron is eſtreated into the Exchequer; this Order ſhall not now by *Certiorari* be removed in *B. R.* for the Fine being eſtreated, if the King's Bench ſhould intermeddle, this would be but to anticipate the Judgment of the Court of Exchequer, before whom the intire Matter may be properly determined. *Mich.* 33 *Car.* 2. The Caſe of the Sheriffs of *London* and *Middleſex*. *Hard.* 169. adjudged upon a Motion to file the Return upon ſuch a *Certiorari*, and denied accordingly.

(B) (a) To what (b) Court it may be granted.

(a) Where to remove a Record out of Ireland, but not out of Scotland. Vaug. 287. (b) Where to remove Orders made by Virtue of a particular Power given by Act of Parliament. 3 Mod. 94, 95. 1 Keb. 818. 2 Keb. 43. 129.

1. If Indictments are taken in Pembrokeſhire, or Brecknockſhire in Wales before the Juſtices of the Great Seſſions there, a Certiorari may be granted out of the King's Bench to the ſaid Juſtices, to remove theſe Indictments, becauſe theſe are but the Declarations of the King, which he may remove where he pleaſes. Mich. 15 Jac. B. R. a Certiorari was granted for the Indictments of one Collins and one Bartlet, and one Sir (c) J. Cary, but the Juſtices there would not return them, upon which the Court was of Opinion to grant an Attachment; but upon the Prayer of the Attorney General a new Certiorari was granted. (Quære, How the Court of King's Bench may proceed upon theſe Indictments.

—Where to Commiſſioners of Sewers. March 196, 197, 199, &c. 1 Vent. 67. Raym. 186. 1 Lev. 288. (c) Cro. Jac. 484. S. C. and a Certiorari granted. Poph. 144. ſeems to be S. C. 2 Rol. Rep. 28. S. C. and adjudged that the Certiorari being granted ſhould ſtand.

(d) King and Morris, S. P. 1 Mod. 64, 68. dubitatur. 1 Vent. 93. 146. per Curiam. 2 Keb. 685. 724. 797, 798. per Curiam. —Latch 12. S. P. adjudged in Caſe of an Indictment of Murder.

2 Trin. 16 B. R. It was argued by Jenkins, That a Certiorari does not lie by Reaſon of the Statute of 27 H. 8. and 34 H. 8. cap. by which abſolute Power in the Affirmative is given to the Juſtices there, (d) but notwithſtanding this per totam Curiam (e) thoſe Statutes bind not the King, but he may ſue where he pleaſes; and therefore it was ordered, that a Return of the ſaid Writ ſhould be made by a Day, and (f) the Clerks ſaid there were many Precedents of the ſame Nature, and upon ſome of them the Trial had been in the County next adjoining. Mich. 13 Car. B R. a Certiorari was granted in the Caſe of one Evans, and others, to remove Indictments of Murder taken within one of the 4 new Counties, which were Counties Marchers.

(e) And therefore tho' it lies not in civil Cauſes, yet it may lie to remove Indictments. 3 Mod. 230. (f) For this vide Cro. Car. 248.

(g) Cro. Car. 331, 332. S. C. and S. P. dubitatur. 1 Vent. 146. S. C. cited and ſaid that the Indictment was removed, and after tried in the next Engliſh County.

3. Mich. 9 Car. B. R. A Certiorari was granted to remove the Indictments of one (g) Chedle and others, of Petit Treaſon, for the Murder of Sir Richard Bulkly which were taken in Angleſey; tho' this be in North Wales, and a County of it ſelf at the Time of the making of the Statute of Rutland; and the Court ſaid, that altho' they were not yet reſolved that it could be tried in the next Engliſh County, yet they had Power to remove the Indictments, to ſee whether the Indictments are good, and to (*) quaſh them if they are not good, and if they are good to remand them back again by Mittimus, by Force of a Statute made tempore H. 8. and Juſtice Jones ſaid, that in the 31 and 32 Eliz upon the ſame Reaſon a Certiorari was granted in Banco Regis, to remove an Indictment taken in Caernarvan, altho' they were not reſolved that it could be tried in the next County. But after there were ſeveral Arguments made at the Bar, whether this Certiorari

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lies or not, and it was not resolved in the End, but the Parties tried it in the proper County.

4. If a Certiorari be directed to the Justices of Peace in the County of (h) Durham, to certify an Indictment taken there before them, they ought to return it. Mich. 10 Car. B. R. Clark's Case, where they returned that it was a County Palatine by Prescription, and the Court advised thereupon.

(h) Vid. 5 & 6 W. & M. cap. 11. Par' 5.

5. 11 Car. B. R. in one Sympson's Case, a Certiorari with a Pain was granted to Durham to remove an Indictment of Barretry there taken before the Justices of Peace, for they were made Justices by Statute.

6. (i) A Certiorari lies to the Justices of Peace within the 5 Ports, to certify an Indictment of Sodomy taken before them, because this is made Felony of late Time, (k) of which they cannot hold Plea there without a Charter of late Time. Trin. 8 Car. B. R. (l) Hopstill Tilden's Case resolved, and the Indictment taken in Sandwich removed accordingly, and tried thereupon, and found Not guilty. (m) Mich. 8 Car. B. R. Dugdale's Case, such a Certiorari was granted, and the Indictment taken at Dover removed accordingly.

(i) Stil. 14. S. P. adjudged nisi.
(k) 2 Lev. 86. vide.
(l) Cro. Car. 252, 253, 264. 291. S. C. adjudged, and that it should not be directed to the Lord Warden of the Cinque Ports, and he to make his Warrant to them to execute it, because they hold Plea of this as Justices of Peace, and not by Virtue of their ancient Charters, &c.
(m) Cro. Car. 253. S. C. adjudged.

7. If there be an Indictment for a forcible Detainer upon the 8 *H.* 6. before Justices of Peace in the County Palatine (n) of *Chester*, it may by *Certiorari* be removed in *B. R.* for the Justices of Peace there being made by Letters Patents, their Proceedings *quatenus* Justices of Peace must be subject to the King's Bench. *Hill.* 23 *Car.* 1. between the (o) King and *Simmons & al' All.* 49. *per Bacon*, and a *Certiorari* awarded accordingly, and the Indictment being returned was quashed.

(n) 5 & 6 W. & M. cap. 11. Par' 5.
(o) Stil. 87. S. C. but S.P. does not appear.

8. If there be a Presentment before Justices in Eyre, for an Offence inquirable and punishable only by Regarders, there no *Certiorari* lies (p) till Conviction; for they proceed according to the Forest Law, and if it should be removed before Conviction, the Offender might go unpunished. *Trin.* 18 *Car.* 2. between the Duke of *Norfolk* and the Duke of *Newcastle*. 1 *Sid.* 296. *per Curiam.*

(p) But where and how it may be removed after Conviction, and the Party grieved relieved. Vid. 4 Inst. 294, 295.

(B) (a) What (b) Records shall be removed by it.

(a) Where by Removal of a Recognizance, conditioned to appear at the next Assises, the Appearance is not dispensed with. Rolls and Pie. Yelv. 207. 1 Bulst. 155. Cro. Jac. 282.

1. (c) If a Certiorari be awarded out de B. R. the last Day of Trinity Term, to remove all Indictments of forcible Entry against certain Persons where they are not indicted at the Time of the Award of the Certiorari, (d) nor at the Time of the Delivery of the Writ to the Officer, but after they are indicted in the Vacation before Michaelmas Term, they ought to be removed by Force of this Writ. Mich. 37, and 38 Eliz. B. R. Cheny's Case, per Curiam.

(b) Whether by Removal of the Indictment the Recognizances to appear, &c. shall be removed, vid. 1 Mod. 41. Stil. 328. (c) For this vid. the King and Buck. 1 Sid. 317. 2 Keb. 138, 141, 142. (d) But if to remove an Indictment of Robbery from the Assises, it ought not to be delivered till the Indictment is found, and the Judge hath the Prosecutors before him, and may bind them over to the King's Bench. 1 Mod. 41. per Twisden. 1 Vent. 63. per Keeling, Chief Justice.

2. If

2. If a Certiorari iſſues to remove an Indictment of forcible Entry (e) againſt ſeveral, naming them, (f) whereas but 4 of them are indicted; yet it ought to be removed. Mich. 37, 38 Eliz. B. R. Cheyny, per Curiam.

(e) Where A. and B. are indicted for Murder, and B. flies, and A. only brings a Certiorari, and whether the Whole or Part only of the Record is removed. March 112. dubitatur, and the Chief Juſtice ſaid, it would be miſchievous if as to B. it ſhould be removed; for ſo he might be attainted here by Outlawry who knew nothing of it.—Where ſome of the Parties indicted refuſed to give Security, according to 21 Jac. cap. 8. vid. March 27. (f) Where not removed by Reaſon of a Variance. 1 Bulſt. 155. Barrow and Hewit. 1 Lev. 50. 1 Sid. 64. 1 Keb. 165, 187. and vid. 1 Keb. 129, 282.

(C) (a) How it ſhall be certified.

(b) In what Caſes the (c) Tenor of the Record ſhall be certified, and in what Caſes the (d) Record it ſelf.

1. Where the Court which awards the Certiorari cannot hold Plea upon the Record it ſelf, (e) there but a Tenor ſhall be certified, becauſe otherways if the Record it ſelf ſhould be removed, there would be a Failure of Right afterwards. Hill. 14 Jac. Banco (f) Pie and Thrill.

(a) In Debt in B. R. upon a Judgment in Briſtow, the Defendant pleaded null tiel Record, &c. and a Certiorari iſſued de B. R. to certify it, and it was certified under the Seal of the Court of Briſtow. Cro. Eliz. 821. and ſaid the Courſe was ſo, and that it need not come in under the Great Seal. (b) 1 Keb. 127. vide 3 Keb. 13. (c) Where in London by their Charter they certify only tenorem recordi. 1 Sid. 155, 230. 1 Keb. 252 (d) Where it was certified in the Preterperfect Tenſe, and therefore by ſome the Record it ſelf was not removed, but only a Hiſtory that there was ſuch a Record; and therefore whether a Second Certiorari ſhould not go. 1 Sid. 229, 230. dubitatur & adjorn'. (e) For this vid. Dier 187. Pl. 4. (f) Hob fol. 135. S. C. and S. P.

2. As in an Information in Banco upon the Statute of Recuſants, if an Indictment and Conviction of the Defendant to be a Recuſant is pleaded, and thereupon null tiel Record is pleaded, and a Certiorari iſſues de Banco to Juſtices of Peace before whom the Conviction was, the Juſtices ought only to certify the Tenor, becauſe the Common Pleas cannot hold Plea upon the Record it ſelf, if it ſhould be removed. Hill. 14 Jac. Banco, (g) Pie and Thrill reſolved.

(g) Hob. fol. 135. S. C. and S. P.

(a) Cinque (b) Ports.

Their (c) Franchiſes and Liberties.

1. (d) The Inhabitants thereof have (e) great Liberties and Privileges in reſpect of their neceſſary Attendance in the Ports, for the Defence and Safety of the Realm. 2 *Inſt.* 557.

Per Magn' Chart', cap. 9. *Barones de Quinque Portubus & omnes alii portus habeant* (f) *omnes libertates & liberas conſuetudines* (g) *ſuas.*

(a) At firſt the Privileged Ports were but 3. Viz. Dover, Sandwich, and Rumny; but Haſtings and Hithe were added by the Conqueror. 4 Inſt. 222. —to which Winchelſea, Rye, and other Towns are adjoined. 2 Inſt. 556. 4 Inſt. 222. —Of which the King's Courts cannot judicially take Notice. 2 Inſt. 557. (b) Are Parcel of the County. 2 Inſt. 557. Cro. Car. 248.—But by Charter exempt from being drawn in Plea within the County in general. Yelv. 13.—But a Judgment in B. for Lands there ſhall bind for ever, tho' ſuch Judgment for Lands in Wales, or a County Palatine, is meerly void. 2 Inſt. 557. 4 Inſt. 223. Br. Cinque Ports 24. (c) For Records touching them. vide 2 Inſt. 558. (d) 4 Inſt. 223. S. P. (e) Not by Grant of the King or Preſcription, but by an ancient Act of Parliament. Br. Cinque Ports 23. (f) To which they have a lawful Title. 2 Inſt. 20. (g) Not intended of Matters of the Crown, with which they intermeddle as Juſtices of Peace. Cro. Car. 253.

Their Courts.

1. THere are ſeveral Courts within the Cinque Ports; one before the Conſtable of the Caſtle of *Dover*, others within the Ports themſelves, before the Mayors and Jurats; (a) another which is called *Curia quinque Portuum apud* Shepway. 4 *Inſ.* 223.

2. There is a Court of Chancery in the Cinque Ports, but no Original Writs iſſue thence, but it ſerves only to decide (b) Matter of Equity. *Mich.* 15 *Car.* 2. 1 *Sid.* 166. *per Curiam.*

(a) 1 Sid. 166. It is ſaid by Twiſden, that no Body knows where this Court is.

(b) But Proceedings at Law, which they uſe to endorſe upon the Bill.

1 Sid. 356. It is ſaid the great Uſe of their Chancery is to relieve againſt Errors in Proceedings at Law, which they uſe to endorſe upon the Bill.

Juriſdiction.

1. THE Lord Warden hath 2 Juriſdictions, 1. The (a) Authority of an Admiral. 2. To hold Plea by Bill concerning the Guard of the Caſtle, *&c.* according to the Courſe of the Common Law. 2 *Inſ.* 556, 557.

2. *Per* 28 *Edw.* 1. The (b) Conſtable of the Caſtle of *Dover*, ſhall not hold Plea of a Foreign County within the Caſtle Gate, except it touch the Keeping of the Caſtle, nor diſtrain the Inhabitants of the Cinque Ports otherwhere, or otherwiſe than they ought after the Form of their Charter for their old Franchiſes confirmed by (c) *Magna Charta.*

3. (d) The Mayors and Jurats of the ſeveral Cinque Ports have Power to hold Plea, *&c.* and (e) upon their Judgment (f) no Writ of Error lies in *B. R.* but they are examinable by Bill in Nature of a Writ of Error, *Coram domino cuſtode ſeu guardiano quinque portuum apud* (g) *Curiam ſuam de* Shepway. 2 *Inſ.* 557.

4. The Juriſdiction of the Cinque Ports is general as well as to (h) perſonal as (i) real and mixt Actions. 4 *Inſ.* 224.

(a) Exempt from the Admiralty of England. 4 Inſ. 223. 1 Chan. Caſ. 306.

(b) Who is always Warden of the 5 Ports. 2 Inſ. 556.

(c) Cap. 9.

(d) Dier 376. a. S. P. 4 Inſ. 224. S. P.

(e) Secus upon the Judgment of the Court of Shepy. 1 Sid. 356. per Twiſden; and ſo are the Books which ſpeak of a Writ of Error to the Cinque Ports to be intended. (f) Cinque Ports 25. ſeems Con. (g) 1 Sid. 166. It is ſaid per Twiſden, that no Body knows where this Court is; and 356. it is ſaid, if it ſhould be admitted that it is known, yet the Admiral hath not held a Court there a long Time. (h) Otherways in Debt or Treſpaſs tranſitory, Cro. Eliz. 910. per Tanfield arguendo.—Where a Stranger comes within the Cinque Ports and does a tranſitory Treſpaſs, and after goes out of their Juriſdiction, he to whom the Treſpaſs was done, may have an Action at Common Law, elſe he would be without Remedy, for they can call none in who are out of their Juriſdiction, and the Privileges were granted for the Eaſe and Benefit, and not the Prejudice of the Inhabitants. Yelv. 12. per Curiam. 2 Inſ. 557. (i) And they hold Plea of Freehold by Plaint. 1 Sid. 166.

Cinque Ports.

When the King's Writ runs thither.

1. IF a Man is murdered in any of the Cinque Ports, his Wife may have an Appeal againſt the Murderer (a) directed to the Sheriff of the County, and he ſhall execute the Writ (b) within the Cinque Ports, for the Conſtable hath no Juriſdiction to hold Plea thereof, as was reſolved, 42 *Eliz.* between (c) *Waes* and *Brains*, 2 *Inſ.* 557. cited.

(a) Becauſe the King in a Manner is concerned, for if the Plaintiff is Nonſuit, the Defendant ſhall be arraigned at his Suit. Criſp & Virol, Yelv. 13. Cro. Eliz. 911. (b) Bet per Yelv. 13. per Poph. If the Defendant at all Times after continued within the Cinque Ports; ſo that he might be proceeded againſt there, no Appeal would lie elſewhere. (c) Wats and Brains, Cro. Eliz. 694. S. C. adjudged.

2. (d) So if the Defendant is in *Cuſtodia Mariſchalli*, the Appeal may be againſt him by Bill. 2 *Inſ.* 557.

(d) Wats & Brains, S. P. Yelv. 13. cited, Cro. Eliz. 695. 778. adjudged.

3. If a Man hath Judgment in any of the King's Courts, and the Defendant hath no Lands or Goods but in the Cinque Ports, the Plaintiff may have a (e) Writ to the Lord Warden to make Execution. 4 *Inſ.* 223.

(e) The Record muſt be certified into Chancery, and from thence by Mittimus to the Lord Warden to make Execution.

4 If a Man is impriſoned at *Dover* by the Lord Warden, an (f) *Habeas* (g) *Corpus* (h) may iſſue to the Lord Warden, *&c.* 17 *Jac.* (i) *Bourn*'s Caſe, *Cro. Jac.* 543. *per totam Curiam*; for the Privilege that the King's Writ runs not, muſt be intended between (k) Party and Party, for there (l) can be no ſuch Privilege againſt the King.

Hecker & Tirrel, 1 And. 28. 3 Leon. 3. N. Bendl. 46. (f) Where a Prohibition, Mandamus, &c. Cro. Car. 543. Palm. 55. 1 Sid. 355. 4 Inſ. 223. 2 Lev. 86. 3 Keb. 598. Hard. 475.——Where a Certiorari, vide 1 Rol. Abr. 395. Pl. 6. (g) Ad faciendum & recipiend', but if ad reſpondend' a private Perſon Q. 1 Mod. 20. (h) But 1 Sid. 166. it was ſaid by ſome, that it had ſcarce ever been known that a Prohibition or Habeas Corpus went to the Cinque Ports. (i) Palm. 54, 55. 96. S. C. adjudged. (k) A quo minus lies thither. Hard. 475. (l) Cro. Eliz. 911.

(a) Lord Warden.

1. (b) HE is the immediate Officer of the Court, and (c) Writs ſhall be directed to him (d) as in all real Actions, *&c.* for Land within the 5 Ports, 2 *Inſ.* 557.

(a) The Conſtable or Keeper of Dover-Caſtle, is alſo Warden of the Cinque Ports, and the Writs

2. (e) So if a Man pleads a Record within the Cinque Ports, and the other pleads *null tiel*, a Writ ſhall iſſue to the Lord Warden, and he ſhall ſend to the Barons, *viz.* the Major and Jurats to certify him of the Record before them, and he ſhall certify the King's Courts. 4 *Inſ.* 223.

directed to him are, Rex, &c. B. Conſtabulario caſtri ſuo de Dover & Cuſtodi quinque Portuum, &c. 2 Inſ. 556. 4 Inſ. 223. (b) 4 Inſ. 223. S. P. (c) But Writs of Appeal muſt be directed to the Sheriff, Cro. Eliz. 694. becauſe the King is in a Manner concerned. Vid. Yelv. 13. Cro. Eliz. 911. 2 Inſ. 557. (d) But if there be an Indictment before Juſtices of Peace within the Cinque Ports, a Certiorari may be immediately directed to them, for they proceed by Virtue of their Commiſſion, and not their ancient Charters, &c. Cro. Car. 253, 254. but for this, Vide 1 Rol. Abr. 395. Pl. 6. (e) Br. Cinque Ports 26. S P.

3. *Per* 2 *Will. & Mar. Cap.* 7. Whereas the late Lord Wardens claimed a Right of Nomination of one Perſon to each of the Cinque Ports, the 2 ancient Towns, and their Members whom they ought to elect to ſerve in Parliament; it is declared and enacted, That all ſuch Nominations were and are againſt Law, and void.

Pleading.

1. IF a Murder is committed at *Sandwich*, and an Appeal brought by Original in *B. R.* directed to the Sheriff of the County of *Kent*, who brings in the Defendant, who pleads that *Sandwich* is Part of the Cinque Ports *ubi breve domini regis non currit*, &c. and demands Judgment of the Writ, this is a bad Plea; for the Defendant having done the Murder within the Cinque Ports and after flying out, if this Pleading ſhould be allowed (a) there would be a Failure of Juſtice. *Mich.* 44 and 45 *Eliz.* between (b) *Criſp.* and *Worral*, *Yelv.* 12, 13. adjudged.

(a) For the Cinque Ports cannot award Proceſs of Outlawry, for that ought to be proclaimed in open County. Cro. Eliz. 910. per Tanfield arguendo (b) Cro. Eliz. 910. S. C.

2. But if the Defendant by his Plea ſhews, that at the Time of the Murder ſuppoſed, and at all Times after he had been an Inhabitant, and Commorant within the Cinque Ports, and ſo had given Juriſdiction to the Judges there, and ſhewed they might have proceeded, *&c.* it had been a good Plea. *Mich.* 44, 45 *Eliz.* between *Criſp* and *Worral*, *Yelv.* 13. *per Poph.*

Common.

Fol. 396.

(A) Common as Lord.

1. THE Lord of the Manor ſeiſed of the Waſtes in which the Tenants have Common, may (b) feed the Common (c) per mie et per tout of common Right without Diſturbance. 18 E. 3. 43. 18 Aſſ. 4.

2. (d) If the Owner of the Soil (e) grants to another Common ſans number there, (f) yet the Grantee cannot uſe the Common with ſo many Cattle that the Grantor ſhall not have ſufficient Common for his Cattle. (g) 12 H. 8. 2.

(b) In the Original it is patter le Common.

(c) But whether the Lord by Preſcription may be reſtrained to a certain Number, vid. 2 Rol. Abr. 267. Pl. 2. (d) Bridg. 5. S. P. arguend'. 1 Rol. Rep. 365. S. P. per Coke, to which my Lord Chancellor agreed. 1 Sand. 345. S. P. arguend'. Co. Lit. 122. a. S. P. (e) So where a Man claims Common ſans number by Preſcription or Cuſtom, for it is againſt the Nature of the Word Common, to exclude the Owner of the Soil, and it was implied in the firſt Grant, that the Owner of the Soil ſhould take his reaſonable Profit there. Co. Lit. 122. a. but for this vide 2 Rol. Abr. 267. Letter L. (f) And tho' per F. N. B. 125. D. Common ſans Number is not admeaſurable, yet if the Commoner ſurcharges it, the Lord may diſtrain, as may be collected out of that Book. 1 Sand. 345. ſaid arguendo. (g) 1 Rol. Abr. 399. Pl. 5. S. C. Br. Common, 48. S. C.

3. The Lord by Preſcription may agiſt the Cattle of a Stranger in the Common. 30 E. 3. 27.

4. But without Preſcription the Lord (h) cannot agiſt the Cattle of a Stranger in the Common. 30 E. 3. 27.

(h) He may licenſe a Stranger to put in his Cattle, if he leaves ſufficient Common for the Commoners. (2 Mod. 6, 7. and vide 2 Mod 275.

5. If *A.* grants Common to *B.* in a certain Place, *A.* cannot afterwards erect a Rick there; for by the Grant the Cattle of *B.* are to range over the whole Place without Reſtraint, and it ſhall not be in the Power of *A.* to defeat his own Grant. *Hill.* 8 *Jac.* between (i) *Farmer* and *Hunt. Cro. Jac.* 271, 272. adjudged.

(i) Yelv. 201, 202. S. C. adjudged.

(B) Common of the Lord.

Who ſhall have it.

1. IF the Lord alien in Fee the Soil where the Common is to be taken, ſaving his Power of feeding as Lord, he ſhall have Common there as Lord. 18 E. 3. 43. 18 Aſſ. (a) 56. admitted.

2. If the Lord without any Saving, aliens the Soil where the Common is to be taken, his Common as Lord is gone by the Feoffment; but the Alienee of the Soil may feed it as the Lord might have done before, for that this Common is given becauſe it is in his Soil, where the Lord has it, and not becauſe he is Lord, and this Reaſon holds here. Vid. 18 E. 3. 30 b. 43. for it ſeems that they may approve it. 18 Aſſ. (b) 56 b.

(a) I ſuppoſe this is intended fol. 56. but it is Pl. 4.

(b) I ſuppoſe this is intended fol. 56. but it is Pl. 4.

(C) Com-

(C) Common Appendant.

Quid.

(a) Kelw. 129. b. S. P. per Keble. (b) Fitz. Iſſue 143. S. C. (c) Br. Common 16. S. C. Br. Aſſiſe 116. S. C. (d) Fitz. Aſſiſe 134. S.C. (e) 4 Co. 37 a. S. P. 2 Inſ. 85, 86. S. P. 4 Co. 38 a.

1. 'TIs not Common Appendant (a) unleſs it has been Appendant Time out of Mind. (b) 40 E. 3. 10 b. 26 H. 8. 4. 17 E. 3. 26 b. 5 (c) Aſſ. 2.

2. For ſuch Common cannot be created at this Day. 26 H. 8. 4. (d) 5 Aſſ. 9. per Herle.

3. Common Appendant is of Common Right. 26 H. 4.

4. (e) If the Lord of a Manor before the Statute of Quia Emptores terrarum, had made a Feoffment of Parcel of the Manor to hold of him the Feoffee as incident to the Grant ſhould have had Common in the Waſtes of the Lord. Mich. 9 Jac. B. R. per Coke and Foſter.

5. Common Appendant may be through all the Year, ſaving at a certain Time, at what Time the Lord feeds it. 27 E. 3. 86. b.

(D) (a) (b) Quotuplex.

Fol. 397.

(a) There are 4 Kinds of Common, appendant, appurtenant, per cauſe de Vicinage, and in groſs. Co.Lit.122 a. (b) Shack and theCommencement thereof. 7 Co. 5. (c) Fitz. Treſpaſs 85. S. C. Br. Common 13. S. C. (d) Fitz. Treſpaſs 85. S. C. Br. Common 13. S. C. (e) 1 Vent. 21. (f) And if Part only is reſowed he may Common in the Reſidue. Truelock and Rigsby, Yelv. 185. 2 Brownl. 189. (g) Br. Common 13. S. C.

1. A Common Appendant may be upon Condition. (c) 37 H. 6. 34. (it ſeems to be intended limited.)

2. Common Appendant may be unlimited, ſo quamdiu as he pays ſo much, ſo tam diu as he ſhall be living upon ſuch a Houſe to which the Common is appendant. (d) 37 H. 6. 34.

3. So Common Appendant may be to Common (e) after the Corn is ſevered (f) till it is reſowed. 17 E. 3. 26. F. N. 180. E. (g) 37 H. 6. 34.

4. So it may be to Common in the Meadow after the Hay carried till Candlemas. 17 E. 3. 26. 34.

5. So it may be to Common in the Paſture from the Feaſt of St. Auguſtin till All Saints. 17 E. 3. 26 b. 34.

6. So it may be to Common between the ſaid Feaſts before mentioned; and if the Tertenant puts in his Cattle before the Feaſt of St. Auguſtin, then he may Common there alſo from the Invention of the Holy Croſs till All Saints. 17 E. 3. 26. 34.

(h) 1 Sand. 343, 344. S. P. appears.

7. (h) So it may be to Common 2 Years after the Corn cut and carried away till it is reſowed, and every 3d Year per totum annum, 22 Aſſ. 42. admit.

8. A Man may have Common Appendant for 30 Cattle in one Place, and to the ſame Land Common Appendant alſo in another Place for Part of his ſaid Cattle, and ſo may take it where he pleaſes. 17 E. 3. 34 b.

9. A Man may preſcribe for Common in certain Lands from the Time the Corn is ſevered, until the Land ſhall be ſowed again by the Aſſent of the Commoners; for by Law the Owner cannot plow where another hath Common. *Mich.* 29 and 30 *Eliz.* between *Hawks* and *Molineux*, 1 *Leon.* 73. adjudged.

10. So a Man may preſcribe for Paſturage for 2 Geldings in 1000 Acres of Meadow, from the Firſt Day of *May* till the Graſs there be cut and made into Hay; for being in ſo great a Quantity of Land, the going of 2 Geldings there cannot ſo defoul or debruiſe it, but that Hay may well be made thereof. *Hill.* 43 *Eliz.* between Sir *John Thomas* and *Laſſels. Cro. Jac.* 27. adjudged.

(E) To what it ſhall be Appendant.

1. IT ought to be Appendant to arable Land. (a) 37 H. 6. 34. 26 H. 8. 4.
2. Not to other Land which is arable. 26 H. 8. 4. not to a Houſe. 26 H. 8. 4.
3. It cannot be Appendant to Land, which is approved within Time of Memory out of the Waſte of the Lord. (b) 5 Aſſ. 2.
4. Common of Turbary cannot be Appendant to Land. (c) 5 Aſſ. 9 Ad.

(a) Br. Common 13. S. C.
(b) Br. Common 16. S. C. Br. Aſſiſe 116. S. C.
(c) Fitz. Aſſiſe 134. S. C.

(F) For what Cattle.

1. IT ought to be for ſuch Cattle as (a) plow his Land (to which it is Appendant as it ſeems) and compaſter it, Scilicet Horſes and Oxen to plow the Land, and Cows and Sheep to compaſter it. (b) 37 H. 6. 34 10 E. 4. 10 b.
2. (c) But he ſhall not uſe it with Goats, Geeſe, or ſuch like, for theſe are not neceſſary to do ut Supra. (d) 37 H. 6. 34.
3. And therefore a Preſcription to have Common Appendant for all manner of Cattle is not good, becauſe it comprehends Goats, Geeſe, and ſuch like; but this is Common Appurtenant. (e) 37 H. 6. 34 b per Curiam, contra (f) 4 H. 6. 6. b.

(a) In the Original it is Gaingeront.
(b) Br. Common 13. S. C.
(c) Co. Lit. 122. a. S. P.
(d) Br. Common 13. S. C.
(e) Br. Common 13. S. C.
(f) This in the Original is miſprinted (as here, and I ſuppoſe ſhould be 14 H. 6. 6 b. which vide Br. Common 14. Fitz. Treſpaſs 33. 1 Rol. Abr. 401. Pl. 2.

(G) Commoner.

For how many Cattle.

1. THE Common is admeaſurable according to the Quality and Quantity of the Freehold to which he claims to have this Common Appendant. (a) 37 H. 6. 34.
2. Scilicet for all thoſe which are (b) levant and couchant upon the Land. 10 E. 4. (c) 15 E. 4. 32 b. 11 H. 6. 12.
3. He that claims Common by Force of a Preſcription as an Inhabitant of a Town, ſhall have no other Cattle to Common there, but what are levant and couchant within the ſame Town. (d) 15 E. 4. 32 b. Curia.
4. Common Appendant may by Uſage be limited to any certain Number of Cattle. 17 E. 3. 27. 34 b.

(a) Br. Common 13. S. C.
Fol. 398.
(b) What Cattle ſhall be ſaid levant and couchant. Noy 30. dubitatur, and it was there ſaid, that Coke Ch. Juſtice in his Circuit in Norfolk ſaid, ſo many Cattle as the Land, to which the Common is Appurtenant, may maintain in the Winter, ſo many ſhall be ſaid levant and couchant. vid. 1 Vent. 54.—And ſo many Beaſts may be ſaid levant and couchant upon a Houſe as may be tied there, and are uſually to be maintained in the Houſe. 2 Brownl. 101.—But per Vaugh. 253. in a common Intent Cattle cannot be levant upon a Meſſuage only. (c) Br. Common 8. S. C. (d) Br. Common 8. S. C.

(H) By the Cattle of whom it may be uſed.

1. Generally the Commoner cannot uſe the Common but with his own proper Cattle. (a) 11 H. 6. 22. b. (b) 22 Aſſ. 84.

2. If the Commoner hath not any Cattle to manure the Land, he may borrow other Cattle to manure it, and may uſe the Common with them, for by the Loan they are in a manner made his own Cattle. (c) 45 E. 3. 26. (d) 11 H. 6. 22. b. 11. b. (e) 14 H. 6. 6. b. (f) 22 Aſſ. 84. Quære 4 H. 4. 4. b.

3. He cannot agiſt the Cattle of a Stranger. (g) 11 H. 6. 22. b. 11. b. (h) 22 Aſſ. 84.

(a) Fitz. Common 3. S. C. Br. 47. S. C. (b) Br. Common 40. Fitz. Aſſiſe 228. S. C. (c) Br. Common 5. S. C. Br. Seiſin 5. S. C.

(d) Fitz. Common 3. S. C. Br. 47. S. C. (e) Fitz. Treſpaſs 33. S. C. Br. Common 14. S. C. (f) Fitz. Aſſiſe 228. S. C. Br. Common 40. S. C. (g) Fitz. Common 3. S. C. Br. 47. S. C. (h) Fitz. Aſſiſe 228. S. C. Br. Common 40. S. C.

4. If he takes the Cattle of a Stranger to fold, and folds them accordingly, being levant and couchant upon the Land, he may uſe the Common with theſe Cattle, for he has a ſpecial Property in them for the Time. Mich. 10 Car. B. R. between Jaſon and Hellyard, per Curiam, upon Evidence at the Bar.

(I) (a) Common ſans Number.

(a) Where grantable over or not, vid. 2 Rol. Abr. 46. Pl. 15, 16. (b) Poſt. Pl. 5. S. P.

1. (b) If a Man as an Inhabitant of a Town claims Common for all manner of Cattle in a Place, and claims the Common by reaſon that he is an Inhabitant there; he ſhall have no other Beaſts to Common there but thoſe that are levant.

2. A Man may preſcribe to have Common for all manner of Cattle by reaſon of his Perſon. (c) 15 E. 4. 33.

(c) Br. Common 8. S. C.

3. If a Man claims Common by Preſcription for all manner of commonable Cattle in the Land of another, as belonging to a Tenement; this is a void Preſcription, (d) becauſe he does not ſay that it is for Cattle levant and couchant upon the Land to which he claims it to be Appurtenant, for a Man cannot have Common ſans Number Appurtenant to Land; and when he claims the Common for all Cattle Commonable, and does not ſay for Cattle levant and couchant upon the Tenement, this ſhall be intended Common ſans Number according to the Words, (e) for there is not any Thing to limit it, when he does not ſay for Cattle levant and couchant. P. 16 Car. B. R. between Cobham and White, adjudged in a Writ of Error upon a Judgment in Windſor Court, and the Judgment there given reverſed for this Cauſe, the Lord Brampſton only being in Court. Intratur M. 14 Car. Rot. 403, 404.

(d) It is naught upon a general Demurrer, but is helpt after Verdict. Cheadle and Biller. 1 Lev. 196. 1 Sid. 313, 314. 2 Keb. 108, 120. Mellor and Spateman. 1 Sand. 346. 1 Mod. 6, 7. & vide 2 Sid. 87. 3 Mod. 162. Co. Ent. 656. Poph. 201. 1 Vent. 164, 165. and ſo. 1 Sand. 227. adjudged. 1 Mod. 75. Cro. Jac. 44.

4. If a Man claims Common for all manner of Cattle in a Place as an Inhabitant within a Town, and claims the Common there, by reaſon that he is an Inhabitant there, he ſhall have no other Beaſts to Common there, but thoſe which are levant and couchant in the ſame Town; for there is no Diverſity between this and Common Appendant. (f) 15 E. 4. 32. b.

(e) But if a Man preſcribes for Common for a certain Number of Cattle, as belonging to certain Land, he need not ſay levant and couchant. 2 Mod. 185. vide the Diverſity adjudged, and 1 Rol. Abr. 401. Pl. 4. 1 Vent. 163. 1 Mod. 75. Cro. Jac. 27. (f) Br. Common 8. S. C.

5. If a Man grants Common ſans Number, the Grantee cannot put in ſo many Cattle; but ſo that the Grantor may have ſufficient Common in the ſame Land. (g) 12 H. 8. 2. per Newport. Fol. 399.

(g) 1 Rol. Abr. 396. Pl. 2. S. C. 1 Rol. Abr. 398. Pl. 3. Br. Common 48. S. C.

6. If a Corporation may preſcribe that every Burgeſs of the ſaid Corporation hath Time out of Mind had Common in Groſs ſans Number in a certain Place for all their Cattle. *Mich.* 21 *Car.* 2. between (h) *Mellor* and *Spateman.* 1 *Sand.* 345, 346. *Dubitatur* and *Keeling* Chief Juſtice (i) poſitively ſaid there could be no Common in Groſs ſans Number.

(h) 1 Mod. 6. 7. S. C. and S. P. dubitatur; But 2 Jon. 115.

2 Lev. 246. in an Action between the ſame Parties for a Diſturbance in the Uſage of the Common, it ſeems to have been adjudged a good Preſcription. And vid. Hard. 118. (i) But vid. Co. Lit. 122. a. this is one of the Commons there enumerated; and 3 Mod. 290. arguendo admitted, but ſaid the Preſcription muſt not be laid to be ad libitum ſuum. And vid. March 83.

(K) (a) Common by reaſon of Vicinage.

(a) For Shack in the County of Norf. (which is a ſort of Common pur cauſe de Vicinage) and the Commencement thereof, vide 7 Co. 5.

1. (b) If there be Common by reaſon of Vicinage between 2 Manors Time out of Mind, &c. yet one may incloſe againſt the other. Co. Lit. 122.

(b) 4 Co. 38. b. S. P.

2. If there be Common pur cauſe de Vicinage between 2 Manors, and the Lord of one Manor incloſes, yet he ſhall not bind a Copyholder of the ſame Manor, but that he may have Common pur cauſe de Vicinage as he had before. Mich. 13 Jac. Banco per Hubert.

3. If there be Common pur cauſe de Vicinage between 2 Manors, and the Lord of one Manor incloſes any Part of his Common, the Common pur cauſe de Vicinage is gone. M. 13 Ja. Banco per Hubert.

4. (c) Where there is Common pur cauſe de Vicinage between 2, yet one cannot put his Cattle into the Land of the other, but they ought to eſcape there of themſelves by reaſon of the Vicinity; for this is but an Excuſe of the Treſpaſs. Co. Litt. 122.

(c) 4 Co. 38. a. S. P.

5. Every Common pur cauſe de Vicinage is a Common Appendant. 7 E. 4. 26. per Lit. Br. Commoner 29.

6. (d) A Man need not preſcribe in a Common pur cauſe de Vicinage, but it is ſufficient to ſay (e) that he and all thoſe whoſe Eſtate, &c. have uſed to intercommon cauſa Vicinagii, becauſe this is Common Appendant, antient Entry, Treſpaſs in Common 11. (but Quære this,) and Vide 13 H. 7. 13. b. a Preſcription for Common pur cauſe de Vicinage.

(d) Poph. 201. S. P. agreed per Curiam.

(e) That he, and all the Occupiers of, &c. have had, &c. and whether this was ſufficiently laid. Poph. 201. dubitatur.

7. If there be *Common pur cauſe de Vicinage* between the Towns of *A.* and *B.* and *A.* hath 50 Acres of Common, and *B.* hath 100 Acres of Common, the Inhabitants of *A.* cannot put more Cattle into their Common, than the 50 Acres will depaſture, without any regard to the Common of *B.* for the original Cauſe of this Common was not the Profit of either Town, but to prevent Suits in open Countries for reciprocal Eſcapes from one Field into the other. *Hill.* 27 *Eliz.* in the Caſe of Sir *Miles Corbet.* 7 *Co.* 5. b. reſolved *per Curiam.*

(L) Common Appurtenant.

1. If a Man hath Time out of Mind had Common of Eſtovers in a certain Place, to be burnt in ſuch a Houſe, and to mend the old Houſes and old Hedges; this is not Common Appendant, but Appurtenant. 11 H. 6. 11. b.

2. If

2. If a Man and his Anceſtors, and all thoſe Whoſe Eſtate he hath in a Houſe have had Common for 2 Beaſts in a certain Place; this is not Appendant, but Appurtenant. 11 H. 6. 12.

3. If a Man bargains and ſells Blackacre to B. and after, before the Deed is inrolled, by another Deed grants a Common to the ſaid B. for all his Cattle which ſhould manure and (a) eat the ſaid Blackacre, which he hath bargained and ſold to the ſaid B. or the which he hath mentioned to be bargained and ſold, and after the Deed is inrolled, this is a good Common Appurtenant to the ſaid Blackacre, altho' the Grantee had nothing in the ſaid Land at the Time of the Grant; and tho' it be admitted that it ſhall not relate to ſettle the Eſtate in him ab initio, in as much as this has Reference to the Bargain and Sale, and to the Eſtate which he had by Force thereof. Mich. 15 Jac. B. R. between Gawen and Stacy, agreed per Curiam.

(a) In the Original it is depaſceront.

4. So if a Man grants a Common to another for all his Cattle, which ſhould be levant and couchant upon the Land which he ſhould purchaſe (*) within a Month after, and after he purchaſes certain Land, this is a good Common Appurtenant to this Land, tho' he had nothing in this Land at the Time of the Grant, in as much as the Grant had Reference to this which he ſhould purchaſe; for it is not neceſſary that he ſhould have the Land at the Time of the Grant. Mich. 15 Jac. B. R. between Gawen and Stacy agreed, per Curiam.

(*) Fol. 400.

5. So if a Man bargains and ſells Blackacre to B. and after before the Deed is inrolled, by another Deed grants a Common to the ſaid B. for all the Cattle which ſhould manure and (b) eat the ſaid Blackacre, and after the Deed is inrolled this ſhall be a good Common Appurtenant to the ſaid Blackacre, tho' the Grant has no Reference to the ſaid Bargain and Sale, in as much as the Grantee had a Poſſibility and Inception of an Eſtate, and an Uſe in the ſaid Acre at the Time of the Grant, and it ſeems that this ſhall relate for the Poſſeſſion ſufficiently to ſupport this Grant, for he need not have ſo full an Intereſt in this Land to annex the Common to it. Mich. 15 Jac. B. R. between Gawen and Stacy adjudged per totam Curiam, upon a ſpecial Verdict, and the Court ſaid it ſhould be ſo without any Help of Relation.

(b) In the Original it is depaſceront.

6. If a Man grants to B. Common for all his Cattle which manure Blackacre, where he has nothing in Blackacre, and after he purchaſes it, this ſhall be a good Common Appurtenant to this Acre, tho' he has nothing in it at the Time, nor the Grant hath Reference to any Purchaſe after, for this ſhall be a good Grant upon a Contingent, ſcilicet if he purchaſes the Land; ſo that this is as much as if he had ſaid that he ſhould have the Common quandocunq; he ſhall have the Land. Mich. 15 Jac B. R. between Gawen and Stacy, per Curiam, and the principal Caſe was adjudged upon this Reaſon. (But Quære in as much as the Grant had no Reference to a future Purchaſe.)

7. In 2 H. 4. A. was ſeiſed in Fee of a Waſte called Whittenhall-Heath in C. and the Prior of Stone was ſeiſed in Fee of certain Meſſuages, Lands, Meadows and Paſture in S. and they being ſo ſeiſed, A. by Deed dated 2 H. 4. grants to the ſaid Prior and Convent Common of Paſture, pro ſe & omnibus tenentibus ſuis in S. prædict' (Scilicet Stallington in Comitatu Staffordiæ) cum omnimodis animalibus ſuis omni tempore anni in Whittenhall-Heath præd' habend'. to them and their Succeſſors, and Tenants in Fee, this is a Common Appurtenant to the ſaid Land which the Prior had in S. aforeſaid, for this cannot be a Common ſans Number, and therefore ought to be interpreted a Common Appurtenant to the ſaid Land by a reaſonable Conſtruction, in as much as it is granted for him and his Succeſſors and Tenants there, which refers to the Land. Mich. 13 Car. B. R. between (c) Sacheverel and Porter, per totam Curiam, adjudged without Difficulty upon a ſpecial Verdict. Intratur Trin. 11 Car. Rot. 324. tho' it was objected by myſelf, that it is not found that by Uſage it hath been ſo interpreted after the Grant.

(c) Cro. Car. 482. S. C. 1 Jon. 397. S. C. adjudged per totam Curiam.

8. If a Man grants to another quandam aſſartam, cum Communia turbariæ quantum pertinet ad duas bovatas terræ cum pertinentiis in D. this is a Common in Groſs, being a Grant de Novo, not by Preſcription, and not Appurtenant to the ſaid Aſſart. (d) 5 Aſſ. 9. adjudged.

(d) Fitz. Aſſiſe 134. S. C.

8. If *A.* as Appurtenant to a certain Meſſuage, and 20 Acres of Land hath Common in the Lands of *B.* and after *B.* enſeoffs *A.* of the ſaid Lands in which, *&c. per quod* the Common is extinguiſhed; and after *A.* leaſes to *B.* the ſaid Meſſuage and 20 Acres of Land, with all Commons, Profits, and Commodities thereto appertaining, *vel occupat' vel uſitat' cum præd' Meſſuagio*, this is a good Grant of a new Common for the Time; for tho' it were not Common in the Hands of the Leſſor, yet it is *quaſi Common* uſed therewith, and altho' (d) it be not the ſame Comnon as was uſed before, yet it is the like Common. *Trin.* 39 *Eliz.* between *Bradſhaw* and *Eyr*, *Cro. Eliz.* 570. by *Gaudy* and *Fenner*, (*Popb.* and *Clinch abſentibus*) but yet becauſe it was not there averred that this Common was therewith uſed at the Time of the Leaſe, it was adjudged againſt the Defendant, who claimed the Common. *Vide.*

(d) So if a Copyhold Meſſuage Eſcheats, to which before Common in the Demeſns of the Lord did belong, and the Lord by Deed grants it per nomina Meſſuag', &c. & quarumcunq; dicto Meſſuag' ſpectant, &c. vel cum eod' Meſſuag' uſitat' Coleridge and Kingſwell. Cro. Eliz. 794. 2 And. 168.

(M) Common Appurtenant.

Fol. 401.

How it may be.

1. (a) If a Man preſcribes to have Common of (b) Eſtovers to his Freehold ſcilicet a Houſe, (c) he cannot (d) preſcribe to ſell the Wood, for this cannot be Appurtenant. 11 H. 6. 11 b.

(a) Noy 145. S. P. adjudged.

2. A Man may preſcribe to have Common Appurtenant to a Manor, for all Manner of Cattle. (e) 14 H. 6. 6 b. it ſeems to be intended of Common Appurtenant, but there this is called Appendant, which cannot be.

(b) So a Man may preſcribe to have as much Turf yearly as two Men can dig in one Day. 1 Lev. 231. (c) But muſt ſhew they are to be burnt or ſpent in the Houſe. 1 Sid 354. 1 Lev. 231. (d) But may to build new Houſes. Cro. Jac. 25. per Curiam contra Williams. (e) Fitz. Treſpaſs 33. S. C. Br. Common 14. S. C. 1 Rol. Abr. 397, Pl. 3.

3. So a Man may preſcribe to have Common Appurtenant to his Freehold for all Manner of Cattle. (f) 15 Aſſ. 8. but this is there called Appendant, but it ſeems to be intended Appurtenant.

(f) Br. Common 41. S. C.

4. (g) A Man may preſcribe that he, and all thoſe whoſe Eſtate he hath in the Manor of D. have uſed to have a Foldcourſe, ſcilicet, Common of Paſture for Sheep not exceeding 300 in a Field (ſcilicet Canefield, as the Caſe was in Norfolk) as Appurtenant to the ſaid Manor, tho' he does not preſcribe to have them Levant and Couchant upon the ſaid Manor, there being a certain Number limited. Mich. 11 Car. B. R. between (h) Day & Spooner, in a Writ of Error agreed per Curiam Intratur Mich. 6 Car. Rot. 183. and H. 11 Car. adjudged accordingly.

(g) For this Point vide 1 Rol. Abr. 398. Pl. 3. Margine.

(h) Cro. Car. 432. S. C. but S. P. does not appear. 1 Jon. 375. S. C. but S. P. does not appear. 1 Rol. Abr. 432. Pl. 3. S. C.

5. A Man may preſcribe to have Common Appurtenant for his Cattle not commonable; as Hogs, Goats, and ſuch like. Co. Lit. 122.

6. A Man may preſcribe to have Common Appurtenant to his Freehold, for all Manner of Cattle, at every Season in the Year. (i) 25 Aſſ. 8. adjudged.

(i) Br. Common 41. S. C.

7. A Man may preſcribe to have Common Appurtenant for Hogs Levant and Couchant upon ſuch Land. Mich. 5 Jac. B. per Curiam.

(N) Common Appurtenant.

The Uſer.

How it ſhall be uſed.

With what Cattle.

2. He that hath Common Appurtenant cannot agiſt the Cattle of a Stranger. 30 E. 3. 27.

2. He that hath Common Appurtenant may borrow Sheep of another to compeſter his Land, and with theſe he may uſe the Common (a) 14 H. 6. 6 b. It ſeems it is intended Common Appurtenant, tho' it is called Appendant.

3. A Man may uſe a Common Appurtenant to his Manor with Cattle which are for his Houſhold. (b) 14 H. 6. 6 b. the Book is of Common Appendant, but it ſeems to be intended by the Book, Appurtenant.

4. But he cannot uſe the Common with Cattle which are to ſell, (c) 14 H. 6. 6 b. as it ſeems the Book is intended.

(a) Fitz. Treſpaſs 33. S. C. Br. Common 14. S. C.
(b) Br. Common 14. S. C.
(c) Br. Common 14. S. C.

(O) Common in Groſs, how it may begin.

1. (a) Common Appendant cannot be made Common in Groſs, for this is for Cattle Levant upon the Land to which, &c. and therefore it cannot be ſevered without Extinguiſhment. 9 E. 4. 39. 26 H. 8 3.

2. So Common Appurtenant for Cattle (b) Levant and Couchant upon the Land cannot be made in Groſs for the aforeſaid Cauſe. Nevil 384. (c) 19 H. 6. 33 b. Paſc. 1 Jac. B. between (d) Drury & Rant adjudged, Contra 26 H. 84.

(a) Cro. Car. 542. S. P. arguendo, viz. Fol. 402. That it may not by Grant be ſevered from the Soil. Cro. Jac. 15. could not by Levant, &c.

(b) But Common Appurtenant for a certain Number of Beaſts, may be granted over. per Curiam. (c) Br. Common 33. S. C. (d) Cro. Jac. 15. S. C. adjudged, viz. That it Grant be ſevered from the Land, becauſe he had it only ſub modo, viz for Beaſts Le-

3. If A. and all thoſe whoſe Eſtate he hath in the Manor of D. have had Time out of Mind a Foldcourſe, ſcilicet Common of Paſture for any Number of Sheep not exceeding 300 in a certain Field as Appurtenant to the ſaid Manor, he may grant over this Foldcourſe to another, and ſo make it in Groſs, becauſe the Common is for a certain Number, and by the Preſcription the Sheep are not to be Levant and Couchant upon the Manor; but it is a Common for ſo many Sheep Appurtenant to the Manor which may be ſevered from the Manor as well as an Advowſon, without any Prejudice to the Owner of the Land where the Common is to be taken. Mich 11 Car. B. R. between (e) Day & Spooner, in a Writ of Error upon a Judgment in B. R. per Curiam, præter Barkly, who ſeemed to doubt of this. Intratur Mich. 6 Car. Rot. 183. but there the Caſe was, whether it might be granted over with Parcel of the Manor, and ſo it ſhould be Appurtenant to this Parcel, and it is adjudged in Banco, that it ſhould paſs as Appurtenant to this Parcel, and ſo held per Curiam in B. R. præter Barkly, who doubted of this, but afterwards, Hill. 11 Car. it was ſo adjudged by the Aſſent of Barkly and all the Court, and Judgment affirmed accordingly.

(e) Cro. Car. 432, 433. S. C. adjudged and affirmed accordingly. 1 Jon. 375. S. C. adjudged and affirmed accordingly. 1 Rol. Abr. 432. Pl. 4. S. C.

(P) For (a) what Cattle.

1. A Man may preſcribe to have it for all Manner of Cattle. 15 E. 4. 33.

2. The Grantee of Common for a certain Number of Cattle cannot Common with the Cattle of a Stranger. 18 E. 4. 14. b.

(a) If the Lord licences a Stranger ad ponend' averia into the Common, this ſhall be intended of Commonable Cattle only, and not of Hogs. 2 Mod. 7. per North Chief Juſtice.—But if the Licence be for a particular Time, it is otherways. 2 Mod. 7. per North.

(Q) By the Cattle of whom.

1. IF a Commoner hath no Cattle he cannot agiſt the Cattle of others to uſe the Common. (b) 45 E. 3. 25 b. Curia (c) 22 Aſſ. 84.

2. So he cannot command his Tenants at Will to uſe it with their Cattle in his Name. (d) 45 E. 3. 25 b. (e) 22 Aſſ. 84. ſame Caſe.

3. But if he borrows other Cattle to manure his Land, he may uſe the Common with them, for they are in a manner his Cattle by the Borrowing, and the Cattle which manure the Land of Right, ought to have Common. (f) 45 E. 3. 25 b. (g) 22 Aſſ. 84.

4. He that hath Common in Groſs for a certain Number of Cattle, may put in the Cattle of a Stranger and uſe the Common with them. (h) 11 H. 6. 22 b.

5. He that hath Common in Groſs ſans Number, may put in the Cattle of another Man, and uſe the Common with them. (i) 11 H. 6. 22 b.

(b) Br. Common 5. S. C. Br. Seiſin 5. S. C.
(c) Br. Common 40. S. C. Fitz. Aſſiſe, 228. S. C.
(d) Br. Common 5. S. C. Br. Seiſin 5. S. C.
(e) Br. Common 40. S. C. Fitz. Aſſiſe 228. S. C.
(f) Br. Common 5. S. C. Br. Seiſin 5. S. C. (g) Fitz. Aſſiſe 228. S. C. Br. Common 40. S. C. (h) Fitz. Common 3. S. C. Br. 47. S. C. (i) Fitz. Common 3. S. C. Br. 47. S. C.

(R) Common in Groſs.

Which ſhall be ſaid Common in Groſs.

1. (a) IF a Man at all Times hath uſed Common with his Cattle Couchant and Levant in certain Places, and not with other Cattle (b) coming; this (*) is Common Appendant to this Place, and not in Groſs. (c) 22 Aſſ. 36. Curia.

(a) 13 Co 66. per Curiam, S. P.
(*) Fol. 403.
(b) In the Original it is Veignants. (c) Br. Common 23. S. C.

(S) Common in Groſs.

What ſhall be a good Grant.

1. IF I grant Common to another for Years, and do not declare in what Place he ſhall have it, this is void. (a) 9 H. 6. 36.

2. If a Man grants to another Common, ubicunq; averia ſua ierint, this is a good Grant by Averment in what Place his Cattle fed at the Time of the Grant, before or after. (b) 9 H. 6. 36.

(a) Br. Grant 5. S. C.
(b) Br. Grant 5. S. C. Fitz. Common 2. S. C. Br. Common 3. S. C.

3. But

3. But without ſuch Averment this is no good Grant. 9 H. 6. 36.

4. If I grant Common to another in my Land every Year that it lies freſh, this is good tho' it be at my Will, whether he ſhall have any Profit, for I may ſow it. 17 Ed. 3. (d)

(d) I ſuppoſe this ſhould be 17 Ed. 3. 34 b.

5. If A. grants Common to B. in certain Land for all his Cattle which ſhall be Levant and Couchant upon Blackare, where B. hath nothing in Blackacre, ſo that it cannot be Appurtenant, yet this ſhall not be a Common in Groſs, becauſe the Intention and Limitation of the Grant is to Cattle Levant and Couchant. Trin. 15 Jac. B. R. between Gawen & Stacy, agreed at the Bar.

6. If A. grants to B. Common in certain Lands for all his Cattle which ſhall manure and (e) feed in Blackare, whereas B. hath nothing in Blackacre, by which this cannot take Effect as a Common Appurtenant, yet this ſhall not take Effect as a Common in Groſs; in as much as it is expreſly limited to ſuch Cattle which manure and feed in the ſaid Land.

(e) In the Original it is Compaſcent.

7 Trin. 15 Jac. B. R. between Gawen and & Stacy, the Court ſeemed econtra; but Mich. 15 Jac. they ſeemed to waive this Opinion, and Croke held expreſly econtra.

8. A Man may grant to another Common in a Place for all manner of Cattle, and in another Place for 10 Beaſts; and ſo the Grantee may put the 10 Beaſts in either of the 2 Places. 17 Ed. 3. 34 b.

(T) Common in Groſs upon a Grant.

In what Place it ſhall be taken.

1. If a Man grants to me Common for my Cattle ubicunq; averia ſua ierint, if the Cattle of the Grantor did never feed in any Place before the Grant, or at the Time of the Grant or after, the Grantee ſhall have no Benefit by the Grant. (a) 9 H. 6. 36.

(a) Br. Common 5. S. C.

2. If a Man grants Common to another ubicunq; averia ſua ierint, and after he Occupies and Manures 100 Acres of Land with his Cattle, and after (b) he becomes ſo Poor that he hath no Cattle, yet the Grantee ſhall have the Common in the 100 Acres. (c) 9 H. 6. 36. Curia.

(b) In the Original it is, il eſt de ey pettit power que il nad, &c.

(c) Br. Common 5. S. C.

3. If a Man grants Common to me for my Cattle ubicunq; averia ſua ierint, if the Grantor at the Time of the Grant or after feeds his Cattle in any Place, the Grantee may Common there alſo. 9 H. 6. 36.

4. Upon ſuch Grant of Common ubicunq; averia of the Grantor ierint, if the Grantor puts his Cattle in his Garden, or in his Corn, the Grantee may put his Cattle there alſo. (d) 9 H. 6. 36.

(d) Br. Common 5. S. C.

Fol. 404.

5. If the Grant be of Common ubicunq; averia ſua ierint, and the Grantor dies; Quære, whether the Grantee ſhall have Common after his Death. 9 H. 6. 36.

6. If one Man grants Common to another for all his Cattle (e) throughout his Manor, yet he cannot Common in the Garden of the Grantor Parcel of the Manor, but only in ſuch Places where a Man of common Right ought to Common. (f) 9 H. 6. 36.

(e) But upon ſuch Grant, he may Common in any reaſonable Part of the Manner, tho' not Waſte or Common before. Cro. Car. 599. adjudged; for by the Grant there is no Reſtraint to the Waſte or Commons. (f) Br. Common 5. S. C.

(U) Common in Groſs by Grant.

In what Time it is to be taken.

1. If a Man grants Common to me quandocunq; averia ſua ierint, the Grantee ſhall not have Common, but when the Cattle of the Grantor are in the Common. (a) 9 H. 6. 36. Curia.

(a) Fitz. Common 2. S. C.

Br. 3. S. C. Br. Grant 5. S. C. Hob. 40. S. C. cited and agreed, becauſe modus donationis. Cro. Car. 599. S. C. cited, and per Berkly, the Clauſe of quandocunq; &c. is void, becauſe it reſtrains all the Effect of the Grant; but Croke contra for modus & Conventio, &c. and is not intendable the Grantor will forbear to put in his own Cattle, to defraud the Grantee of his Common. 1 Rep. 87. S. C. cited.

(X) Common.

(a) Seiſin.

1. A Tortious Uſer of Common cannot put him in Seiſin. (b) 45 Ed. 3. 25. b. 26 (c) 22 Aſſ. 84.

2. As the Commoner cannot gain Seiſin by Cattle which he agiſts for ſuch Uſer is not lawful. (*) 45 Ed. 3. 25. b. (d) 22 Aſſ. 84. Curia.

3. So he cannot gain Seiſin by the Uſer of his Tenants at Will, being his Servants with their Cattle by his Command in his Name, for their Uſer with their Cattle is tortious. (e) 45 Ed. 3. 25. b. (f) 22 Aſſ. 84. ſame Caſe.

4. But if the Commoner hath no Cattle, and ſo takes the Cattle of another, and the Tertenant delivers Seiſin to the Commoner, and is preſent when the Cattle are put in, and he aſſents to the Uſer and putting in, or commands him ſo to do; this is a good Seiſin. 45 Ed. 3. 26. (g) 22 Aſſ. 84. per Thorpe.

5. So if the Commoner hath no Cattle, he may take Seiſin by the Cattle of another, and chaſe them back preſently, for the Continuance is tortious, and this is a good Seiſin. (h) 45 Ed. 3. 26. per Thorpe; but Broo Commoner, 51, Quære of this (and it ſeems not to be Law, for the putting them in without Continuance is tortious. (i) 22 Aſſ. 84. per Thorpe.

6. If a Man hath Common ſans Number, if he hath been ſeiſed of this with Cattle without any certain Number, as 20, 30, or 40, this is a good Seiſin. 11 H. 6. 23.

7. If a Man recovers a Common, and the Sheriff upon a Writ of Seiſin comes to the Place, and by Parol delivers to him Seiſin of the Common; this is a good Seiſin of Common to have an Aſſiſe. (k) 22 Aſſ. 84. per Thorpe.

(a) For Seiſin in general, vide 2 Rol. Abr. 463. and of what Seiſin an Aſſiſe lies, vide 1 Rol. Abr. 270, 271.
(b) Br. Common. 5. S. C. Br. Seiſin 5. S. C.
(c) Br. Common 40. S. C. Br. Seiſin. 36. S. C. Fitz. Aſſiſe 228.
(*) Br. Common 5. S. C. Br. Seiſin 5. S. C.
(d) Fitz. Aſſiſe 228. S. C. Br. Common 40. S. C.
(e) Br. Common 5. S. C. Br. Seiſin 5. S. C.
(f) Br. Common 40. S. C. Fitz. Aſſiſe 228.
(g) Br. Seiſin 36. S. C. (h) Br. Seiſin 5. S. C. Br. Common 5. S. C. (i) Br. Common 40. S. C. Br. Seiſin 36. S. C. Fitz. 228. S. C. (k) Br. Seiſin 36. S. C. Fitz. Aſſiſe 228. S. C.

(Y) In what Caſes the Seiſin of one ſhall ſerve for others.

1. The Seiſin of the Father is not ſufficient for the Heir. (a) 45 Ed. 3. 25. (b) 22 Aſſ. 84.

2. The Seiſin of a Leſſee for Years of a Common, is ſufficient for him in Reverſion. 45 Ed. 3. 26. (c) 22 Aſſ. 84.

(a) Br. Seiſin 5. S. C.
(b) Br. Seiſin 36. S. C. Fitz. Aſſize 228. S. C. (c) Fitz. Aſſiſe 228. S. C. Br. Seiſin 36. S. C.

Fol. 405.

Commoner.

(A) (a) What (b) Things a Commoner may do.

1. (c) **If a Lord of a Common makes Cony burrows in the Common, and stores them with Conies, tho' he hath no Warren, (d) yet the Commoners cannot justify the killing the Conies, that they may not increase to the Prejudice of the Common.** Mich. 5 Jac. B. R. **between** (e) Hodson **and** Grissell **adjudged.**

2. (f) **If the Lord of a Common makes Cony-burrows in the Common, and stores them with Conies, by which the Commoners cannot have sufficient Common, yet the Commoners cannot justify the killing the Conies,** (g) **but ought to bring their Assise or** (h) **Aaion** (i) **against the Lord,** for they cannot be their own Judges, dubitatur. Trin. 11 Jac. B. R. **between** (k) Carrel **Plaintiff, and** Park **and** Baker **Defendants.** Mich. 5 Jac. B. R. **between** (l) Hodson **and** Grissell, per Curiam.

3. (m) **So altho' the Sheep of the** Commoners **are killed by falling into the said Coney burrows so made by the Lord; yet they cannot justify the Digging of the Land, and stopping them for the Cause aforesaid.** Trin. (n) 11 Jac. B. R. dubitatur.

4. **If J. S. hath Land adjoining to the Land of J. D. in which J. N. hath** Common of Pasture, **and J. S. makes Coney burrows in his Land, and stores them with Conies, which come into the Land of J. D.** (o) **J. N. who hath the** Common of Pasture, **cannot there kill the Conies, because he hath nothing to do there but take the Grass with the Mouth of his Cattle.** Mich. 43, 44 Eliz. B. R. **between** (p) Bellowe **and** Longhdon **adjudged.** Mich. 10 Car. B. R. **between** (q) Eversly **and** Wilkinson **adjudged; such a** Commoner **brought an** Action upon the Case **against J. S. who without any lawful Grant or Prescription had stored the Land adjoining with Conies, by which the Conies came into the Land where he had** Common, per quod **he lost his** Common, **and adjudged that the Aaion does not lie, and a Judgment given in** Banco, **reversed accordingly in this Case in a** Writ of Error, **and the Court gave the Reason because the** Commoner **may kill the Conies.** Intratur Hill. 8 Car. B. R. Rot. 302.

5. (s) **A** Commoner **may justify the Taking of the Cattle of a Stranger Damage-feasant upon the** Common (t) **in his own Name for the Interest which he has in the** Common. (u) 15 H. 7. 2. b. 12, 13. b. per Curiam. 14 H. 7. 3. b. Co. 9. Mary's Case, 112. b. F. N. B. 128. C. 10 Ed. 4 4. (y) 13 H. 7. 15. b. **agreed.**

(a) For the Interest and Power of a Commoner, and the general Learning thereof, vide Bridg. 10; 11. Godb. 123, 124. 2 Leon. 201, 202.

(b) Where he may make one or more Gaps to put in his Cattle, if the Common be inclosed, vide Goulf. 117. Lit. Rep. 38. 2 Inst. 88. — May throw down the Hedges, 2 Mod. 65, 66, 1 Brownl. 228. — If the Lord makes a Pond in the Common, the Commoners may let the Water out. 1 Brownl. 228. per Sir Rob. Fitcham.

(c) Cony's Case, S. P. Godb. 123, 124. adjudged. 2 Bulst. 116. cited. Yelv. 105. cited. Cro. Eliz. 876. cited. 2 Leon. 201. adjudg d. 4 Leon. 7. adjudg'd; Cro. Jac. 229, 230. S. P. per Curiam. 1 Brownl. 227. (d) But whether a Commoner may prescribe to kill the Conies so often as the Common hath been oppressed. Bridg. 9, 10, 11. dubitatur. (e) Bridg. 10. seems to be S. C. cited. Cro. Jac. 195. S. C. adjudged. Yelv. 104, 105. S. C. adjudged. (f) Cony's Case, S. P. Godb. 123, 124. adjudged. Yelv. 105. cited. Cro. Eliz. 876. cited. 2 Bulst. 116. cited. 2 Leon. 201, 202. 4 Leon. 7. adjudged; tho' it should be admitted the Commoner hath no other Remedy. Cro. Jac. 229, 230. S. P. per Curiam. (g) For this, vide 1 Rol. Abr. 90. Pl. 9. 106. Pl. 19. (h) And that lies notwithstanding the King grants to the Lord a free Warren there. 1 Jon. 12. 1 Rol. Abr. 106. Pl. 19. (i) And accordingly, Yelv. 143. it was adjudged in an Action brought by the Heir of the Commoner, for the Continuance in his Time. (k) 2 Bulst. 115, 116. S. C. and S. P. per Curiam. (l) Bridg. 10. seems to be S. C. cited. Cro. Jac. 195. S. C adjudged. Yelv. 104, 105. S. C. adjudged. (m) Cro. Jac. 229, 230. S. P. per Curiam. (n) 2 Bulst. 115, 116. S. C. adjudged. (o) 1 Rol. Abr. 90. Pl. 9. (p) Cro. Eliz. 876. S. C. the Action being brought by J. D. adjudged, for the Coney is a Beast of Warren, and profitable as Deer are, and not to be compared to Vermine. Ow. 114. S. C. adjudged, for the same Reason as in Cro. the Action being brought by J. D. Cro. Jac. 195. S. C. cited Yelv. 105. S. C. cited. 2 Bulst. 116. S. C. cited. (q) Cro. Car. 387. S. C. and S. P. per Curiam. 1 Rol. Abr. 90. S. C. and S. P. con. Cro. Car. 387. S. C. adjudged upon the same Reason, and the first Judgment reversed accordingly. 1 Jon. 356. S. C. adjudged, and the Judgment reversed accordingly. (s) Bridg. 10. S. P. arguend'. 1 Rol. Abr. 320. Pl. 12. S. P. and vide there Pl. 13. Kelw. 47. a. S. P. agreed per Curiam. Yelv. 13. S. P. arguend' 9 Co. 112. S. P. per Curiam. Godb. 185. S. P. per Curiam. Jenk. Rep. 144. S. P. admit, per Curiam. (t) But can have no Action unless laid per quod his Common was impaired. Kelw. 47. a. but for this,

vide Robert Mary's Caſe. 9 Co. 112, 113. 1 Brownl. 197. 2 Brownl. 55. but for this vide Ante 89. Pl. 8. (u) Br Common 35. S. C. 39. S. C. Br. Juſtification 15. S. C. (y) This is miſprinted in the Original (as here) and I ſuppoſe ſhould be 15 H. 7. 13.

6. If there be a Cuſtom that a Cloſe ought to lie freſh and hained every 2d Year till Lady-Day, after the Corn cut and carried away, and J. S. hath uſed Time out of Mind to have Common in the ſaid Cloſe after Lady-Day, till it is ſowed again with Corn for his Cattle levant and couchant upon a certain Tenement, as Appurtenant thereto; in (z) this Caſe, if the Lord of the Soil of the ſaid Cloſe puts in his Cattle in the ſaid Cloſe, againſt the Cuſtom when it ought to lie freſh and hained, by the Cuſtom the ſaid J. S. tho' he be but a Commoner, yet (a) he may take the Cattle of the Lord there Damage-feſant, and (*) juſtify it in an Action of Treſpaſs brought againſt him by the Lord of the Cloſe where he took the Cattle; for it will be the worſe Common if the Lord may eat the Graſs before the Common is to be taken by the Cuſtom. Mich. 14 Car. between Trulock and White adjudged, this being moved in Arreſt of Judgment. Intratur Tr. 14 Car. Rot. 1212. B. R.

(z) But elſe it is a general Rule he cannot diſtrain or chaſe out the Cattle of the Lord, or (*) Fol. 406. Tertenant, Damage-feſant, for which vide 2 Leon. 203. Yelv. 104, 105. Yelv. 129. Cro. Jac. 208. 1 Brownl. 187, 188. Godb. 182. (a) So where the Lord by Cuſtom is ſtinted to a certain Number of Cattle, and yet he puts in more. Kinrick and Bargiter. Yelv. 129. adjudged by 3 Judges againſt 2, who doubted whether as the ſtinting the Lord was gained by Cuſtom, a Cuſtom and Uſage to diſtrain ought not to be alledged. Cro. Jac. 208. 1 by 3 Judges againſt 2, who doubted as before. 1 Brownl. 187, 188. by 3 Judges againſt 2, who doubted as before.—But how far the Lord may be reſtrained to a certain Stint, vide 2 Rol. Abr. 267. Letter L.

7. A (b) Commoner in an Action of Treſpaſs cannot juſtify his coming there with an Intent to put in his Cattle there, if he does not put them in. P. 17 Jac. B. between Sir Henry Spilman and Hermitage, adjudged. (b) Lit. Rep. 38. vide.

8. But the Commoner may juſtify his coming to ſee if the Paſture in it be fit to receive his Cattle. P. 17 Jac. B.

9. (c) If (d) I have (e) Common of Eſtovers in the Woods of J. S. and J. S. cuts Part, or all of the Wood, yet I cannot take any Part of this which is cut, (f) but ſhall be put to my Aſſe or Caſe, as my Eſtate is. P. 17 Jac. B. between Sir Henry Spilman and Hermitage, per Curiam. (c) Cro. Eliz. 826. S. P. per Curiam. Cro. Jac. 257. S. P. per Curiam. 1 Rol. Abr. 567. Pl. 3. like Point. Yelv. 188. S P. per Curiam. 1 Brownl. 220. S. P. per Curiam. 1 Bulſt. 93, 94. S. P. admitted arguendo. (d) So if one grants to me 1000 Cords of Wood to be taken at my Election, and the Grantor, or a Stranger cuts down All or Part of the Wood, I can take no Part of that which is cut down; Sir Tho. Palmer's Caſe. 5 Co. 25. Cro. Eliz. 820. Noy 32. Moor 692. Pl. 955. Yelv. 188. cited. (e) But if a Man claims all the Thorns, &c. growing in ſuch a Place, he may take them tho' cut down by another. Douglas and Kendal. Cro. Jac. 257. adjudged. Yelv. 188. adjudged. 1 Brownl. 219, 220. adjudged. 1 Bulſt. 93, 94. adjudged. (f) For this, vide 9 Co. 112. 1 Brownl. 197. 1 Rol. Abr. 108. Pl. 22. F. N. B. 58. J. Hob. 43. Yelv. 188. 5 Co. 25.

10. (g) If a Common every Year in a (h) Flood is ſurrounded with Water, yet the Commoner (i) cannot (k) make a (l) Trench in the Soil to avoid the Water, becauſe he has nothing to do with the Soil, but only to take the Graſs with the Mouth of his Cattle. 12 H. 8. 2. 13 H. 8. 15 D. 36 H. 8. 36. b 39. (g) 2 Bulſt. 116. S. P. arguend. Bridgm. 10. S. P. arguend'. Godb. 52. ſeems S. P. arguendo. (h) In the Original it is fuer. (i) So the Commoner cannot cut Buſhes, Fern, &c. which impair the Common. Bridgm. 10.—Unleſs it be by ſpecial Preſcription. Godb. 182. (k) Unleſs by ſpecial Cuſtom. (l) For if he makes any Thing de novo in the Land he is a Treſpaſſer, but he may amend and reform a Thing abuſed; and therefore if the Land be full of Molehills he may dig them down. 1 Brownl. 228. per Sir Robert Fitcham.—So if there be Holes dug in the Common to the Damage of the Land, they may put again the Earth dug into it's Place. 1 Brownl. 228. per Sir Robert Fitcham.

Common.

Approvement thereof.

1. By the Order of the Common Law there could be (a) no Approvement, becauſe the Common iſſued out of the whole Waſte. 2 *Inſt.* 85.

(a) By the Common Law, the Lord might improve againſt any that had Common Appendant, but not againſt a Commoner by Grant. 2 Inſt. 474. 1 Rol. Rep. 365.

2. (b) By the Statute of (c) *Merton*, *cap.* 4. becauſe great Men having (d) enfeoffed others of ſmall Tenements in their great Manors, complained they could not make their Profit of the Reſidue of their Manors, as Waſte, Woods, and Paſtures, it was Provided, when ſuch Feoffees bring an (e) Aſſiſe for their (f) Common of Paſture, and it is alledged they have not ſufficient Paſture (g) belonging to their Tenements, Ingreſs or Regreſs, the Truth ſhall be inquired by the Aſſiſe, and if found they have not ſufficient, *&c.* they ſhall recover Seiſin by the View of the Inqueſt, and by their (h) Diſcretion ſhall have ſufficient, *&c.* but if found they (i) have ſufficient, *&c.* the other ſhall make (k) the Profit (l) of the (m) Reſidue, and be quit of the Aſſiſe.

(b) Explained. 2 Inſt. 85, 86. Vaugh. 257. (c) Made 20 H. 3. (d) So that it extends only to enable the Lord to approve againſt his Tenants. 2 Inſt. 85. (e) So it may be tried in an Action of Treſpaſs, 2 Inſt. 88. Godb. 117.—or if the Lord incloſe any Part, and leave not ſufficient Common, in the Reſidue the Commoner may break down the whole Incloſure. 2 Inſt. 88. (f) It extends not to Common of Piſcary, Turbary, Eſtovers, &c. 2 Inſt. 87. (g) So that it extends not to Common in groſs. 2 Inſt. 86. (h) So that if found they have not ſufficient, the Inqueſt ſhall find what is ſufficient, that the Lord may approve the Reſidue. 2 Inſt. 88. (i) And tho' after it ſhould prove inſufficient, the Improvement continues. 2 Inſt. 87, 88. (k) By Incloſure. 2 Inſt. 87. and not by digging for Coles, &c. 1 Sid. 106.—And if the Lord makes a Feoffment of Part, his Feoffee may incloſe, for the Feoffment in its Nature was an Improvement. 2 Inſt. 87. (l) And thereby 'tis diſcharged of the Common, and if the Tenant purchaſe it, his Common is not extinguiſhed. 2 Inſt. 87. (m) But the Lord cannot approve the Whole, leaving them ſufficient in other Lands. 2 Co. 25. b.

3. By the Statute of *Weſtm.* 2. *cap.* 46. The Statute of *Merton* ſhall bind (n) Neighbours, and ſuch as claim Common of Paſture appurtenant to their Tenements; but not ſuch as claim Common by ſpecial Grant or Feoffment for a certain Number, or otherwiſe.

(n) Tho' he dwells in another Town, ſo the Towns and Commons adjoin. 2 Inſt. 474.—And if the Lord hath Common in the Tenant's Ground, the Tenant may improve within this Act. 2 Inſt. 474.—Seems as if the Common of the Lord was reſerved upon the firſt Feoffment. 475.

4. By Occaſion of a (o) Wind-mill, Sheep-cote, Dairy, inlarging of a Court (p) neceſſary or (q) Curtilage, (r) none ſhall be grieved by Aſſiſe of Novel Diſſeiſin for Common of Paſture.

(o) Theſe are but for Example, for the Lord may erect an Houſe for the Habitation of a Beaſt-keeper. 2 Inſt. 476. 1 Lev. 62. (p) It muſt be ſhewed that it was done for his neceſſary Reliance. Nevil and Hammerton. 1 Lev. 62. adjudged. 1 Sid. 79. adjudged. 1 Keb. 83. 314. (q) Whether neceſſary it ſhould be an ancient one. 1 Lev. 62. dubitatur. 1 Sid. 79. dubitatur, and vid. 1 Keb. 283, 314. (r) Tho' there is not ſufficient Common left. 2 Inſt. 476. 1 Lev. 62.

5. And where any, having Right to approve, levies Dyke or Hedge, and (s) it is thrown down (t) in the Night or other Seaſon, *&c.* and it cannot be known (u) by Verdict of Aſſiſe or Jury by whom, and the Men of the Towns near (x) will not indict ſuch as are guilty of the Fact, the Towns near adjoining (y) ſhall be diſtrained to levy the Hedge or Dyke at their own Coſts, and to yield Damages.

(s) The cutting down of Timber is not within the Act. Raym. 487.

(t) If the Proſternation in the Day or Night was before the Face of the Owners, or ſo publick that the Offenders might be known, it is not within the Act. 1 Lev. 108. a Traverſe taken accordingly. (u) For the Inquiſition and other Proceedings upon this Act. vide Cro. Car. 280, 440, 580. 1 Jon. 307. 1 Sid. 107, 212. 1 Lev. 108. 1 Mod. 66. (x) No Time being appointed, it ſhall be intended within a Year and a Day. 2 Inſt. 476. 1 Rol. Rep. 365. per Cro. Car. 440. a convenient Time. (y) The Lord ſhall bring his Action upon this Statute againſt the Towns bordering round about the Town where the Fact was done, and Judgment ſhall be given that they ſhall at their proper Coſt make the Ditch, &c. 2 Inſt. 477. 1 Rol. Rep. 365.

6. *Per* 3 *Ed.* 6. *cap.* 3. The Statutes of *Merton* and *Weſtm'* are confirmed, and treble Damages given to the Commoners that recover in ſuch Aſſiſe againſt the Lord.

(a) Admeaſurement thereof.

(a) For this, and where it lies. Vid. F. N. B. 125.

1. It lies by (b) one Commoner againſt (c) another, but if the Tenant ſurcharges the Common, the Lord ſhall not have a Writ of Admeaſurement againſt the Tenant. F. N. B. 125. A. D.

(b) Per 2 Inſ. 86. it lies only for and againſt ſuch as have Common appendant. But Q. and Vid. F. N. B. 125. D. 1. Rol. Rep. 365. (c) Yet upon this Suit all the Commoners ſhall be admeaſured. 125. B.

2. So if the Lord ſurcharge the Common, or approve, without leaving ſufficient, the Tenant ſhall not have a Writ of Admeaſurement againſt him, but an Aſſiſe. F. N. B. 125. D.

3. No Writ of Admeaſurement lies againſt a Commoner ſans Number, Nor ſhall his (d) Common be admeaſured. F. N. B. 125. D.

(d) But the Tertenant may diſtrain his Cattle. 1 Sand. 345.

(a) Pleading.

(a) Preſcription for Common omni tempore anni in a Foreſt, &c. it was not found to be a Foreſt. Hard. 87.

How and by what Name Common may be claimed or (b) preſcribed for.

(b) Vide The Pleadings after the general Title Preſcription.

1. If in Bar to an Avowry for Damage-feaſant, the Defendant preſcribes for Common in the Place where *&c. pro omnibus equis*, &c. and ſo juſtifies the putting in his Gelding there, this is a good Plea, for *equis* is a general Name, and comprehends Geldings as well as Horſes, and Geldings in common Speech are called Horſes, but for Mares it is not ſo. *Mich.* 42 *Eliz.* between *Stapleton* and *Morſe*. *Cro. Eliz.* 798. adjudged by all the Judges *contra Anderſon*, and they ſaid all the Judges of *Serjeants Inn* with whom they had conferred, were of the ſame Opinion except one.

2. If in Bar of an Action of Treſpaſs the Defendant pleads, That he, and all thoſe whoſe Eſtate he hath in the Manor of *A.* have Time out of Mind had Paſturage for 2 Geldings in the Place where, and ſo juſtifies, this is a good Plea, for ſuch Common may be claimed by the Name of Paſturage. *Hill.* 43 *Eliz.* between Sir *John Thornill* and *Laſſels*. *Cro. Eliz.* 27. adjudged.

3. If a Man in Bar to an Avowry for Damage-feſant preſcribes, That he, and all thoſe whoſe, *&c.* have had Common *pro* 25 (c) *magnis averiis* in the Place where, *&c.* and ſo juſtifies his putting in the Geldings to uſe the Common, this is a good Plea for *magna averia* may well be intended (d) Horſes, Oxen, Kine, or ſuch other Beaſts of theſe kind which are Commonable, and by the common Phraſe of People are well known among them, and there needs no Averment that the Gelding was one of the *magna averia*. *Trin.* 18 *Jac.* between (e) *Standred* and *Shoreditch*. *Cro. Jac.* 580. adjudged the rather becauſe after a Verdict for the Plaintiff.

(c) Vid. Kelw. 197. where the Defendant preſcribed for Common for groſs Beaſts, and was forced to ſhew what in Specie, viz. Horſes, Mares, Oxen, &c. (d) But whether a Man may preſcribe for Common pro magnis averiis, viz. pro bidentibus, &c. 1 Sand. 227. dubitatur, and Keeling Chief Juſtice ſaid, Sheep were great Beaſts in reſpect of Conies, &c. (e) 2 Rol. Rep. 173. S. C. adjudged and ſaid, that all manner of Cattle, except Sheep and Yearlings, ſhould be called Magna averia.

Pleading.

By the Commoner and Lord, and he that claims under him.

1. If in an Action of Treſpaſs brought by a Commoner againſt a Stranger, for putting his Cattle in the Common *per quod Communiam in tam amplo modo habere non potuit*, the Defendant pleads a Licence from the Lord to put his Cattle there, but does not aver there is ſufficient Common left for the Commoners; this is no good Plea, for tho' it may be objected, the Plaintiff may reply thereto, yet being the very Giſt of the Action, the Defendant ſhould have pleaded thereto. *Hill.* 26 and 27 *Car.* 2. between *Smith* and *Feverel.* 2 *Mod.* 6. adjudged.

2. But in an Action againſt the Lord, the Plaintiff muſt particularly ſhew the Surcharge. 2 *Mod.* 7. *per Curiam.*

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MVSEVM
BRITANNICVM

FINIS.